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“Fixed Star” or Twin Star?: The Ambiguity of Barnette

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“FIXED STAR” OR TWIN STAR?: THE AMBIGUITY OF *BARNETTE*

Steven D. Smith*

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By venerable tradition, oracles are—and are expected to be—opaque. The decision in *West Virginia State Board of Education v. Barnette*¹ is revered,² above all, for one oracular pronouncement in Justice Robert Jackson’s majority opinion, and like the deliverances that issued from Delphi, that pronouncement is portentous but also ambiguous.

Unafflicted with false modesty, Jackson undertook to set forth—in a sentence, in a metaphor—our most fundamental constitutional commitment, or the “fixed star in our constitutional constellation.” Not merely *a* bright star, or an *important* star, but rather *the* “fixed star.” (If, that is, there is any such “fixed star”: the pronouncement was offered in the conditional.) This sounds like a momentous statement, and it is. But what exactly does Jackson’s oracular statement mean? What *is* our “fixed star”?

*Warren Distinguished Professor of Law, University of San Diego. This essay was written for a conference on “*Barnette* at 75” held at Florida International in October 2018, and I benefitted from questions and commentary at the conference. Thanks also to Jim Allan, Larry Alexander, Jordan Barry, Don Dripps, Adam Hirsch, Paul Horwitz, Bert Lazerow, David McGowan, Sai Prakash, Maimon Schwarzschild, Darien Shanski, Mila Sohoni, and Chris Wonnell for valuable comments on an earlier draft, and to John Mysliwiec for research assistance.

¹ 319 U.S. 624 (1943).

² The decision has been praised as “eloquent and epochal” (Leo Pfeffer), “among the great paeans to human liberty” (John Noonan), “haunting” and “among the most eloquent pronouncements ever on First Amendment freedoms” (Rodney Smolla). The quotations are collected in Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 255 n.15, 261 (2000).

Two principal interpretations offer themselves, indicative of two different stories about the American project. We might call the first of these the “neutrality story” (or perhaps the “agnosticism story,” or “the ‘no orthodoxy’ story”). The second we might call the “integrity story” (or perhaps simply “the personal freedom story”).

In the eloquent language of Justice Jackson, the ideas animating these stories are blended together, as if they formed a single unitary story. Perhaps he believed they did. And yet upon reflection, it seems that the stories are not only distinct; they are in tension with each other. And each interpretation has fundamentally different implications for urgent constitutional questions, and for our national self-understanding. And so in reflecting on *Barnette* on its 75th anniversary, we should consider what the decision means, or what it *should* mean.

To revert to the Court’s metaphor: what is—what *should be*—the “fixed star” in our “constitutional constellation”?

I. THE FUNDAMENTAL CHALLENGE: PLURALISM

It will be helpful to begin by trying to formulate the question to which *Barnette* proffered an answer. In accordance with their religious convictions, Jehovah’s Witness school children in a West Virginia school had refused to salute the flag and to recite the Pledge of Allegiance, and for this refusal they had been expelled.³ Stated stingily, therefore, the question was whether a public school can expel students for noncompliance with a requirement that students salute the American flag and recite the Pledge. The answer to that question presumably mattered to the school, and it would no doubt be of vital importance to particular individuals who are conscientiously opposed to this salute and recital. Just in itself, though, the answer could hardly rise to the magnitude of describing *the* “fixed star in our constitutional constellation.”

But the specific question about schools and salutes can be seen as one particular manifestation of a more elemental one: how, or on what sort of principles, can a political community—or a common life together—be maintained under conditions of deep and persistent pluralism? That question arguably has been the central one for governance and political theory for at least the past half-millennium.

In earlier periods, as John Rawls reported, it was “natural to believe . . . that social unity and concord requires agreement on a general and

³ For a detailed history of the background of the case, see SHAWN FRANCIS PETERS, JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 36 (2000).

comprehensive religious, philosophical, or moral doctrine.”⁴ Such agreement was not always spontaneously forthcoming, of course, but the general assumption was that insofar as divergent opinions threatened the social and political order, authorities had the right and responsibility to suppress such heterodoxy in the interest of unity and social stability. Hence the persecution of Christians in the Roman Empire,⁵ and hence the medieval inquisitions.

And then, as Rawls explained, “the Reformation” happened, “fragment[ing] the religious unity of the Middle Ages and leading to religious pluralism.” This “in turn fostered pluralisms of other kinds, which were a permanent feature of culture by the end of the eighteenth century.”⁶ So, what to do?

The major political thinkers of early and contemporary modernity—Hobbes, Locke, Rousseau, and Rawls himself—have been fascinated by, even obsessed with, that question. On a more practical level, the question has challenged politicians, judges, and citizens generally. But despite the outpouring of theoretical and practical responses, satisfactory answers have been hard to come by. The first response in Western nations was to try to reestablish the older Christian order by force. That response proved to be a frightful failure: we call the failure the “wars of religion.” The next response, ratified in the Peace of Westphalia, was to establish the confessional state under the principle of *cuius regio eius religio* (the religion of the prince shall be the religion of the realm).⁷ Spain would be Catholic, the Netherlands Protestant, England something in between. That strategy proved somewhat more stable—but still far from comforting to the growing numbers of subjects who did not share the religion of their prince and were disinclined either to convert or to gather up goods and kin and move to some friendlier foreign land.

And so in America a different answer gradually developed. But what was that answer? What is the American contribution to the challenge of pluralism?

This was the fundamental question taken up in *Barnette*. The case posed the question in wrenching form, and on more than one level. Pluralism was conspicuous in the case itself: the Jehovah’s Witness plaintiffs obviously had views of religion, of the nation, and of civic obligation that were repugnant to many of their fellow citizens. In West Virginia and elsewhere, these

⁴ JOHN RAWLS, *POLITICAL LIBERALISM* xxv (1996).

⁵ The phenomenon is discussed at length in STEVEN D. SMITH, *PAGANS AND CHRISTIANS IN THE CITY* 130–158 (2018).

⁶ RAWLS, *supra* note 4 at xxiv.

⁷ See Craig Calhoun, *Secularism, Citizenship, and the Public Sphere*, in *RETHINKING SECULARISM* 75, 80 (Craig Calhoun et al. eds., 2011) (“What issued from the Peace of Westphalia was not a Europe without religion but a Europe of mostly confessional states . . .”).

disagreements had led to hostility, acrimony, and violence.⁸ But these domestic divisions paled beside the even more massive and destructive divergences on the global level. The *Barnette* case arose, of course, in the context of a horrific war growing out of and reflecting not just (as in many wars before and since) competing bids for territory or resources or power, but rather fundamentally antagonistic philosophies and worldviews—fascism, Marxism, democracy.

In such contexts, combatants will often feel an urgent need to unite their own citizens or subjects around shared ideals. And yet, reflecting often-noted paradoxes in liberal democracy,⁹ the philosophy for which the Western combatants purported to be fighting was precisely a philosophy of freedom in which citizens would *not* be compelled to embrace particular ideals or creeds.

What then to do? Three years before *Barnette*, when the United States was not yet at war, the Supreme Court had answered this question by ruling that the nation and its institutions could compel general assent—or at least the outward appearance of assent—to the fundamental creed expressed in the Pledge of Allegiance.¹⁰ But this ruling had left many uneasy: they worried that a coerced affirmation of “liberty and justice for all” reflected a kind of performative contradiction that betrayed what the nation stood for (and would soon be fighting for).¹¹ And so in *Barnette* the Court revisited the question. How is community—a common life—to be maintained when people differ fundamentally about the most basic matters, such as our obligations to God and our duties to country?

This was the central question that the *Barnette* Court addressed. In an important sense, this has been *the* perennial question for modern pluralistic societies. And from this perspective, it is not surprising that the case would elicit a statement from the Justices about our most essential constitutional commitment, or about the “fixed star in our constitutional constellation.”

If there is any such star, that is. But is there? What was the Court’s answer to the question?

II. TWO INTERPRETATIONS

“If there is any fixed star in our constitutional constellation,” Justice Jackson wrote portentously, “it is that no official, high or petty, can prescribe

⁸ See generally PETERS, *supra* note 3.

⁹ For a perceptive and probing discussion, see Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. CONTEMP. LEGAL ISSUES 625, 625 (2002).

¹⁰ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940).

¹¹ See PETERS, *supra* note 3, at 59–71.

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.” What did this statement mean? What *should* it be taken to mean?

A. *The Neutrality Interpretation*

One answer would focus on the first assertion in the disjunction—the part that precedes the next-to-last “or.” “[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion” Under the American Constitution, the words seem to suggest, governments must refrain from prescribing, or declaring, or putting their official imprimatur on, any “orthodoxy.” The term “orthodoxy” derives from a Greek work meaning “true opinion.”¹² Often the term is associated with religious opinions or creeds, but its scope need not be so restricted, and *Barnette* explicitly preempted any such restrictive reading. Rather, the Court seemed to say that governments in this country are not to declare what is taken to be true in “politics, nationalism, religion, or other matters of opinion.”

This contention resonates with a national story that is comfortingly familiar. Pre-modern governments, the story tells us, sponsored orthodoxies, or officially-sanctioned views (usually grounded in notions of monarchy and Christianity) about what the truth is in political and religious matters. Such declarations might well provoke disagreement, and they did. And so, in the early modern period, as contention about such matters proliferated, the practice of declaring official orthodoxies led to discontent and dissension.

The rulers’ initial response, as noted, was to try to shore up the official orthodoxies by repressing dissent—first on the international level and later within the newly emerging nation-states. Hence the wars of religion and, later, *cuius regio eius religio*. But these responses proved unsatisfactory; and so, Americans settled on a different and indeed opposite response. Rather than entering into the various controversies and declaring in favor of one side or another, government should remain aloof, taking no sides. With respect to such controversies, governments would remain agnostic. Neutral. A stance of steadfast neutrality would be our constitutive commitment—our “fixed star.”

The neutrality theme is discernible—or so proponents contend—in the constitutional text itself. Unlike the Articles of Confederation, and unlike most state constitutions at that time (and since), the American Constitution contained no meaningful acknowledgments of deity or Almighty God. Proponents of “secular” government sometimes try to dissolve this apparent

¹² See PAUL TILLICH, A HISTORY OF CHRISTIAN THOUGHT 305 (1967).

agnosticism by turning the Constitution's silence into a commitment to public secularism.¹³ But the text makes no such commitment—not expressly, anyway—and when a movement later developed to make this supposed commitment explicit, the movement was rebuffed by the citizenry.¹⁴ With respect to religion, we might say, Americans wanted to keep their Constitution neutral, favoring neither religion nor secularism.

The neutrality theme is also apparent in a good deal of modern constitutional law. It is most insistently conspicuous in decisions involving the First Amendment's religion clauses.¹⁵ But free speech decisions in recent decades have likewise gravitated toward making a requirement of regulatory "content neutrality," or "viewpoint neutrality," the central criterion of free speech doctrine.¹⁶ The theme is plainly discernible as well in a good deal of modern political philosophizing devoted to the idea that government is supposed to be "neutral" with respect to "the good," or "the good life"¹⁷: John Rawls may be taken as an eminent representative of this school of thought.

B. *The Integrity Interpretation*

The neutrality interpretation is suggested, as noted, by the part of the *Barnette* pronouncement that precedes the disjunctive "or." By contrast, if we focus instead on the second part of the disjunction, we may perceive a different possibility. "[N]o official, high or petty, can . . . force citizens to confess by word or act their faith [in any such orthodoxy]." Taken by itself, this prohibition would not forbid government officials to say, or to "prescribe" in non-compulsory ways, what shall be the officially preferred "right opinion" in political, religious, or other matters. But the prohibition insists that government must not compel citizens to affirm such opinions.

This part of the *Barnette* pronouncement suggests a different kind of story about the American project. In this second story, the serious problem with pre-modern and early modern governments was not that kings or princes proclaimed what they believed to be true in religious or political matters. The problem, rather, was that governments required subjects to affirm the prevailing orthodoxies (whether those subjects agreed or not), and punished

¹³ See, e.g., ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE* 150–206 (2005). For an alternative view, see Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. REV. 120, 120 (2008).

¹⁴ See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 287–334 (2002).

¹⁵ See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). See generally STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 128–38 (2014).

¹⁶ See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

¹⁷ See, e.g., RAWLS, *supra* note 4, at 190–95; RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191–92 (1985).

those who refused. The punishments might be severe—beheading (as in the case of Sir Thomas More) or being burned at the stake (as in the cases of the “Oxford Martyrs”—Hugh Latimer, Nicholas Ridley, and Thomas Cranmer). Or the sanctions might be less bloody—exclusion from political participation, or from attendance at Oxford or Cambridge.¹⁸ Either way, the punishments were oppressive, and divisive.

And so in America, the resolution developed that although governments and government officials might proclaim ostensible truths of various kinds (as in fact they have pervasively done), government would also respect and protect the integrity and freedom of its citizens. Citizens would be permitted to disagree with the “truths” announced by government, to speak their minds, and (within limits) to live in accordance with their own convictions. Perhaps most importantly, citizens would not be forced to suffer the most direct and severe impairment of their integrity—namely, being compelled to affirm things they do not believe. Instead of the *confessional* state, we would have the committedly *non-confessional* state.

This interpretation can also claim a good deal of support in the American political tradition. Typically, governments and government officials have not been shy about prescribing what they take to be true opinion on matters of “politics, nationalism, religion, and other matters of opinion.” On the contrary, the practice began at the very moment the nation came into being: the Declaration of Independence justified the nation’s existence on the basis of a pronouncement of “self-evident truths” (and whether or not they are in some sense “self-evident,” they are surely not uncontroversial¹⁹) concerning matters including “nature and nature’s God” and the rights conferred on individuals by “their Creator.” And yet on key occasions, community leaders have also emphatically disavowed any authority to require assent to such “truths” by citizens. Indeed, Thomas Jefferson declared that not even indirect or implicit affirmations could be compelled: it “is sinful and tyrannical,” he thundered, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves.”²⁰ The Constitution itself explicitly repudiated the standard practice of requiring officials to take oaths

¹⁸ See ALEXANDRA WALSHAM, *CHARITABLE HATRED: TOLERANCE AND INTOLERANCE IN ENGLAND, 1500–1700*, at 86–87 (2006); ALEC R. VIDLER, *THE CHURCH IN AN AGE OF REVOLUTION* 40–41 (1961).

¹⁹ Cf. ERNEST GELLNER, *POSTMODERNISM, REASON, AND RELIGION* 52 (1992) (“The preamble to the American Declaration of Independence informs [Americans] that its truths are self-evident, and Americans tend to assume it to be so. But they are nothing of the kind: these assumptions are in fact heretical or unintelligible in most other cultures.”).

²⁰ VA. CODE ANN. § 57-1 (1786). We may follow Jefferson here in declining to notice some of the complications that this resounding and unqualified declaration neglects to notice. For further discussion, see Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 *CONST. COMMENT.* 365 (2006).

supporting the prevailing religious ideas.²¹ And the Supreme Court has repeatedly reaffirmed the commitment against compelled affirmations; *Barnette* is only the most eloquent statement of this fundamental commitment.²²

In sum, we have two interpretations, and two stories endorsing fundamentally different strategies or responses to the challenge of pluralism. In one story, government officials are forbidden to prescribe what is right opinion in political, religious, and other matters; they must instead remain neutral or noncommittal or agnostic. In the other story, governments and government officials are free to declare—vigorously, if they choose, even triumphantly—what they believe to be true. But they are committed to respecting the integrity and freedom of citizens, and hence must not require citizens to affirm preferred or prevailing ideas or punish citizens for refusing to do so.

So, which of these stories offers the better understanding of the American project?

III. WHICH INTERPRETATION IS RIGHT?

The question can hardly be settled just by reading *Barnette*—among other reasons because both interpretations can find support there. Thus, if we look only at the revered sentence from *Barnette*, we might suppose that the neutrality interpretation is the correct or at least the primary one. After all, the “no orthodoxy” language comes first in the sentence, and it is separated from the “no compulsion” language by an “or,” not an “and.” This disjunctive wording suggests, as I have argued elsewhere,²³ that the prohibition on prescribed orthodoxies can stand by itself; it is not qualified by or conditioned on the “no compulsion” language. The second prohibition—on compelled affirmations—might then be taken as a sort of entailed corollary of the prohibition on government-prescribed orthodoxies.

Indeed, if government is not permitted to pronounce any orthodoxies in the first place, the prohibition on compelling assent may seem superfluous—because there would be no orthodoxies for government to compel assent *to*. And yet this last observation may provoke doubt about the neutrality

²¹ See U.S. CONST. art. VI, cl. 3.

²² See also *Pac. Gas & Electric Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 20–21 (1986) (plurality opinion) (forbidding government from requiring a business to include a third party’s expression in its billing envelope); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (forbidding government from requiring citizens to display state motto on license plates); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (forbidding government from requiring a newspaper to include an article).

²³ See generally Steven D. Smith, *Law and Cultural Conflict: Barnette’s Big Blunder*, 78 CHI.-KENT L. REV. 625, 653–58 (2003).

interpretation, because interpretations that render part of the text superfluous are usually disfavored. And if we consider the opinion as a whole, the “no orthodoxy” interpretation may come to seem untenable. Thus, while forbidding West Virginia from *compelling* objecting students to recite the Pledge, the decision did not question the state’s authority to sponsor recitals of the Pledge of Allegiance in its schools, and to encourage (though not compel) students to participate.²⁴ So, wasn’t the Pledge itself a kind of prescribed, though not compulsory, creed or orthodoxy?

Indeed, wouldn’t a firm prohibition on orthodoxies itself amount to a kind of . . . orthodoxy? What is the phrase “fixed star in our constitutional constellation” if not a metaphor for a kind of categorical commitment—or orthodoxy?

In short, *Barnette* sends mixed signals; it does not settle the question of its own meaning. We might instead approach the case’s portentous pronouncement in Dworkinian fashion by asking which interpretation would make the pronouncement “the best it can be”? Which interpretation—the neutrality interpretation or the integrity interpretation—is preferable as a matter of political morality and the American constitutional tradition?

A. *The Neutrality Interpretation—For and Against*

The appeal of neutrality. We might start by appreciating how the neutrality interpretation and story are powerfully attractive. That is because governmental neutrality in controversial political and religious matters can seem compelling on grounds both of competence and of consequences.

Thus, especially on large matters of religion and philosophy, including political philosophy, why would we expect government officials, “high or petty,” to have any particular ability or competence to arrive at “true opinion”? Far better— isn’t it?—to leave such matters to individuals to ponder and conclude as they will.

Moreover, when citizens hold different and opposing views on such matters (as they nearly always do, at least in the contemporary world), a government that steps in and declares in favor of one set of views and against others will inevitably leave some citizens feeling disappointed, alienated, perhaps angry. These citizens may come to feel like (to quote Justice Sandra Day O’Connor) “outsiders” and lesser “members of the political community.”²⁵ These are consequences that a political community might

²⁴ More generally, the Court indicated that public schools could teach, and could require students to learn, American history and civics in a way that would “tend to inspire patriotism and love of country”; this sort of instruction was distinguished from “compulsion of students to declare a belief.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943).

²⁵ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

ardently wish to avoid. The neutrality interpretation tells how to avoid them. Or at least it purports to.

The impossibility of neutrality. So the neutrality story can seem attractive, almost irresistible (as its ubiquity in religion clause cases and literature perhaps attests). The story does have at least one inconvenient feature, however: it instructs government to do something that is manifestly impossible.²⁶ That is because governments simply cannot avoid taking stands and prescribing orthodoxies, or “right opinions,” of various sorts.²⁷

Lest this difficulty be overstated, and hence misunderstood, we might quickly acknowledge that governments do seem to maintain a stance of “neutrality” in all manner of matters—namely, matters in which there is no practical demand that government take a position. For example, unlike Roman emperors of the Fourth Century, American governments do not take any position on the relative merits of Athanasian as opposed to Arian ideas of the Trinity. They can avoid taking a position because no one, or virtually no one, asks for government’s opinion on such questions. In the same way, American governments typically express no views on whether cats make better pets than dogs, whether strawberries taste better than cucumbers, or whether baseball is a better sport than football or basketball. In these and countless other matters in which people disagree, American governments remain “neutral.”

The difficulty begins, though, as soon as some constituency holds a view or makes a demand that *does* implicate government. At that point, the possibility of remaining neutrally aloof evaporates: even to do nothing is in effect to reject the view and the demand.

And indeed, government officials high and petty are constantly and of necessity making decisions on all matter of issues, great and small; and they typically give reasons for adopting these decisions and for rejecting the reasons and decisions that they have chosen not to adopt. Thus, government

²⁶ I am hardly the first to make this observation. See, e.g., Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 945–46 (1995); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 606 (1980).

²⁷ Indeed, as we have already observed, the “no orthodoxy” prohibition is itself a kind of orthodoxy. This is not merely a semantic gambit, but rather a practical reality. Historically, many or most thinkers have *not* believed that government should refrain from prescribing what should be orthodox in matters of “politics, nationalism, and religion.” Even today, many people believe government *should* speak authoritatively in one area or another: government should take a stand, should declare what is just and unjust. Other people disagree. Interpreted in “no orthodoxy” terms, *Barnette* in essence declares that former group is mistaken and that the latter group holds the “true opinion.” And the decision backs up this judgment with the full force of the Constitution and the judiciary. The Justices, including Justice Jackson, surely fall into the category of “officials high or petty,” and in *Barnette* they forcefully and unapologetically declared what would be the orthodoxy, or “right opinion,” with respect to the fundamental, historically contested question presented in the case. See generally *Barnette*, 319 U.S. 624 (1943).

officials offer reasons for adopting one policy on trade rather than another—or on immigration, or criminal law, or civil rights, or taxation, or foreign policy, . . . or drug use, or smoking, or beef consumption.²⁸ In offering these reasons and urging legislators or judges or citizens generally to accept them, and in confirming and implementing such reasons in coercively-imposed policies, these officials are plainly “taking sides.” And they are prescribing what they regard as “right opinion,” or orthodoxy, in all of the various matters that they act upon or pronounce upon.²⁹

What else could they do? Not act at all? Act without giving any reasons for their actions? Offer reasons but decline to suggest that such reasons are actually true, or “right opinion”? Is such a course even possible, or coherent?

But let us suppose that these necessities could somehow be circumvented. Government somehow finds a way to do its job—to make decisions and to formulate and implement policies—without ever offering any reasons or supporting propositions that government holds out as true. What claim could such a government have on the allegiance of its citizens? Such a government would affirm nothing, stand for nothing. How could citizens feel loyalty to such a government? Its policies would be supported by nothing deemed to be true. Why would citizens feel any obligation to respect such policies? Such a government, it seems, would degenerate into the rule of pure fiat and force. Surely a commitment to that sort of utterly arbitrary government is not the “fixed star in our constitutional constellation”?

The bottom line is that governments, under our Constitution or otherwise, are constantly and necessarily in the business of declaring some things to be true and others to be false—of “prescribing what shall be orthodox” in the diverse and sundry matters that government deals with. And indeed, American governments have from the beginning emphatically and sometimes eloquently enlisted support on the basis of declarations of what were held out as pertinent or important or even noble truths. Liberty. Equality. Opportunity. “We hold these truths” This is a nation “*dedicated to the proposition that*”³⁰

²⁸ See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005).

²⁹ Might it be that government officials can *assert* something, and even assert it *as true*, without “prescribing” it? The suggestion seems empty, because as I have argued elsewhere, “to say you believe something is to assert that you believe it is true; and to assert that something is true is necessarily to assert—or at least to imply—that other people who are interested in believing the truth should believe it too. Hence, to affirm something is necessarily to prescribe it, at least implicitly.” Smith, *supra* note 23. Moreover, if we take “prescribe” to mean more than “assert” or “recommend” but rather something like “*require assent to*,” then we would effectively have dissolved the first part of the *Barnette* statement into the second part. *Id.*

³⁰ In this vein, John Courtney Murray argued that our constitutional order, or what he called “the American Proposition,”

The academic defense of neutrality. Over the last half century or so, to be sure, theorists of liberal democracy have sponsored a virtual industry devoted to answering such objections, and to defending the idea that government must be “neutral” with respect to “the good,” or “the good life.”³¹ The discussions have grown abstruse, sophisticated, perhaps sophistical. Conceptions of “neutrality” become more numerous, and subtle. It would be impossible, obviously, to address the many permutations here.³² Nor is this necessary, I think, because it seems that the whole project faces a debilitating dilemma. Either the theoretical project of reconciling government with the ideal of neutrality ultimately fails, in which case it fails; or else the project succeeds, in which case . . . it still fails.

Let me explain. Imagine a group of citizens who are profoundly unhappy with one or another government policy, and who complain that the policy has rejected their own considered views and commitments. They are opposed to a requirement that employers provide contraceptive coverage, maybe—or to an exemption from this requirement for religious employers.³³ Or they oppose the teaching of evolution in the public schools.³⁴ Or they think government should not recognize same-sex marriage—or *should* recognize it emphatically and unqualifiedly, and hence should refuse to exempt objectors from providing goods or services for same-sex weddings.³⁵ And these citizens quite plausibly claim that in adopting the disfavored policy, government has taken a side, has rejected their own views, and has thereby departed from neutrality.

Suppose we set out to explain to these objectors that they are mistaken: in fact the government policies they dislike do not violate any obligation of neutrality *properly understood*. It may be—in fact it seems likely—that we will be unable to provide any convincing explanation. But suppose we are more ingenious; so we manage to devise a sophisticated account of “neutrality” that permits or even requires the policy the complainants object

rests on the . . . conviction that there are truths; that they can be known; that they must be held; for, if they are not held, assented to, consented to, worked into the texture of institutions, there can be no hope of founding a true City, in which men may dwell in dignity, peace, unity, justice, well-being, freedom.

JOHN C. MURRAY, S. J., *WE HOLD THESE TRUTHS* ix (1960).

³¹ See *supra* note 17. In the area of religion specifically, see ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 120 (2013).

³² I have engaged in more extensive analysis elsewhere. See, e.g., Steven D. Smith, *The Paralyzing Paradox of Religious Neutrality*, in *WILEY-BLACKWELL COMPANION TO RELIGIOUS DIVERSITY* (Kevin Schillbrack ed.) (forthcoming); SMITH, *supra* note 1 **Error! Bookmark not defined.**, at 128–38; Smith., *supra* note 23.

³³ See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

³⁴ See *Edwards v. Aguillard*, 482 U.S. 578, 581 (1987).

³⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015); *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018).

to.³⁶ How much good will this feat of theorizing accomplish? Will it solve the problem of pluralism that we began with, and that led us to postulate a requirement of “neutrality,” or of “no orthodoxy”?

It’s hard to see how. After all, we didn’t start off with some preexisting and shared commitment to “neutrality” (whatever “neutrality” might turn out to mean), or with a determination to go wherever “neutrality” might lead us. Rather, we faced a practical political challenge—namely, pluralism. People vehemently disagreed on fundamental matters sometimes involving government, and we were looking for a way to deal with such disagreements so that people would not feel alienated, oppressed, rejected. So, suppose we do somehow manage to show—to the satisfaction of the objectors or, more realistically, to the satisfaction of some detached academic onlooker—how a particular controversial policy actually follows from some carefully-honed conception of “neutrality.” So what?

We have presumably not shown the objectors that their own position (on contraception, or evolution, or marriage, or whatever) is mistaken, or that they are wrong to hold the views and commitments that they in fact hold. Probably we would not even try to discredit their views directly and on the merits—for fear of relinquishing any pretense of “neutrality.” The whole point of adopting a “neutrality” strategy, after all, was to avoid having to resolve on the merits the various disagreements that arise in a pluralistic society—to avoid saying (as governments did in the days of the wars of religion and of *cuius regio eius religio*) “this group is right and that group is wrong.” Consequently, the dissatisfied constituency will still believe that the government’s policy conflicts with their legitimately-held views about contraception or evolution or marriage. So why should it even matter to them whether the policies they oppose can somehow be squared with some theorist’s conception of “neutrality”? If that conclusion should turn out to be correct, their likely (and wholly logical) response would be, “I’m telling you: this policy conflicts with and rejects my views. It just does. And if ‘neutrality’ somehow prescribes the rejection of my views, then to hell with ‘neutrality.’”³⁷

The bottom line is that the neutrality story, for all of its appeal, is not a plausible account of what American governments have ever done or ever could do. Insofar as governments pretend to be “neutral” even as they take sides on controversial policies, they are engaged in a large-scale enterprise

³⁶ For an extended effort that purports to do basically this, see BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10–12 (1980). For a more recent effort attempting a similar project in the area of religion specifically, see KOPPELMAN, *supra* note 31.

³⁷ Apologies for the profane language, but the objector I am imagining would use these terms in a fairly literal sense. *Cf. Revelation* 3:16 (New International Version) (“So, because you are lukewarm—neither hot nor cold—I am about to spit you out of my mouth.”).

of deception and self-deception.³⁸ And as the deception becomes increasingly transparent, the strategy becomes almost a kind of effrontery to constituencies that find themselves on the losing side of “neutral” policies. Governments cannot be neutral—not at least insofar as they respond to demands to act or not to act—and even if they could, the eschewal of any orthodoxy would not be the remedy for pluralism that it enticingly holds itself out as being.³⁹

B. *Pros and Cons of the Integrity Account*

At this point, the integrity interpretation, though somewhat less ambitious, may come to seem more attractive. The basic idea now is that although governments will properly and unavoidably adopt policies and will defend those policies by offering reasons held out as true, and although in a pluralistic nation these policies and reasons will inevitably be disagreeable to some citizens, every citizen will at least be assured that his integrity will be respected: he will not be required to affirm, as Jefferson put it, “opinions which he disbelieves.”⁴⁰

For one kind of person, this assurance may not be as comforting as a promise that government will never disagree with him at all—will never *be able* to disagree with him, in fact, because government will never take

³⁸ See SMITH, *supra* note **Error! Bookmark not defined.**, at 137–38.

³⁹ Can we nonetheless profitably use the terminology of “neutrality” in a more limited sense? Readers of an earlier draft, and especially Mila Sohoni, have pressed this question on me. For example, we might say that although a public high school is not constitutionally required to have any political books in its library (or even to have a library at all), the school should not be permitted to include books written by Democrats while excluding books by Republicans (or vice versa). Why not? “Neutrality” may seem to provide the easiest and best explanation.

In this respect, “neutrality” seems to work in much the same way as “nondiscrimination.” Thus, nondiscrimination laws identify particular criteria—race, sex, and so forth—that particular actors are *not* permitted to rely on. We might describe these laws as prescribing “neutrality” with respect to race, sex, or whatever criteria the laws forbid. Similarly, a public school might be forbidden to use something like “political affiliation” in its selection of library books. And we might describe this prohibition in terms of “neutrality.”

This usage does seem both familiar and potentially useful, and it resonates with a good deal in our political tradition. Still, it is important to acknowledge the very limited scope of this sort of nondiscrimination “neutrality.” Nondiscrimination laws or policies are decidedly *not* neutral with respect to any actual substantive disagreements. Thus, laws prohibiting racial discrimination are emphatically not neutral toward, say, segregationists; laws prohibiting sex discrimination are not neutral toward any who might favor a more patriarchal society or marketplace. The cogent answer to an employer who wants to hire only white employees is not: “You can’t do that because the law or the government is neutral in matters of race,” but rather “You can’t do that because the law is *not* neutral in matters of race: it rejects your view.” In sum, we can talk of obligations of “neutrality” in a limited sense; but insofar as genuine substantive disagreements present themselves, it is simply futile (or deceptive) to try to resolve them by invoking “neutrality.”

⁴⁰ See Smith, *supra* note 20.

positions or declare “right opinions” or orthodoxies that some citizens might disagree with. But that is a bogus promise anyway—one that never has been and never could be honored. By contrast, the commitment not to compel affirmations promises less, but it has the virtue of making a promise that is within government’s power to keep.

In addition to being possible, the prohibition against compelled affirmations is also ennobling—we might say that it is respectful of “human dignity”—at least on some views of humanity, conscience, and the importance of truth. We need not elaborate on those premises here, except to say that they resonate with a view suggesting that what gives nobility and dignity to human beings is our capacity to pursue and declare truth and to live with integrity in accordance with our (fallible) judgments about truth.⁴¹

Two modern plays—Thomas Bolt’s *A Man for All Seasons*, and Bertolt Brecht’s *Galileo*—might be taken as reflecting this conception, one with a positive portrayal and the other with a negative portrayal. Bolt’s play depicts a man (Thomas More) who is admirable for adhering to conviction and refusing to affirm to the contrary—even at the cost of his life. Brecht’s play depicts a man (Galileo, in Brecht’s eminently contestable interpretation) who is ignoble because he acquiesces in affirming what he does not believe.

The integrity story also conveys a general image of the American project that may be attractive. This image contrasts markedly with that conveyed by the neutrality story. In that story, at least if we suppose that the kind of neutrality it commends were actually possible, government would pronounce no judgments, declare no truths, stand for nothing⁴² (except arguably for a kind of procedural fairness and for its own insistent refusal to stand for anything more substantive). And citizens are implicitly depicted as delicate, fragile actors who feel alienated and disempowered if government says anything that contradicts their own views. In the integrity story, by contrast, government *does* proclaim what it takes to be true and good and just; but it is secure enough in its commitments and respectful enough of its citizens that

41 See Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. 1233, 1288–89 (2002).

42 In this vein, Michael Zuckert imagines how the signers of the Declaration of Independence, who pledged their lives, fortunes, and sacred honor in perilous support of the “self-evident truths” on which the American revolution was justified, might react to the Truth-eschewing political philosophy of John Rawls and other modern liberal theorists:

For shame, Professor Rawls . . . Do you men of Harvard know nothing of truth? Martin Luther said, “Here I stand, I can do no other.” He knew the princes of church and state would give him no peace, no rest, yet he stood. And you Harvard philosophers, what do you say? “Here I sit. I dare do no more.”

Michael P. Zuckert, *Is Modern Liberalism Compatible with Limited Government? The Case of Rawls*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 72 (Robert P. George ed., 1996).

it need not and does not compel those citizens to agree.⁴³ And the citizens are sufficiently self-confident and tough-minded that they can engage with officials and fellow citizens, understanding that sharp disagreements even over fundamentals will inform the exchanges,⁴⁴ without feeling threatened or alienated by the fact of such disagreements.⁴⁵

To be sure, not everyone will find this image of community attractive. And not everyone will agree with the premises about human beings and truth that inform the integrity story. In our own history, those premises are arguably grounded in the biblical or Jerusalem-based strand of our tradition—in stories from Hebrew scripture about Hananiah, Mishael, and Azariah, (given the Babylonian names of Shadrach, Meshach, and Abednego), who were thrown into a fiery furnace for refusing to bow before the king's golden statue, or about the Maccabees, who courageously refused to submit to the enlightened Greek orthodoxies of Antiochus Epiphanes. And in pointedly pertinent sayings of Jesus,⁴⁶ and in the whole tradition of martyrs, beginning with the Apostles⁴⁷ and running through and beyond Thomas More, and narrated for earlier generations of Americans by John Foxe's phenomenally popular *Book of Martyrs*.⁴⁸

As literacy in this biblical and Christian tradition wanes (even among self-identifying Christians⁴⁹), however, and as the biblical tradition comes to be deemed inadmissible as a basis of public policy (largely under the influence of the neutrality interpretation), it is hardly surprising that the

⁴³ Cf. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (“[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.”).

⁴⁴ Cf. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (commending national debate that is “uninhibited, robust, and wide-opening” including criticisms that can be “vehement, caustic, and sometimes unpleasantly sharp”).

⁴⁵ See Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 682–83 (1988) (interpreting and praising Justice Louis Brandeis's famous concurrence in *Whitney v. California* for understanding the First Amendment as a manifestation of civic courage in which officials and citizens are not afraid of a public square characterized by diverse and even threatening opinions). For a more recent articulation of this vision, see JOHN INAZU, *CONFIDENT PLURALISM* 16–18 (2016).

⁴⁶ See, e.g., *Matthew* 10:32–33 (New International Version) (“Whoever acknowledges me before men, I will also acknowledge before my Father in heaven. But whoever disowns me before men, I will disown him before my Father in heaven.”).

⁴⁷ E.g., *Acts* 4:1–21 (New International Version).

⁴⁸ The integrity account can also find support in the Athens-based strand of our tradition, however. For example, Socrates might be taken as a leading exemplar. See Plato, *Socrates' Defense (Apology)*, in *PLATO: THE COLLECTED DIALOGUES* 3 (Edith Hamilton & Huntington Cairns eds., Hugh Tredennick tr. 1961).

⁴⁹ See STEPHEN PROTHERO, *RELIGIOUS LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW—AND DOESN'T* (2008).

integrity interpretation has become increasingly embattled in recent years (as the public debate over cases like *Masterpiece Cakeshop* reflects). This, arguably, is the central vulnerability of the integrity interpretation. While not commanding the impossible in the sense that the neutrality interpretation does, the integrity account depends on the acceptance of particular views and premises; and as that acceptance diminishes, the integrity account may lose its hold on the nation’s self-understanding.

In sum, the integrity interpretation with its commitment against compelled affirmations is itself a kind of contestable orthodoxy—one that is itself at least implicitly grounded in other orthodoxies. In affirming the prohibition on compelled affirmations (as on this interpretation the Court did in *Barnette*), government thus in effect endorses a kind of orthodoxy. If the neutrality or “no orthodoxy” interpretation is correct, that endorsement would itself be a breach of our most fundamental constitutional commitment.⁵⁰ This is why I said at the outset that the two interpretations are not merely different in their implications but actually in tension with each other.⁵¹

C. *The Religion-Specific Interpretation of Barnette*

In response to an earlier analysis similar in some respects to that offered here, Professor Steven Shiffrin concedes that American governments constantly declare what they take to be truths, and that the “neutrality” or “no orthodoxy” interpretation is therefore untenable as a general proposition about American government. The problem is so obvious and so inescapable, Shiffrin thinks, that it is implausible to interpret *Barnette* in this way; and he thinks that most readers have not given the decision any such interpretation.⁵² *Barnette*’s demand for neutrality and eschewal of orthodoxy are limited, Shiffrin thinks, to the area of religion. In that domain, however, Shiffrin thinks the neutrality/“no orthodoxy” commitment *is* viable and mandatory.⁵³

Justice Jackson’s opinion in *Barnette* resists this religious-specific interpretation. The Court observed that although the Jehovah’s Witness plaintiffs in the case were motivated by religious beliefs, the constitutional commitment declared in the decision was not dependent on any such

⁵⁰ And *Barnette* itself would thus amount to a performative self-contradiction.

⁵¹ And one practical implication of this observation is that the “no orthodoxy” interpretation, if widely embraced, has the potential to undermine the commitment to “no compelled affirmations.”

⁵² If we bracket religion for the moment, I am not aware of anyone, including Justice Jackson, who believes that government should be neutral on matters of politics, nationalism, or other matters of opinion. As Smith expertly points out, government could not function if it tried to be neutral on such issues. Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717, 723 (2003).

⁵³ *Id.* at 724–28.

motivations.⁵⁴ And, as noted, the Court explicitly extended its “no orthodoxy” principle to “politics, nationalism, religion, and other matters of opinion,” without distinguishing its application in those various domains. Moreover, the Pledge of Allegiance at that time did not contain religious content in the conventional sense: the words “under God” had not yet been added to the Pledge.

Even so, and given the prevalence of neutrality language primarily in the Court’s religion clause cases, one might be tempted to dismiss Jackson’s sweeping statement as rhetorical overreaching—and thus to limit the *Barnette* pronouncement to religion, regardless of what the Court itself said or intended. The deeper problem, though, is that the religion-specific neutrality interpretation is vulnerable to exactly the same historical and practical objections as the more general neutrality interpretation.

To be sure, as noted earlier, government can remain neutral on matters (religious or not) about which no one asks government to speak or act. And for the most part, Americans have not demanded that government address particular matters of theology. But when issues implicating religion do arise in which government is expected to speak or act, the possibility of neutrality recedes. And in fact, such issues have been pervasive in American history.

Such issues might be roughly sorted into two main categories. First, Americans have often expected government explicitly to proclaim more generic “truths” in matters of religion, and government officials have often been more than happy to comply. Indeed, they have sometimes believed that government has a *duty* to acknowledge deity.⁵⁵ Thus, from the beginning to the present, government officials have proclaimed national days of thanksgiving and prayer. Legislatures and other governmental bodies have appointed chaplains and commenced sessions with prayer.⁵⁶ The Supreme Court itself has asserted that this is a “Christian nation”⁵⁷ and, later and more ecumenically, that “[w]e are a religious people whose institutions presuppose a Supreme Being.”⁵⁸

⁵⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634–35 (1943).

⁵⁵ Thus, in his First Inaugural Address, President Washington declared that:

[I]t would be peculiarly improper to omit in this first official Act, my fervent supplications to that Almighty Being who rules over the Universe. . . . No People can be bound to acknowledge and adore the invisible hand, which conducts the Affairs of men more than the People of the United States. Every step, by which they have advanced to the character of an independent nation, seems to have been distinguished by some token of providential agency. . . . These reflections, arising out of the present crisis, have forced themselves too strongly on my mind to be suppressed.

George Washington, *First Inaugural Address*, in *THE SACRED RIGHTS OF CONSCIENCE* 446, 446–47 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

⁵⁶ See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 786–88 (1983).

⁵⁷ *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892).

⁵⁸ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

More recently, to be sure, and particularly since the announcement of the “no endorsement” test in the 1980s,⁵⁹ such declarations may be less frequent, and more suspect. Commentators may call for a categorical cessation of any such expressions.⁶⁰ If that course were adopted (which seems unlikely), the nation and its self-understanding would arguably be *less religious* (in the conventional sense of the term⁶¹), but it would not thereby become *more neutral*. After all, a government that declines to engage in public prayer (even though many citizens favor the practice), or that disavows the proposition that our institutions presuppose a Supreme Being (although many citizens believe that proposition), is taking a stand on a controversial theological question just as surely as a government that adopts the opposite course.

More broadly, though (and this is the second category of issues), on a whole host of issues that governments address—environmental protection, civil rights, abortion, immigration, economic policy—citizens hold a variety of religious beliefs that they often regard as directly relevant to the resolution of such issues. In adopting policies on such issues, government may or may not invoke the supporting religious premises; but government inevitably at least rejects the religious beliefs that would have prescribed a different policy, even if the rejection is only tacit. Thus, in legalizing abortion, government rejects pro-life religious views. In strictly restricting immigration, government rejects religious views which teach that we have a more expansive obligation to be welcoming to strangers and foreigners. In teaching evolution, public schools reject biblical literalist views which hold that the world was created in six days.⁶²

In making these decisions, to be sure, government may not comment explicitly on the religious views that are being tacitly rejected. But a tacit rejection of one constituency’s views, though it may be less aggressively insulting,⁶³ is no more “neutral” in its substance than an explicit rejection.

⁵⁹ See *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 633, 638 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 691–92 (1984) (O’Connor, J., concurring).

⁶⁰ See, e.g., Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2086 (1996).

⁶¹ For a discussion of the complexities here, see Smith, *supra* note 5.

⁶² Cf. Shiffirin, *supra* note 52, at 724–25 (acknowledging that “government frequently takes positions that contradict religious beliefs”).

⁶³ Shiffirin plausibly contends that,

there is a world of difference between logical entailment and social meaning. Suppose that at the bar mitzvah rather than saying, “I am a Catholic,” I say, “I am a Catholic and I think you of the Jewish faith are wrong.” . . . I will have converted a logical inference into an insult.

Id. at 726. We can bracket the question of whether a belief in Catholicism logically entails that the “Jewish faith” is “wrong”; Shiffirin’s basic observation seems sensible enough. Even so, this observation, while making a potentially valuable point about diplomacy or political etiquette, hardly redeems the possibility of actual neutrality.

It may also be said that in formulating public policies government does not *reject* religious views, exactly, but merely *declines to consider* them—and that it does this because the Constitution so requires. But a refusal to consider reasons that are presented as pertinent or even dispositive can hardly be considered “neutrality” in any meaningful sense. Imagine the judge who tells a defendant: “I’m required to be completely neutral in trying this case, and thus neutral with respect to any arguments you make; and so I will be. In fact, I’m so committed to neutrality that I’m not even going to listen to any of your arguments.”

And even if the Constitution does prohibit government from considering “religious” reasons (a highly problematic proposition, by the way⁶⁴), this observation merely amounts to saying that it is not particular *government officials* who have chosen to depart from neutrality in rejecting (or refusing to consider) religious reasons; it is *the Constitution itself*. The losing litigant or constituency is in effect told: “It’s not *Congress*, or *the Justices*, that are rejecting your religious views: it’s *the Constitution*. We’re just doing what the Constitution commands us to do.” Let’s suppose, *arguendo*, that this amended description is accurate. How is the amended description supposed to help with the challenge of pluralism that gave rise to the neutrality strategy in the first place?

In sum, neutrality is no more plausible in the area of religion than it is in general. What *is* possible, in religion as in other matters, is protection of the integrity of citizens by not forcing them to affirm what they do not believe.

IV. *BARNETTE* IN OUR TIMES

The preceding discussion has suggested that the better interpretation of *Barnette* understands the decision as an affirmation of the proposition that government should not compel citizens to affirm things they do not believe. But that is not only the preferable interpretation of the case; it is an interpretation that has special relevance and urgency in our own troubled times.

This urgency should not be surprising. The temptation to suppress dissent and to compel agreement seems well-nigh universal.⁶⁵ Still, the

⁶⁴ See Steven D. Smith, *The Constitution and the Goods of Religion*, in DIMENSIONS OF GOODNESS 319-321, 333 (Vittorio Hösle ed., 2013).

⁶⁵ It is “perfectly logical,” as Holmes famously declared, if you are confident of “your premises” and “your power,” to use law to “sweep away all opposition.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Or at least people with power have often thought so; and for those who embrace this logic, there seems to be no reason to stop with silencing your opponents: better still to require them affirmatively to support your preferred doctrines.

inclination to compel agreement can be particularly overpowering in times of trouble, tension, polarization. Thus, the Romans’ persecution of the Christians usually picked up in times of threat or catastrophe.⁶⁶ Henry VIII demanded that his subjects take a loyalty oath, and sent Thomas More and others to the scaffold for refusing, during a particularly tense and volatile period when the crown was in the midst of a radical and divisive revolt against Church and tradition. In this country, loyalty oaths have been pressed during periods of stress and insecurity—the Cold War, the McCarthy period.

Our own times are characterized by intensifying polarization and conflict, often described as the “culture wars.” At times it can seem that the nation is dividing into two hostile sides or camps.⁶⁷ One of those sides—usually described as “progressive”⁶⁸—has won major victories, but often the democratic legitimacy of these victories seems fragile. Abortion and same-sex marriage have proven to be bitterly divisive issues, and in each case the progressive side has prevailed, for the most part, not legislatively, but rather as a result of fiercely contested judicial decisions that even their supporters may find to be inadequately reasoned.⁶⁹

In these circumstances, it should not be surprising if pressures to compel conformity were to intensify.⁷⁰ And—every action producing a reaction—the constitutional commitment to eschew such compulsion would likewise become especially salient.⁷¹

⁶⁶ Edward Gibbon remarked caustically that:

If the empire had been afflicted by any recent calamity, by a plague, a famine, or an unsuccessful war; if the Tiber had, or if the Nile had not, risen beyond its banks; if the earth had shaken, or if the temperate order of the season had been interrupted, the superstitious Pagans were convinced that the crimes and the impiety of the Christians . . . had at length provoked the Divine Justice.

EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 419 (The Heritage Press 1995) (1776).

⁶⁷ In a recent survey, almost a third of Americans surveyed opined that the country would experience a civil war within five years. See Ewan Palmer, *Is a Second Civil War Likely? One Third of American Think So*, NEWSWEEK.COM (June 28, 2018), <http://www.newsweek.com/second-civil-war-likely-one-third-americans-think-so-999254>.

⁶⁸ See, e.g., JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 43–44 (1991).

⁶⁹ See, e.g., Michael J. Perry, *Obergefell v. Hodges: An Imagined Opinion, Concurring in the Judgment* (Emory Univ. Sch. of Law, Paper No. 15-356, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2624022.

⁷⁰ Robin West, for example, has strenuously opposed constitutional decisions granting what she calls “exit rights” (such as free exercise exemptions) from “our civil society” and its norms. Robin West, *Freedom of the Church and our Endangered Civil Rights: Exiting the Social Contract*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 399, 402 (Micah Schwartzman et al. eds., 2015); see also Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 894 (2014).

⁷¹ The sociology here is no doubt complicated. Paul Horwitz suggests to me in correspondence that pressures to conformity, and hence the need for countervailing constitutional protection against such conformity, may be especially strong in times of general or popular dissension combined with *elite* consensus. The suggestion seems plausible, as does its application to our own troubled times.

So it seems we read almost daily about some television personality, sports figure, politician, or business executive who says something that offends prevailing orthodoxies and is forced by public or social or economic pressure to recant, and to abjectly affirm his or her support for the preferred views or values. And it is not an accident that three of the most vigorously contested decisions of the Supreme Court's last term centrally involved the *Barnette* principle against compelled affirmations. Nor is it an accident that one of those decisions concerned abortion and another concerned same-sex marriage.

In two of the cases, a 5-4 majority reaffirmed the *Barnette* commitment.⁷² In the third—*Masterpiece Cakeshop*, the same-sex marriage case—the Court noted the “compelled speech” issue but decided the case on more particularistic and *ad hoc* grounds⁷³: the Court reversed a Colorado decision requiring a baker and cake artist to “design and create” cakes for same-sex weddings,⁷⁴ contrary to his traditionalist Christian convictions, because, in the Court's interpretation, Colorado officials had made anti-religious comments⁷⁵ and had treated the Christian baker differently than other bakers.⁷⁶ How lower courts and the Supreme Court itself will ultimately decide such cases remains, at this point, uncertain.

For the most part, advocates, Justices, and amicus briefs that addressed this issue argued about whether a cake, or a wedding cake, or a custom-made wedding cake, is “expressive.” And on this point, the advocates have disagreed. While not irrelevant, however, this kind of argument overlooks

⁷² See *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2387 (2018).

⁷³ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1744 (2018). Only Justice Thomas, in a concurring opinion, went on to conclude that the state had also violated the *Barnette* principle against compelled expression. *Id.*

⁷⁴ *Id.* at 1738.

⁷⁵ *Id.* at 1731. In fact, any hostility to religion expressed by the Colorado commissioners was surely less belligerent than that expressed by the United States Civil Rights Commission in a document entitled *Peaceful Coexistence*. U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29–167 (2016). Chairman Martin Castro asserted that the phrases “religious liberty” and “religious freedom” are hypocritical “code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, [and] Christian supremacy,” and he joined three other commissioners in a statement that described proposed protections for religious freedom as hypocritical manifestations of “intolerance and animus.” *Id.* at 29, 40. In their substance, moreover, the Colorado commissioners' statements were arguably less offensive and dismissive of traditional religious views than the majority opinion written by Justice Kennedy in *United States v. Windsor*. See *United States v. Windsor*, 570 U.S. 744 (2013); see also Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675 (2014).

⁷⁶ Paul Horwitz points out to me in correspondence that the *Barnette* Court might similarly have rested its decision on seemingly differential treatment afforded Jehovah's Witnesses by West Virginia officials. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 627–28 (1943). The Court chose not to rely on this differential treatment but instead emphatically affirmed the principle against compelled affirmations. *Id.* at 642.

the more crucial point—namely, that in this and other recent “wedding vendor” cases, what the contending parties on both sides care about, primarily or even exclusively, is precisely what providing or refusing to provide services *expresses*.⁷⁷

Thus, in *Masterpiece Cakeshop* (the baker case), and in *Arlene’s Flowers* (the florist case), and in *Elane Photography* (the wedding photographer case), the Christian vendors declined to provide a product or service not because of any scruples about serving LGBT customers, but rather because they believed that in providing the particular requested product or service they would thereby be sending a message that they believed to be contrary to God’s will.⁷⁸ In *Arlene’s Flowers*, for example, the florist had sold thousands of dollars of flowers over a period of years to the customer, knowing that he was gay and that some of the flowers were intended to celebrate Valentine’s Day or birthdays with his same-sex partner. She also agreed to sell him the “raw materials” for his wedding; her objection was to using her artistic talents to create floral arrangements for the wedding, because that would be her own creative expression.

For their part, the same-sex couples readily obtained the products or services sought from other vendors. So they sought either no damages or negligible damages for the deprivation of a product or service. In *Arlene’s Flowers*, for example, the same-sex couple requested and received \$7.91 for the cost of driving to another florist.⁷⁹ These cases are not about material

⁷⁷ For a clear though noncommittal explanation of the approach, see Rick Hills, *Who Cares Whether Cake-Baking is “Expressive”?* *The Doctrinal Costs of Focusing on Private Burdens Rather Than Governmental Purpose*, PRAWFSBLAWG (Sept. 11, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/2017/09/who-cares-whether-cake-baking-is-expressive-the-doctrinal-costs-of-focusing-on-private-bu.html>.

⁷⁸ Some advocates persist in denying or in refusing to understand this point. Thus, in *Masterpiece Cakeshop*, Justice Ginsburg (joined in her dissent by Justice Sotomayor) asserts unequivocally that the Christian baker Jack Phillips refused to create a wedding cake for the same-sex couple “solely” because of their sexual orientation. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1750 (2018) (Ginsburg, J., dissenting). But Ginsburg’s claim amounts to a bald assertion unsupported by any evidence. On the contrary, the uncontradicted evidence indicated that Phillips was conscientiously opposed to designing and creating a cake celebrating a wedding between persons of the same sex, regardless of their sexual orientation; conversely, he was happy to create and sell any product on his inventory (including a wedding cake for the only kind of wedding that Phillips himself recognizes as creating a marriage) to anyone, again regardless of their sexual orientation. Thus, Phillips would not create a cake for two males who wanted to marry, even if they happened to be heterosexual; he *would* create a cake for a man and woman who wanted to marry even if one or both were homosexual. In sum, it was the *product* (and its associated *message*) that he found objectionable, not the sexual orientation of the persons requesting that product and message. Ginsburg simply refused to accept that Phillips believed what he said he believed. See Steven D. Smith, *Disagreement, Discrimination, and Polarization: An Open Letter to Justice Ruth Bader Ginsburg*, PUBLIC DISCOURSE (Oct. 30, 2018), <https://www.thepublicdiscourse.com/2018/10/43954/>.

⁷⁹ See Warren Richey, *A Florist Caught Between Faith and Financial Ruin*, CHRISTIAN SCIENCE MONITOR (July 12, 2016), <http://www.csmonitor.com/USA/Justice/2016/0712/A-florist-caught-between-faith-and-financial-ruin>.

injury, obviously, but rather about what advocates often describe as “dignitary harm”⁸⁰; the complainants are aggrieved by the offense or insult they experience when a vendor declines to serve them because of opposition to their union. Their injury, in short, consists not in the loss of a product or service but rather in what they perceive as the demeaning *message* conveyed by the vendors’ refusals.⁸¹

This injury may be perfectly real. But it amounts to an assertion of offense or hurt or humiliation caused by what the complainants have perceived as a hostile or discriminatory message. And the remedy ordered by the courts—namely, the requirement that the vendors serve or cater to same-sex marriages in the future—amounts to a demand that the vendors act in the future in a way that will no longer convey the disfavored message and instead will reflect a more acceptable message. On these facts, it is hard to see how *Barnette*’s prohibition on compelled expression does not apply.⁸²

V. CONCLUSION

The *Barnette* decision has sometimes been interpreted to mean that governments in this country are prohibited from declaring what they consider to be “orthodox” in political and religious matters. But although alluring from a certain point of view, this interpretation commands governments to do something they never have done and never could do. The better interpretation

⁸⁰ See, e.g., Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER, 177, 189–91 (2015); Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & POL’Y 705, 706 (2014); cf. Helen M. Alvare, *Religious Freedom versus Sexual Expression: A Guide*, 30 J.L. & RELIGION 475, 476 (2015) (“On the part of a person who identifies as LGBT, another’s refusal to recognize a state-recognized marriage is often interpreted as a rejection of his or her entire person, and an affront to dignity, equality, and social respectability.”).

⁸¹ Advocates who oppose exemptions for religious objectors sometimes argue that there may be situations—or areas of the country—in which it would be difficult or impossible for a same-sex couple to obtain a needed product or service. But regardless of whether this concern is or is not justified, the fact remains that in the actual cases that have commanded public attention, no such injury was incurred. In those cases, the complaint was about an unwanted message, and the remedy was to order the vendors to act in the future so as to convey a more acceptable message—though one that the vendors did not believe.

⁸² A common attempt to deflect this conclusion contends that the *Barnette* principle *might* apply if a same-sex couple asked a Christian baker to prepare a cake with an explicit message—“God Bless This Same-Sex Union,” perhaps—or perhaps even with particular expressive symbols, such as two grooms. But the complainants in *Masterpiece Cakeshop* did not request any specific wording or symbolism; they merely asked the baker to, as the Colorado Court of Appeals put it, “design and create a cake to celebrate their same-sex wedding.” *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015). See, e.g., Andrew Koppelman, *The Gay Wedding Cake Case Isn’t About Free Speech*, AM. PROSPECT (Nov. 27, 2017), <http://prospect.org/article/gay-wedding-cake-case-isn-t-about-free-speech>. If anything, though, the injury to integrity is even greater when a person is not merely asked to recite some pre-established script, but rather is conscripted to use her or his creative or artistic talents to craft or create a message that he or she opposes.

of *Barnette* is that it prohibits governments from compelling citizens to affirm things they do not believe. And as it happens, that is a commitment that is timely in our own troubled and tumultuous circumstances.