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Not Such a Fixed Star After All: West Virginia State Board of Education v. Barnette, and the Changing Meaning of the First Amendment Right Not To Speak

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NOT SUCH A FIXED STAR AFTER ALL: *WEST VIRGINIA STATE BOARD OF EDUCATION V. BARNETTE*, AND THE CHANGING MEANING OF THE FIRST AMENDMENT RIGHT NOT TO SPEAK

Genevieve Lakier*

There are few 75-year-old opinions that are as important to contemporary free speech law as Justice Jackson's gorgeous opinion in *West Virginia State Board of Education v. Barnette*.[1] *Barnette*'s continuing relevance to First Amendment jurisprudence was recently demonstrated quite vividly by the fact that it was cited—in fact quoted— in all three of the major free speech cases the Supreme Court handed down last term.[2] It isn't only at the Supreme Court, however, that the septuagenarian opinion continues to exert influence over free speech disputes. Across the country, state and federal courts routinely invoke *Barnette* as support for the proposition that the freedom of speech guaranteed by the First Amendment guarantees a right not to speak, as well as a right to speak, and on that basis use it to justify the invalidation of all manner of disclosure, notice, and compelled subsidization laws.[3]

At first glance, the enduring vitality of Justice Jackson's opinion in *Barnette* suggests something reassuring about the modern First Amendment tradition: namely, that it is consistent over time, that the principles courts rely upon in resolving free speech cases are stable and enduring and not easily changed by the vicissitudes of political circumstance and judicial temper. Upon closer inspection, however, this reassuring reading turns out to be hard

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1 319 U.S. 624 (1943).

2 Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2464 (2018); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2387 (2018) (Breyer, J., dissenting); Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018).

3 *See, e.g.*, Burns v. Martuscello, 890 F.3d 77, 85–86 (2d Cir. 2018) (striking down prison policy that required inmates in state prison to snitch on fellow inmates as a violation of the prohibition against compelled speech first articulated in *Barnette*); Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore, 879 F.3d 101, 106 (4th Cir. 2018) (striking down city ordinance that required pro-life pregnancy centers to post a disclaimer in their waiting room notifying clients that they do not provide abortion or birth-control services); Frudden v. Pilling, 742 F.3d 1199, 1204, 1208 (9th Cir. 2014) (striking down a school policy that required students to wear shirts bearing the school logo); Nat'l Ass'n of Mfrs. v. N.L.R.B., 717 F.3d 947, 950 (D.C. Cir. 2013) (invalidating National Labor Relations Board regulation requiring employers to post notices of employee rights in the workplace).

to sustain. This is because if one looks at how contemporary courts invoke *Barnette*, what becomes apparent is that the decision is today taken to mean something that it is highly unlikely the members of the Court who joined Justice Jackson's majority opinion intended, and something that is very difficult to justify under the reasoning in the opinion itself.

Rather than demonstrating the stability of foundational First Amendment precepts, what *Barnette*'s long life thus demonstrates is largely the opposite: namely, the subtle but profound shift that has taken place over time in the judicial conception of the First Amendment, the interests it protects, and the constraints it imposes on government power. This shift can be described in various ways: as a move away from a democracy-focused First Amendment towards an autonomy-focused one, as a turn away from a positive and towards a negative-rights model of the First Amendment, and as the *Lochnerization* of the First Amendment. However we describe it, the result has been a significant expansion in the scope of the First Amendment right not to speak and a reconceptualization of *Barnette* itself. To see this, it is necessary first to untangle what *Barnette* actually held from how it is remembered today.

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In *Barnette*, the Court faced (as virtually every student of free speech law learns) a First Amendment challenge to a West Virginia regulation that required students in the state's public schools to salute the US flag or risk expulsion.[4] A group of Jehovah's Witnesses who had children in the public schools sought an injunction restraining the government from enforcing the regulation against their children. They argued that because their religious faith prohibited them from saluting the flag, enforcement of the regulation against their children would violate both their and their children's free exercise and free speech rights.[5] The district court that initially heard the case granted their request for an injunction to prevent school officials from enforcing the regulation, and, on appeal, the Supreme Court affirmed.[6] Unlike the district court, however, the Supreme Court resolved the case on free speech rather than free exercise grounds.

The Court concluded that the regulation violated the free speech rights of the Jehovah Witness children, and by proxy their parents, because it forced them to espouse a belief in the importance of the flag that they did not possess and thereby deprived them of a freedom that Justice Jackson insisted was by

4 *Barnette*, 319 U.S. at 625–26. For more background on the case see Vincent Blasi and Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 433 (Michael C. Dorf ed., 2004).

5 *Barnette*, 319 U.S. at 629–30.

6 *Id.* at 630, 642.

1943 "commonplace" knowledge that the First Amendment protected.[7] This was the freedom to express whatever "belief and . . . attitude of mind" one desired, except when doing so posed a "clear and present danger of a kind the State is empowered to prevent and punish."[8] Because the government did not claim that participation in the ceremony was necessary to avert a clear and present danger, the Court concluded that participation in the flag salute ceremonies could not be required of Jehovah's Witnesses or, for that matter, anyone else.[9]

In holding as much, the Court overruled its earlier decision in *Minersville School District v. Gobitis*,[10] upholding a very similar mandatory flag salute law against a First Amendment challenge, and reaffirmed its commitment to the minority-protecting, diversity-promoting conception of the free speech guarantee it had begun to sketch out in earlier decisions, such as *Cantwell v. Connecticut*.[11] The decision was, in this respect, very significant. It was also, however, clearly limited.

In his majority opinion, Justice Jackson was careful to specify the facts that made the free speech question at issue in the case relatively straightforward.[12] He noted, for example, that this was not a case in which the Court had to resolve conflicting rights claims.[13] If there had been a conflict of this sort, Justice Jackson suggested that the outcome might have been different because the state's justification for acting would have been greatly enhanced.[14] The outcome might also have been different, Justice Jackson suggested, if the education the state threatened to deny to students who refused to salute the flag was something those students freely chose to avail themselves of rather than a compulsory obligation.[15] Finally, and most importantly for our purposes, Justice Jackson noted that this was not a case in which the state merely "require[d] teaching by instruction and study of . . . our history and . . . the structure and organization of our government" or

7 *Id.* at 633.

8 *Id.*

9 *Id.* at 633–34.

10 *See generally* 310 U.S. 586 (1940).

11 310 U.S. 296, 310 (1940) (construing the First Amendment as a "shield [under which] many types of life, character, opinion and belief can develop unmolested and unobstructed.").

12 *Barnette*, 319 U.S. at 641 ("The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own.").

13 *Id.* at 630 (noting that "the refusal of [the school children] to participate in the [flag salute] ceremony d[id] not interfere with or deny rights of others to do so.").

14 *Id.* (asserting that it is cases in which there is a "collision" between competing rights that "most frequently require intervention of the State to determine where the rights of one end and those of another begin.").

15 *Id.* at 632.

"acquaint[ed students] with the flag salute, so that they may be informed as to what it is or . . . what it means." [16] This, Justice Jackson made clear, it absolutely could do.[17] What it could not do was compel students to attest to beliefs they did not hold without infringing the "right of self-determination in matters that touch individual opinion and personal attitude" that the First Amendment guaranteed.[18]

The opinion in *Barnette* thus established an important but limited principle: namely, that the government may not compel individuals to espouse beliefs that they do not hold when those beliefs touch on "matters of individual opinion and personal attitude," except when doing so is necessary to avert a clear and present danger or perhaps to determine access to an optional government benefit. Notwithstanding Justice Jackson's forceful assertion in perhaps the most famous passage of the opinion that it is a "fixed star in our constitutional constellation" that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," the opinion did not in fact prohibit the government from using its power of the purse or the bully pulpit to promote certain "orthodox" ideas—such as, for example, the idea that the United States is a nation under God, the flag its quasi-sacred symbol.[19] It merely prohibited the government from affirmatively requiring private citizens to endorse those ideas. The opinion also did not suggest, even in a whisper, that the freedom of speech guaranteed by the First Amendment was threatened when the government compelled individuals to speak about matters that were *not* a question of individual opinion and personal attitude. To the contrary, it strongly implied that, in the school context, at least, the government could compel students to speak about matters of fact as part of the ordinary course of civic education.[20]

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16 *Id.* at 631 (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting)).

17 *Id.*

18 *Id.* at 631, 634.

19 *Id.* at 642. Justice Jackson made clear, for example, that the government of West Virginia could continue to organize "voluntary and spontaneous" flag salute ceremonies, and other "patriotic ceremonies" of that sort without facing any constitutional difficulties. *Id.* at 641. *See* Steven D. Smith, *Law and Cultural Conflict:* Barnette*'s Big Blunder*, 78 CHI.-KENT L. REV. 625, 626 (2003) ("[T]he Court [did not suggest] that a state is somehow forbidden to conduct Pledge exercises in public schools and to encourage student participation. If the Pledge expressed a sort of terse orthodoxy . . . and if articulating, endorsing, and officially sponsoring the Pledge amounted to 'prescribing' it, then the *Barnette* Court was not in fact forbidding prescription in the case itself; it ruled only that the state could not force unwilling students to participate.").

20 *Id.* at 631. In a footnote, Justice Jackson chastised school officials in the United States for failing to attend to the educational dimensions of the flag salute. He cited, in particular, a recent study that found that few children were able "to remember and state the meaning of the flag salute which they recited each day." *Id.* at 631 n.12 (citing Herbert T. Olander, *Children's Knowledge of the Flag Salute*, 35 J. EDUC.

For the first three decades after it was handed down, this was certainly how the decision was interpreted. When the Court cited *Barnette*, it invariably did so as support for the proposition that the government could not require its citizens to "contribute to the support of an[y] ideological cause [they] may oppose" or to attest to beliefs they did not hold.[21] It did not read *Barnette* to forbid the government from advocating particular ideas or beliefs, nor did it construe *Barnette* to apply when the government compelled speech to attest to beliefs they *did* hold or to disclose facts that were not a matter of opinion. The Court made clear, for example, that laws that required school teachers and public servants to swear that they would perform their public duties lawfully and in accordance with the U.S. Constitution posed no constitutional problem, so long as their purpose was not to penalize those who held disfavored political opinions.[22] In general, the Court struck down laws that compelled speakers to disclose true facts only when their practical effect was to make it difficult for those they regulated to put forward their own point of view.[23]

The Court's understanding of *Barnette* and the principle that it established began to shift, however, in the wake of its 1974 decision in *Miami Herald Publishing Co. v. Tornillo*.[24] In *Tornillo*, the Court struck down a Florida law that required local newspapers to offer political candidates, whose "personal . . . or official" character they criticized, a right of reply.[25] The Court held that the law was unconstitutional for two reasons. First, it imposed a penalty on newspapers that chose to engage in certain kinds of

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RES. 300, 305 (1941)). The implication here is that, rather than mandating participation in the flag salute, school officials should make sure that students could remember and state its meaning.

21 Abood v. Detroit Bd. of Ed., 431 U.S. 209, 235 (1977). *See also* Lathrop v. Donohue, 367 U.S. 820, 858 (1961) (Harlan, J., concurring) ("The holding of *Barnette* was that, no matter how strong or weak such beliefs might be, the Legislature of West Virginia was not free to require as concrete and intimate an expression of belief in any cause as that involved in a compulsory pledge of allegiance.").

22 *See* Cole v. Richardson, 405 U.S. 676, 684 (1972) (discussing the cases).

23 The decision in NAACP v. Alabama*,* 357 U.S. 449 (1958), illustrates this approach. In that case, the Court held that a court order that required the Alabama branch of the National Association for the Advancement of Colored People (NAACP) to disclose true facts—namely, the names and addresses of its members—violated the First Amendment. The Court held that the order violated the First Amendment because, given the circumstances in which the order applied (namely, Jim Crow Alabama), its enforcement would make it very difficult for members of the NAACP to exercise their freedom of association. *Id.* at 462–63. Nowhere in the opinion did the Court suggest that had the circumstances been different, the Alabama court could not have required the NAACP to disclose the names of its members. It merely noted that insisted that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462. The Court assumed, in other words, that the constitutional harm wrought by the Alabama law was not that it required the NAACP to speak but that doing so would make it difficult for the organization to continue to promote its political agenda.

24 418 U.S. 241 (1974).

25 *Id.* at 244.

political critique by requiring them to give up scarce and valuable column inches of space to the candidates' reply when they did so.[26] Second, it limited the editorial freedom of newspaper editors by requiring them to print material in their newspapers they would otherwise not. In his majority opinion, Chief Justice Burger made clear that the fact that the law intruded upon the editorial freedom of newspaper editors meant that it would violate the First Amendment even if it did not make it more difficult or more expensive for newspapers to engage in political critique.[27] This was because, he explained, "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment [and i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."[28]

The Court's first explanation for why the Florida law was unconstitutional was entirely in keeping with *Barnette*, and its interpretation of the First Amendment as a safeguard of "self-determination in matters that touch individual opinion and personal attitude." But its second explanation was plainly not. After all, *Barnette* did not hold that the government violated the First Amendment whenever it limited the "editorial freedom" of school children by telling them what they could or could not say. In *Tornillo*, the Court thus read into the First Amendment a far more expansive right against compelled speech than *Barnette* had suggested. Indeed, Chief Justice Burger did not cite *Barnette* once in his majority opinion.

There is no reason why the Court had to rely on the same principle to decide *Tornillo* as it relied upon in *Barnette*. The two cases were easily distinguishable. Most obviously, in *Tornillo*, the Court addressed the question of what rights newspapers enjoy under the Press Clause of the First Amendment, whereas in *Barnette*, the Court addressed the question of what rights school children possess under the Speech Clause. One can easily understand why the Court might have wished to grant newspapers and other members of the press greater independence from state control than other kinds of speakers, given the important structural role the press plays in the democratic system of government that the First Amendment helps to

26 *Id.* at 256–57.

27 *Id.* at 258 ("Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.").

28 *Id.*

safeguard.[29] In *Tornillo*'s wake, however, the Court did not distinguish the two cases along these or any other lines. Instead, it read the two cases together.

The result was a significant change in the Court's understanding of *Barnette*. Consider in this respect the 1977 decision in *Wooley v. Maynard*, which struck down a state law that required residents to display the state motto "Live Free or Die" on their license plates.[30] The law at issue in *Wooley*, like the law at issue in *Barnette*, compelled speakers to endorse—albeit, in this case, only tacitly—a contestable belief. As such, the Court could easily have resolved the question of its constitutionality by relying on *Barnette* alone. In striking down the law, however, the Court invoked not only *Barnette* but also *Tornillo*, which it construed as a case that "illustrated" the principle first articulated in *Barnette*: namely, that "the right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[31] *Barnette* of course did *not* hold that the right to speak and the right not to speak were complementary components of something called freedom of mind.[32] It merely held that, just as the government could not prohibit speakers from taking positions on contested matters of opinion, it could not compel them to do so either. *Tornillo*, meanwhile, said nothing about what freedom of mind the Speech Clause guaranteed; as I noted earlier, it was resolved exclusively on Press Clause grounds. By reading the two decisions together, the Court thus changed the meaning of both. It suggested that *Barnette* found in the Speech Clause a similarly expansive right not to speak as *Tornillo* found in the Press Clause.

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29 For an argument along these lines, see Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 653 (1975).

30 430 U.S. 705, 717 (1977).

31 *Id.* at 714 (quoting W. Va. State Bd. of Educ. v. Barnette*,* 319 U.S. 624, 637 (1943)).

32 Indeed, the phrase "freedom of mind" appeared only one time in Jackson's opinion, in a passage in which Justice Jackson argued that enforcing the Bill of Rights did not mean "to choose weak government over strong government" but instead meant "to adhere as a means of strength to individual freedom of mind in preference to [the] officially disciplined uniformity for which history indicates a disappointing and disastrous end." *Barnette,* 319 U.S. at 637. This assertion is, of course, entirely in keeping with the nuanced rule the majority sketched out. It is true that in his concurring opinion (which he wrote in addition to joining Justice Jackson's majority opinion), Justice Murphy did suggest that the right to speak and not to speak might be complementary rights. *Id.* at 645 (Murphy, J., concurring) ("The right of freedom of thought and of religion as guaranteed by the Constitution . . . includes both the right to speak freely and the right to refrain from speaking at all, except in so far as essential operations of government may require it for the preservation of an orderly society—as in the case of compulsion to give evidence in court."). Not one other member of the Court joined Justice Murphy's concurrence, however.

The Court made this explicit in its 1988 decision in *Riley v. National Federation of the Blind*.[33] The case involved a state law that required professional fundraisers, who solicited funds on behalf of charities, to disclose to potential donors how much of the money they received in donations they actually turned over to the charities they worked for.[34] The North Carolina legislature had enacted the law after it came to light that fundraisers were keeping in some cases over 80% of the money they collected for charity, without disclosing as much to potential donors.[35] North Carolina defended the law by arguing that "the First Amendment interest in compelled speech [was] different [and lesser] than the interest in compelled silence"—at least in cases such as this one, where the government compelled speakers to disclose only true facts.[36] The Court disagreed. It insisted that the decisions in *Barnette*, *Tornillo*, and *Wooley* established the "constitutional equivalence" between [laws that] "compelled speech and [laws that] compelled silence" and that this constitutional equivalence held even when the government compelled purely factual speech.[37] "These cases cannot be distinguished," Justice Brennan wrote in his majority opinion, "simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech."[38] The Court concluded as a result that any time the government compelled speech, no matter its content, its actions should be subject to "exacting First Amendment scrutiny."[39] Because the North Carolina law could not satisfy this strict scrutiny, the Court struck it down.[40]

The Court reaffirmed this expansive view of the prohibition against compelled speech when it held in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* that the government could not require a private association to include marchers in its parade who expressed a message with which it disagreed because, under *Barnette*, the state may "not compel affirmance of a belief with which the speaker disagrees" and noted also that "this general rule . . . applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather

33 487 U.S. 781, 796–97 (1988).

34 *Id.* at 784.

35 *See id.*

36 *Id.* at 796; *see also* Brief for Appellants at 12, Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988) (No. 87-328), 1987 WL 881143, at *1 ("The requirement of truthful, factual disclosure cannot be said to abridge anyone's freedom of speech.").

37 *Id.* at 797.

38 *Id.* at 797–98.

39 *Riley*, 487 U.S. at 798.

40 *Id.* at 798–800.

avoid."[41] This principle applied, the Court made clear, even when the government compelled speech in order to protect the constitutionally-protected rights of other parties—in this case, those speakers excluded from the parade.[42] It implicitly rejected, in other words, the suggestion in Justice Jackson's opinion in *Barnette* that the government might enjoy greater power to compel speech in cases where there was a "collision" between competing constitutionally-protected interests.[43]

In *Zauderer v. Office of Disciplinary Counsel*, the Court carved out a limited exception from the strong presumption against compelled speech it announced in *Wooley* and *Riley* when it held that laws that require commercial advertisers to provide "purely factual and uncontroversial information" about the products and services they advertise need only satisfy rational basis scrutiny, not the strict scrutiny these other cases called for.[44] The Court justified this holding by pointing to the unique characteristics of commercial speech. The fact that, unlike other kinds of protected speech, commercial speech receives constitutional protection primarily to safeguard the right of its audience to receive the information it communicates rather than to protect the expressive freedom of its speaker meant, the Court argued, that commercial advertisers' "constitutionally protected interest in *not* providing any particular factual information . . . is minimal" at best—and certainly "not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*."[45] It concluded that requiring the government to show that "disclosure requirements [were] reasonably related to the State's interest in preventing deception of consumers" was therefore sufficient to protect commercial speakers' First Amendment rights.[46] In holding as much, the Court obviously rejected the view that there is never a constitutionally relevant difference between laws that require speakers to take a position on matters of opinion and laws that required speakers to disclose true or at least "uncontroversial" facts. Nevertheless, by justifying the distinction on the basis of the rather unique constitutional status of commercial speech, the Court implicitly reaffirmed the principle it had articulated in *Riley*: namely,

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41 515 U.S. 557, 573 (1995).

42 *Id.* at 570. The Court acknowledged that the group excluded from the parade sought to exercise its constitutionally protected freedom of speech—and more specifically, wished to "celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, [and] show that there are such individuals in the community" but did not factor this into its analysis. *Id.*

43 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943).

44 471 U.S. 626, 651 (1985).

45 *Id.*

46 *Id.*

that ordinarily, the government may not compel the expression of either fact or opinion without satisfying strict scrutiny.

Today, the idea that the government acts in a presumptively unconstitutional manner—outside the commercial speech context at least—both when it compels speakers to take a position on matters of opinion and when it compels speakers to assert true facts is a widely accepted, if not universally embraced, principle of free speech jurisprudence. This principle was in fact reasserted by the Court just last term in *National Institutes of Family & Life Advocates v. Becerra*.[47] In that case, the Court addressed a free speech challenge to a California law, the FACT Act, that required clinics that provided medical care to pregnant women, but typically not abortion, to notify prospective clients that the state offered free or low-cost medical care, including abortion, and to provide them a phone number they could call to learn how to access these services.[48] The Court held that because the Act required clinics to disclose information they did not want to disclose it constituted a content-based regulation of speech that should ordinarily be subject to strict scrutiny.[49] Justice Breyer, in dissent, strongly disagreed. Because the California law did not attempt "to '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,'" Justice Breyer argued, "it d[id] not warrant heightened scrutiny."[50] He vigorously rejected the idea that it was only when the government regulates commercial speech that the distinction between laws that compel speech on matters of opinion and laws that require the disclosure of uncontested facts is a constitutionally relevant one.[51]

That Justice Breyer's dissent in *Becerra* managed to attract the votes of only three other members of the Court suggests how much has changed in free speech jurisprudence since *Barnette* was handed down. It is not simply the case that Justice Breyer's view of when the First Amendment protects a speaker's right not to speak tracks much more closely with the language of Justice Jackson's opinion in *Barnette*. It is also the only view of the First

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47 138 S. Ct. 2361, 2371 (2018).

48 *Id.* at 2369.

49 *Id*. at 2371 ("The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices 'alte[r] the content of [their] speech.'" (quoting Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 795 (1988))); *Id.* at 2371 ("Content-based regulations . . . 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015))).

50 *Id.* at 2387 (Breyer, J., dissenting) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

51 *Id.* at 2387–88.

Amendment right not to speak that makes sense, given the logic of Justice Jackson's opinion. To see why, it is necessary to look in more detail at the argument that Jackson made in *Barnette* to explain why the West Virginia law violated the First Amendment.

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In recent decades, the Court has tended to justify the First Amendment presumption against laws that compel speech on autonomy grounds. It has argued that the First Amendment guarantees speakers the right not to speak, as well as the right to speak, in order to ensure their more general right to "choose the content of [their] own message."[52] The idea here is that, as Justice Kennedy put it in *Turner Broadcasting System, Inc. v. FCC*, "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[53]

The fact that the Court has tended to view the First Amendment right not to speak as a mechanism for safeguarding speaker autonomy helps explain its insistence, in *Hurley* and other cases, that a presumption of unconstitutionality applies both when the government compels the expression "of value, opinion, or endorsement" and when it compels "statements of fact."[54] After all, in both cases, the government forces the speaker to say something she might otherwise not and thereby deprives her of control over the content of her message. Nor is there any reason to assume that the threat to speaker autonomy posed by laws that compel the expression of opinion will be categorically greater than the threat posed by laws that compel the expression of fact. As both *Riley* and *Becerra* make clear, speakers can object to being compelled to communicate facts when those facts threaten their economic or ideological projects just as strongly as they can object to being compelled to communicate opinions they do not hold. If what the First Amendment mostly cares about is preserving the right of individual speakers to dictate what they will and will not say, it is perfectly sensible to subject both kinds of laws to the same degree of constitutional scrutiny.

The Court's tendency to rely upon an autonomy justification for the right not to speak also explains, to some degree, the limited carve-out for laws that compel commercial speakers to disclose information about the products they advertise. After all, as Justice White's opinion in *Zauderer*

52 Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) ("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.").

53 512 U.S. 622, 641 (1994).

54 *Hurley*, 515 U.S. at 573.

made clear, commercial speakers have never been held to possess the kinds of autonomy interests under the First Amendment as other speakers possess.[55] The Court has never provided a very satisfying explanation for why this is the case.[56] Nevertheless, if one takes as a given that the First Amendment protects speaker autonomy *except* when that speaker engages in commercial speech, one can well understand why the Court might consider laws that require commercial speakers to speak to be much less threatening to constitutional interests than other kinds of compelled speech laws. The fact that commercial speakers lack a constitutionally-protected autonomy interest cannot explain why *Zauderer* only applies to laws that require the disclosure of true and uncontroversial facts, but it certainly helps make sense of the distinction the Court has drawn between compelled commercial speech and other kinds of compelled expression.

The expansive notion of speaker autonomy the Court has relied upon in recent cases cannot make sense, however, of the nuanced rule that Justice Jackson's opinion in *Barnette* articulated. If the First Amendment protects the speaker's autonomy to "choose the content of his own message" it should prohibit both government actions that compel students to salute the flag and that compel them to display their knowledge of the history and meaning of the flag. And yet *Barnette* strongly suggests that the first compulsion is not constitutionally problematic, whereas the second compulsion is.

The difficulty one faces trying to explain this aspect of the opinion on autonomy grounds reflects the fact that the Court's decision in *Barnette* was not motivated ultimately by a belief in the near-absolute right of the speaker to choose the content of her speech. This is not to say that Justice Jackson's opinion evinced no concern for the autonomy of the West Virginia school children. To the contrary, it is full of stirring affirmations of the importance of protecting the freedom of dissenters, like the Jehovah Witnesses, to believe what they will and to publicly express their point of view. But the freedom it

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55 Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 641 (1985); *see also* Robert Post, *The Constitutional Status of Commercial Speech,* 48 UCLA L. REV. 1, 14 (2000) ("The Court has been quite explicit that commercial speech should be constitutionally protected so as to safeguard the circulation of information. It has therefore focused its analysis on the need to receive information, rather than on the rights of speakers.").

56 The most convincing justification for the view that commercial speakers do not have constitutionally protected autonomy interest is the claim that, because the motive of commercial speakers is purely commercial and not self-expressive, the autonomy they exercise when they speak is not the kind of autonomy the First Amendment cares about. Edwin Baker made this argument in an influential early article, and others have more recently articulated similar views. C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 12–15 (1976). This view is problematic, however, not only because it presumes that commercial speakers do not in fact advance any self-expressive aims when they speak, which seems unlikely to be true, but because it fails to explain why other kinds of primarily commercially-oriented actors (movie makers, newspapers, video game manufacturers) do exercise constitutionally-protected autonomy. For a critique of the special treatment of commercial speech along these lines see Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 619–22 (1982).

celebrates—and that it construes the First Amendment to protect—is not the freedom of the speaker to dictate in almost all circumstances what she will or will not say. It is instead the freedom produced by, and necessary to, a democratic system of government. Jackson spelled this out in a crucial passage towards the end of the opinion. After noting the significant evils produced by governmental efforts to "coerce uniformity of sentiment"—including the profound political violence these efforts could engender—Justice Jackson wrote:

> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority. [57]

As this passage makes plain, the Court struck down the West Virginia flag salute law not because it took from schoolchildren the absolute right to decide what they would or would not say but, because it violated a fundamental principle of democratic government: namely, that in a democratic society, it is the people and not the government that get to decide contested normative questions—including the contested normative questions that determine the exercise of governmental power. This is what it means to say that the government may not coerce the consent of the governed; that its authority must be controlled by public opinion, not the other way around.[58] The flag salute ceremony violated this principle by insisting that there was only one correct way to think about the nation and the flag that represented it, and by punishing those who took an alternative view.[59]

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57 W. Va. State Bd. Of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

58 *See* Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 883 (1963) ("The crucial point . . . is not that freedom of expression is politically useful but that it is indispensable to the operation of a democratic form of government. Once one accepts the premise of the Declaration of Independence—that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.").

59 *Barnette*, 319 U.S. at 634. In a footnote, Justice Jackson spelled out some of the contested political questions buried in the flag salute and accompanying pledge of allegiance. He noted, for example, that "[u]se of [the word] 'Republic,' if rendered to distinguish our government from a 'democracy,' or the words 'one Nation,' if intended to distinguish it from a federation, open up old and bitter controversies in our political history; 'liberty and justice for all,' if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement. *Id.* at 634 n.14.

The fact that the Court invalidated the West Virginia flag salute law because of its democratic problems, not because of its threat to the autonomy of the Jehovah Witness schoolchildren, explains many things about the decision. First, it explains why the Court chose to decide the case on free speech rather than free exercise grounds. Even if the flag salute law had not trampled on the religious sensibilities of the Jehovah Witness schoolchildren, its actions would still have violated fundamental democratic principles, as the majority understood them. Nothing turned, as a result, on the religious nature of the objection to the law, as Justice Jackson made clear. [60] This made the Free Exercise Clause an overly narrow basis for decision, and the Free Speech Clause a much more natural fit.

The democratic logic of the opinion also explains its almost total lack of concern with the possibility that the state of West Virginia might require school children to learn and attest to facts (facts about the flag or the nation, for example) that they found disagreeable. Educational exercises of this sort may have the effect of promoting certain value systems and disadvantaging others, as Justice Jackson acknowledged, quite explicitly.[61] But they do not mandate them; nor do they impose a significant burden on those who possess heterodox views, at least not if they are conducted—as Justice Jackson insisted they should be conducted—in a manner that is not "partisan or [the] enemy of any class, creed, party, or faction."[62]

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60 *Id*. at 634 ("Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. . . . 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.").

61 *Id.* at 631 (noting that by making students "acquainted with the flag salute" the government could "arouse[their] loyalties" and that acquaintance with "the guaranties of civil liberty . . . tend to inspire patriotism and love of country"). As this quote makes clear, Jackson actively endorsed, not merely tolerated, the state's use of its educational powers to advance these political goals.

62 *Id.* at 637. Justice Jackson did not spell out what he thought an education was not partisan or the enemy of any class, creed, party, or faction would look like, but presumably what he meant by this was that education should neither advance a partisan ideological agenda nor have the effect of stigmatizing or marginalizing any group. One might query whether it is ever possible to achieve a *truly* non-partisan education, in this sense of the term. Debates about the teaching of evolution and/or creationism in the classroom demonstrate how difficult it can be for school authorities to provide an education that is not perceived by some parents and children as stigmatizing or marginalizing their religious faith or point of view. As a practical, matter, however, it certainly seems possible to draw a distinction between educational programs that are intended to, or have the effect, of *significantly* stigmatizing, or privileging, a certain set of religious or political or cultural beliefs, and educational programs that are not, and do not. Certainly in the decades since *Barnette* was handed down, numerous judicial decisions have tried to draw distinguish between impermissible and permissible kinds of educational compulsion. *See, e.g.*, Brinsdon v. McAllen, 832 F.3d 519, 530–31 (5th Cir. 2016) (requiring student to recite Mexican pledge of allegiance in Spanish class did not violate First Amendment because there was no evidence that the required speech involved an attempt to compel the speaker's affirmative belief); Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (striking down law that required schools that taught evolution to also teach creation science because the government was able to "identif[y] no clear secular purpose for the [law]"); Wallace v. Jaffree, 472 U.S.

The democratic logic of the opinion explains more generally why Justice Jackson was careful to limit the right against compelled speech to speech on "politics, nationalism, religion, or other matters of opinion" and to insist that the First Amendment protects a "right of self-determination in matters that touch individual opinion and personal attitude," but not a right of self-determination more generally. Laws that compel speech about matters *other* than opinion may pose the same threat to speaker autonomy as laws that compel the assertion of belief. But they do not pose the same threat to the democratic principles that Jackson emphasized in his opinion. This is because they do not purport to grant the government a power that, on the majority's view, no democratic government may possess: namely, the power to dictate to their citizens what view they may hold on contested normative questions. Of course, laws that require the disclosure of facts may end up shaping public discourse in one way or another.[63] They nevertheless leave it up to members of the public to do what they will with the facts they receive. They do not, in other words, require citizens to adopt the government's value system or its normative conclusions. They respect in this way the foundational autonomy vested in citizens of a democratic state to make their own moral evaluations of the world they find themselves in, and to act accordingly.[64]

This is not to say that laws that compel the disclosure of facts pose no threat to the health and vitality of the democratic system. For one thing, the line between fact and opinion is not always clear. Although we may, in principle, distinguish facts from opinions by their falsifiability, in practice there may be many claims about the world that—although potentially falsifiable—are not able to be falsified given our present state of knowledge. When the government compels the assertion of these kinds of facts, it essentially requires speakers to assert a belief, albeit one that may one day be

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38, 56 (1985) (striking down law requiring students to participate in a moment of silence in school because it had no "clear[] secular purpose").

63 A law that requires companies to publicly disclose whether their products were manufactured in a war zone, for example, might have the effect of generating public debate about that war, or the moral responsibility of corporations that do business in it. *See* Nat'l Ass'n of Mfrs. v. S.E.C., 748 F.3d 359, 371 (D.C. Cir. 2014) (construing an SEC rule that required companies to disclose whether they used products that were manufactured in the war-stricken Congo as a law that essentially required companies to "confess blood on [their] hands . . . .").

64 *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 356 (1991) (arguing that a fundamental premise of the First Amendment is that the government may not force people to "pursue . . . the government's objectives—instead of their own."); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 26 (1986) (arguing that an important presupposition of the republican tradition is the idea that "we are free only insofar as we are self-governing [meaning that we] direct[] our actions in accordance with . . . reasons we adopt for ourselves, as proper to ourselves, upon conscious, critical reflection . . . .").

empirically tested. This is obviously problematic for all the reasons discussed above.[65]

Even laws that require the disclosure of only facts that are subject to empirical verification may represent an undemocratic exercise of power when they are motivated by a desire to advantage or disadvantage a particular group or ideology—when they are, to use Justice Jackson's language, "partisan, or [the] enemy of any class, creed, party or faction."[66] The same is true of laws that, although motivated by entirely legitimate aims, make it, in practice, very difficult for minority groups to express their views publicly. This is the lesson from *NAACP v. Alabama*.[67]

Some level of judicial scrutiny may therefore be required to check that the government, when it compels the expression of fact, is not seeking to further a partisan end, or making it in practice very difficult for some speakers to express themselves. It is difficult, however, to see why laws of this sort should be treated as the "constitutional equivalent" of laws that compel the disclosure of opinion, if what one cares about primarily is that the government does not have the power to control democratic public opinion or to otherwise coerce the consent of the governed.

One could of course argue that laws that compel the expression of fact are democratically problematic because they deprive members of the political community of a fundamental right of democratic citizenship: namely, the

65 This explains why, even in the commercial speech context, courts defer to disclosure requirements only when they require the disclosure of "true and uncontroversial" facts—a phrase we might interpret to refer to facts that are not only widely accepted but that are also able to be empirically tested.

66 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). Justice Jackson did not spell out what he thought an education was not partisan or the enemy of any class, creed, party, or faction would look like, but presumably what he meant by this was that education should neither advance a partisan ideological agenda nor have the effect of stigmatizing or marginalizing any group. One might query whether it is ever possible to achieve a *truly* non-partisan education, in this sense of the term. Debates about the teaching of evolution and/or creationism in the classroom demonstrate how difficult it can be for school authorities to provide an education that is not perceived by some parents and children as stigmatizing or marginalizing their religious faith or point of view. As a practical, matter, however, it certainly seems possible to draw a distinction between educational programs that are intended to, or have the effect, of *significantly* stigmatizing, or privileging, a certain set of religious or political or cultural beliefs, and educational programs that are not, and do not. Certainly in the decades since *Barnette* was handed down, numerous judicial decisions have tried to draw distinguish between impermissible and permissible kinds of educational compulsion. *See, e.g.*, Brinsdon v. McAllen, 832 F.3d 519, 530–31 (5th Cir. 2016) (requiring student to recite Mexican pledge of allegiance in Spanish class did not violate First Amendment because there was no evidence that the required speech involved an attempt to compel the speaker's affirmative belief); Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (striking down law that required schools that taught evolution to also teach creation science because the government was able to "identif[y] no clear secular purpose for the [law]."); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (striking down law requiring students to participate in a moment of silence in school because it had no "clear[] secular purpose.").

67 *See* 357 U.S. 449 (1958); *see also supra* note 23.

right to determine for themselves what facts are true. In recent years, some scholars have suggested something along these lines. James Weinstein has argued, for example, that it is "a fundamental . . . precept of American popular sovereignty that the people, not the government, are entrusted with determining the veracity of statements in public discourse."[68] This is not how the Court has traditionally viewed the matter, however. Instead, it has taken for granted that, while the government may not patrol false opinions, it may patrol false facts—at least when they are libelous or otherwise socially harmful—without violating any principles of democratic sovereignty, let alone fundamental ones.[69] One can understand why. Lies not only deceive but disempower their hearers, by depriving them of the ability to accurately assess the world around them, and on that basis to reach conclusions about how they and others should act.[70] They make it harder, in other words, for citizens to effectively exercise their political power. The result is that both laws that punish false statements of fact and laws that compel the disclosure of facts can promote, rather than threaten democratic values, even if it is also the case that they can be misused.

Perhaps no case better illustrates how unthreatening to democratic principles laws that compel the disclosure of true fact may be than the law struck down by the Court in *Riley.* By requiring professional fundraisers to disclose how much of the money they received in donations they gave to charities, the law obviously compelled fundraisers to speak when they otherwise might not. There was no evidence, however, that the North Carolina legislature that enacted the law did so in order to promote a particular government-favored point of view, or to punish the fundraisers for

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68 James Weinstein, *Climate Change Disinformation, Citizen Competence and the First Amendment*, 89 U. COLO. L. REV. 341, 343 (2018); *see also* ROBERT POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM 29 (2016) ("[G]overnment control over truth is in tension with democratic legitimation. Citizens who seek to participate in public discourse and who are penalized because they disagree with official versions of factual truth, are excluded from the possibility of influencing public opinion.").

69 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."); *see also* United States v. Alvarez, 567 U.S. 709, 721 (2012) (plurality) ("As our law and tradition show, then, there are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be."); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

70 Strauss, *supra* note 64, at 355 ("Lying forces the victim to pursue the speaker's objectives instead of the victim's own objectives. If the capacity to decide upon a plan of life and to determine one's own objectives is integral to human nature, lies that are designed to manipulate people are a uniquely severe offense against human autonomy.").

the views they held.[71] Nor is there any reason to believe that the law had a viewpoint discriminatory effect, or otherwise distorted or limited public debate about charitable giving, or the particular issues the charities regulated by the law addressed. One can disagree with North Carolina's decision to impose a disclosure requirement on professional fundraisers on policy grounds. The Red Cross and other national charities submitted an amicus brief to the Court in which they argued that the law was bad economic policy because it would deter charitable giving by focusing consumer attention on the costs of fundraising, rather than the good the charities regulated by the law achieved.[72] But it is hard to see how the law posed any threat whatsoever to the democratic principles invoked in Justice Jackson's opinion. One might in fact conclude, to the contrary, that the North Carolina law, like many other disclosure laws, encouraged democratic critique by giving consumers more information than they would otherwise possess about the virtues and the vices of the existing regulatory system. At the very least, it can be understood as an attempt by the North Carolina legislature to avoid a "collision" between the right of fundraisers to determine the content of their charitable solicitations and the right of consumers to know how their charitable dollars would be spent by imposing on fundraisers a very modest disclosure requirement.

The decision in *Riley* demonstrates quite powerfully how the Court's reconceptualization of the right not to speak as a mechanism for protecting the autonomy of individual speakers, rather than as a mechanism for ensuring democratic freedom, has resulted in the creation of a much more expansive right than *Barnette* suggested. It also demonstrates, consequently, how useful a tool the right not to speak has become for those who wish to challenge government policies that promote health and safety, consumer welfare, or labor rights, by means of the mechanism of disclosure. Indeed, compelled speech doctrine today represents an important front in the First Amendment challenge to the regulatory state.[73]

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71 Certainly, the fundraisers and charities that challenged the law provided no evidence of this kind of bad governmental motive in their brief. *See* Brief for the Appellees at 7–9, (No. 87-328), Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988), 1988 WL 1031782, at *8–14.

72 Brief of Amici Curiae Independent Sector, American Cancer Society, American Red Cross, Care, Inc., Certain Other Independent Sector Members and Other Nonprofit Organizations, (No. 87-318), Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988), 1988 WL 1031783, at *20–21 ("[Because] attracting and then retaining people's interest always is difficult . . . [requiring disclosure of i]ssues outside the charity's chosen message, no matter how relevant to some citizens' contribution decisions, will dilute most people's attention or turn them away from the charity and its message.").

73 Lucien J. Dhooge, *The First Amendment and Disclosure Regulations: Compelled Speech or Corporate Opportunism?*, 51 AM. BUS. L.J. 599, 600 (2014) (noting that in recent years there have been "numerous judicial challenges to federal disclosure regulations by individual companies and trade associations utilizing the First Amendment and, specifically, the prohibition upon compelled speech.").

It is virtually impossible to believe that any of the justices who joined Justice Jackson's opinion in *Barnette* would have signed on to this reimagining of its meaning. All were progressives and/or New Dealers—that is to say, jurists who believed in the value of the regulatory state and its ability to promote human liberty, not just threaten it. They were also justices who were keenly aware of the threat that an overly absolutist First Amendment posed to the health and flourishing of the regulatory state.

Justice Black made this concern unmistakably clear in the concurring opinion he wrote to explain why he and Justice Douglas had chosen to join Justice Jackson's majority opinion only three years after voting to uphold a very similar flag salute law in *Gobitis*. It was, Justice Black wrote, their "reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare" that had led both he and Justice Douglas to vote with the majority in the earlier case.[74] Although over time they had come to believe that this reluctance was insufficient to justify a flag salute like the one in West Virginia, which did little to promote the public good, Justice Black insisted that the principle remained a sound one.[75] "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do," Justice Black argued. "The First Amendment does not go so far."[76]

In his majority opinion, Justice Jackson also acknowledged, albeit less explicitly, the threat that an overly individualistic interpretation of the First Amendment posed to the health of the regulatory state. He noted, for example, that "the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence."[77] This was not so much, Justice Jackson explained, because of the technological and economic changes that had taken place between the eighteenth and twentieth centuries. Instead it reflected the profound transformation that had taken place over that period in the dominant understanding of the nature and purpose of government. The principles the Bill of Rights announced, Justice

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74 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943) (Black, J., concurring).

75 *Id.* at 644 ("Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. . . . The ceremonial, when enforced against conscientious objectors, [is] more likely to defeat than to serve its high purpose, [and] is a handy implement for disguised religious persecution.").

76 *Id.* at 643.

77 *Id.* at 639.

Jackson wrote, "grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs."[78] In the contemporary period, in contrast, "the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls."[79] It was against the backdrop of this changed reality, Justice Jackson insisted, that the Court would and should interpret the meaning of freedom of speech.[80]

The sensitivity to historical context that both Justices Jackson and Black's opinions in *Barnette* reveal—as well as their keen desire to avoid making the First Amendment an overly rigid constraint on the power of the welfare state—suggests that not only did they not strike down the flag salute law because it infringed a generalized right to speaker autonomy, but that they would have been unwilling to read a right of this sort into the First Amendment. To do so, after all, would have been to construe the First Amendment as a guarantee of the kind of negative or "laissez faire" liberty that Justice Jackson associated with the eighteenth-century constitutional order that the New Deal Court had only just a few years earlier rejected. Justice Jackson's opinion in *Barnette* suggests instead a more positive view of the liberty that the First Amendment guarantees. It construes the First Amendment to guarantee to the individual the right to live in a democratic state and to participate in the democratic processes of self-government, *not* the right to say whatever one wishes, free of government control. This is a vision of the First Amendment, however, that is quickly receding into the past.

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The preceding discussion suggests that, rather than the ordinary processes of common law adjudication whereby principles are reshaped and sometimes expanded upon acquaintance with new sets of facts, the changes that have taken place in First Amendment compelled speech doctrine over the past seventy years instead reflect a wholesale transformation in the Court's understanding of the purposes that the prohibition against compelled speech serves. These days, the Court no longer views the prohibition against compelled speech as a means of preventing the government from coercing the consent of the governed. Instead, it views it as a mechanism for ensuring

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78 *Id.* 639–40.

79 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943).

80 *Id.* ("These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions.").

that choices about what to say and what not to say are, except in extraordinary circumstances, the individual's and not the government's to make. The result is a much more expansive prohibition against compelled speech than the Justices who joined the majority opinion in *Barnette* could have envisaged.

The extent of this transformation should not be overstated. Notwithstanding the Court's assertion in *Riley* and *Hurley,* and more recently *Becerra,* that laws that compel the disclosure of facts are constitutionally equivalent to laws that compel the assertion of opinion, lower courts continue in some cases to subject the former to more deferential scrutiny than the latter. Many of these involve laws or policies that require the nonpublic disclosure of information to the government.[81] But even in cases involving the kind of public, noncommercial speech that has long been of primary First Amendment concern, lower courts find creative ways to distinguish the Court's contrary precedents away, or else simply ignore them.[82]

The Court itself recently suggested that there are limits to how broadly the rule against the compelled disclosure of facts applies. In his opinion in *Becerra*, for example, Justice Thomas asserted that the holding in the case did not call into question the "legality of health and safety warnings long considered permissible." [83] Nor, Justice Thomas asserted, did the Court's holding call into question its earlier decision in *Planned Parenthood of Southeast Pennsylvania v. Casey*, which rejected a compelled speech challenge to a Pennsylvania law that required doctors who perform abortions to inform their patients about "the nature of the procedure, the health risks of the abortion and childbirth, and the probable gestational age of the unborn child" before they could proceed.[84] *Casey* held that when the government compels doctors to provide information to their patients as part of the

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81 *See, e.g.*, United States v. Sindel, 53 F.3d 874, 878 (8th Cir. 1995) (rejecting compelled speech challenge to law that required taxpayer to disclose information about his clients to the Internal Revenue Service because the law did not require the taxpayer "to disseminate publicly a message with which he disagrees."); Beeman v. Anthem Prescription Mgmt., 58 Cal. 4th 329, 345–52 (2013) (applying rational basis scrutiny to state law that required prescription drug claims processors to compile and summarize information on pharmacy fees and to transmit the information to their clients).

82 *See, e.g.*, United States v. Arnold, 740 F.3d 1032 (5th Cir. 2014). For example, in *United States v. Arnold*, the Fifth Circuit held that a provision in the Sex Offenders Registration Act that required sex offenders to publicly disclose their status in a public database did not violate the First Amendment right not to speak because it required the disclosure of only facts, not opinion. 740 F.3d at 1035. In concluding as much, the Fifth Circuit entirely ignored the contrary precedents of *Riley* and *Hurley.*

83 Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2376 (2018).

84 *Id.* at 2373–74 (plurality opinion) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 884 (1992)).

"practice of medicine" it need only satisfy rational basis scrutiny.[85] This holding, Justice Thomas made clear, remained good law, notwithstanding the *Becerra* Court's otherwise unequivocal rejection of the idea that ordinary First Amendment rules do not apply to "professional speech."[86]

Justice Thomas provided little by way of a principled explanation, however, for why the FACT Act was not a regulation of medicine.[87] Nor did he explain why laws that compel doctors to speak as part of the practice of medicine should be exempt from the general presumption against compelled expression. Do doctors not have autonomy rights?[88] Justice Thomas also did not provide any explanation for why the principles enunciated in the case did not call into question the constitutionality of "health and safety warnings long considered permissible."[89]

It remains somewhat mysterious as a result exactly how significantly the Court's reconceptualization of the right not to speak will limit the government's ability to mandate the disclosure of facts. Nevertheless, *Becerra,* and the many lower court decisions which have treated laws that require the disclosure of facts as presumptively unconstitutional, suggest that the impact of the Court's reconceptualization of the right not to speak as an autonomy right will not be insignificant.[90] They suggest that the rule against compelled speech not only can but will be used to strike down laws that pose

85 *Casey*, 505 U.S. at 884 (plurality opinion) ("To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.").

86 *Becerra*, 138 S. Ct. at 2372–73.

87 *Id.* at 2385–86 (Breyer, J., dissenting) ("The majority tries to distinguish *Casey*. . . . This distinction, however, lacks moral, practical, and legal force. The individuals at issue here are all medical personnel engaging in activities that directly affect a woman's health—not significantly different from the doctors at issue in *Casey*. . . . The Act requires these medical professionals to disclose information about the possibility of abortion (including potential financial help) that is as likely helpful to granting 'informed consent' as is information about the possibility of adoption and childbirth. . . . If the law in *Casey* regulated speech 'only as part of the *practice* of medicine,' so too here.").

88 Thomas argued that laws like the one upheld in *Casey* were subject to more deferential scrutiny because they constituted merely incidental regulations of speech, not direct regulations like the FACT Act. *Id.* at 2373. This is not the case however. The Court has made clear in previous decisions that laws are not incidental regulations of speech if their application "depends on what [speakers] say." Holder v. Humanitarian Law Project, 561 U.S. 1, 27 (2010). *See also* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1741 (2018) (asserting the same). As a result, the Pennsylvania law upheld in *Casey* is no more an incidental regulation of speech than the law struck down in *Becerra*. The only important distinction between the two laws is that the Pennsylvania law discourages women from obtaining abortions, whereas the FACT Act (to some degree at least) encourages it. But if this is the true basis of the distinction Justice Thomas drew in *Becerra*, it is a deeply disturbing one because what it produces is just the kind of viewpoint discrimination that the First Amendment is supposed to prevent.

89 Nat'l Inst. of Family & Life Advocates v. Becerra*,* 138 S. Ct. 2361, 2381 (2018) (Breyer, J., dissenting) (making this point).

90 Nat'l Ass'n of Mfrs. v. N.L.R.B., 717 F.3d 947, 957 (D.C. Cir. 2013).

little threat to the vitality of the democratic public sphere, or to the ability of heterodox speakers to publicly express their views.

This is troubling, not only because it makes it much more likely that the First Amendment will serve as the kind of "rigid bar" to government regulation that Justice Black worried it could, but should not, become. The expansive view of the First Amendment right not to speak that *Riley* and *Becerra* articulate will also make it harder for the government to protect the autonomy of listeners—listeners like the patients at the crisis pregnancy centers in *Becerra* and the donors in *Riley*—by ensuring that they have adequate information to make an informed choice about where to get medical care, to give their money, or make other choices of the kind. This is because, by focusing entirely on the autonomy interests of the speaker, they give short shrift to the autonomy interests of the listeners. It is not at all obvious why the one should matter more than the other for First Amendment purposes. A significant advantage of the democracy-focused conception of the rule against compelled speech advanced in *Barnette* is that, by protecting the autonomy of the democratic citizen, it protects the autonomy of speakers and listeners both.

Despite these obvious problems, the decision last term in *Becerra* suggests that the Court remains strongly committed to the expansive, autonomy-focused conception of the First Amendment right not to speak it first suggested in *Tornillo* and spelled out in *Riley*. This means that, even as we celebrate *Barnette's* continuing relevance to free speech law, it is important to also take stock the profound change that has taken place in the law of compelled speech since *Barnette* was handed down. *Barnette* may still be a star in the sky of First Amendment jurisprudence, but it is a fixed star no longer. The First Amendment it illuminates looks a lot more like the laissez faire constitutional order that the New Deal Court that decided *Barnette* believed it had left behind. More specifically, the freedom that the Court today protects in the name of the First Amendment is very different than the freedom that *Barnette* celebrated. This is vital to recognize, if we want to understand not only the First Amendment's past, but its present and future also.