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FORCED PATRIOT ACTS

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In the traumatic and emotionally disruptive period immediately following the September 11th terrorist attacks, many Americans turned to a variety of collective and individual expressions of patriotism as a source of comfort.[1] The nation's leading retailer reported that sales of American flags skyrocketed.[2] At many public events, people belted out patriotic songs. Indeed, Commissioner Bud Selig decreed that major league baseball teams regularly broadcast *God Bless America* instead of *Take Me Out to the Ball Game* during the seventh inning stretch.[3] Red, white, and blue bumper stickers bearing a variety of well-worn nationalist slogans became ubiquitous.[4] Public statements of unity such as these are a predictable and understandable response to the perception that the nation's security is threatened, as people search for connection and certainty.[5]

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1. People also commonly turn to religion in such circumstances. For a thoughtful account of the role and limits of public religious statements in times of crisis, see William P. Marshall, *The Limits of Securalism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11 (2002).

2. Debbie Howlett, *Post-9/11 Flags Due for Repair, Replacements*, USA TODAY, Mar. 28, 2002, at A3 (reporting that Wal-Mart's retail sales of United States flags for the two months following September 11th had risen ten-fold).

3. Jack Curry, *Flags, Songs and Tears, and Heightened Security*, N.Y. TIMES, Sept. 18, 2001, at C15. Teams were also given the option to play the song immediately prior to games. *Id.*

4. Jim Shea, *Patriotic Buy Bumper Crop of Stickers*, THE TIMES UNION, Oct. 29, 2001, at C3.

5. One might offer another interpretation of these events as a reflection of Americans turning to civil religion during a critical and unstable time. The controversial concept of an American civil religion suggests that there is a common set of "beliefs, symbols, and rituals" to which Americans adhere and relate in a manner analogous to, but distinct from, theistic religion. *See* Robert N. Bellah, *Civil Religion in America*, *in* BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD 175 (1970). As one commentator describes Bellah's visualization of this concept, "civil religion provides a secular set of norms and values formerly shared by a society that was homogeneous and united religiously, economically, and socially." Alexandra D. Furth, Comment, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis*, 146 U. PENN. L. REV. 579, 597 (1998). Some modern commentators, however, have reinterpreted civil religion to include aspects of sacral religion as well. *Id.* at 596. A complete consideration of the civil

The government was not far behind. The United States House of Representatives adopted a concurrent resolution of solidarity, encouraging American citizens to display the United States flag for thirty days after the attacks.[6] Later in the year, the House designated September 11th as "Patriot Day."[7] At the state and local level, lawmakers introduced numerous measures designed to instill patriotic and nationalistic feelings and promote civic education in children.[8]

While hortatory and symbolic measures ordinarily have little impact on civil liberties, public officials did not confine their post-September 11th responses to what we might call measures of comfort. In perhaps the most predictable government response to the terrorist attacks, public officials in many jurisdictions proposed, and in many cases adopted, measures forcing individuals to participate in public acts of patriotism without regard to those individuals' consciences or personal beliefs. Focusing on schoolchildren, these laws required students to publicly engage in patriotic acts, such as flag salutes, exercises, and ritual recitation of the Pledge of Allegiance.[9]

This type of governmental reaction to the terrorist attacks is consistent with a cycle that has repeated itself throughout modern history. Over at least the past century, a pattern has emerged in which the state repeatedly has responded to perceived national security fears with, among other things, laws that force American citizens to demonstrate their loyalty by participating in public expressions of patriotism or refraining from unpatriotic speech.

Legal scholars recently have reflected a great deal on the broader civil liberties impact of government responses generated as part of the post-September 11th "war on terrorism."[10] Their work has scrutinized direct regulation of private conduct through measures such as the USA PATRIOT Act,[11] which are putatively designed to address terrorist threats and other national security concerns. Some scholars assert that the

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religion aspects of forced patriot acts is beyond the scope of this essay, but is surely worth incorporating into a broader discussion of the role of ceremonial nationalism in response to national crises.

6. 2001 House Concurrent Resolution 225 (Sept. 13, 2001).

7. 2001 House Concurrent Resolution 71 (Dec. 18, 2001).

8. John Gehring, *States Weigh Bills to Stoke Students' Patriotism*, EDUCATION WEEK, Mar. 27, 2002, at 19.

9. *See, e.g.*, COLO. REV. STAT. § 22-1-106(2) (2003) (removed from the statute in 2004); 24 PENN. STAT. § 7-771 (held unconstitutional by Circle Schools v. Pappert, 381 F.3d 172 (3d Cir. 2004)).

10. *See, e.g.*, David Cole, *The New McCarthyism: Repeating History in The War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003); Neal Devins, *Congress, Civil Liberties, And The War on Terrorism*, 11 WM. & MARY BILL RTS. J. 1139 (2003); Anthony Lewis, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 257; Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273. For a pre-September 11th account of the impact of war on civil liberties, see WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

11. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

severity of government reactions to national security crises diminishes over time and with experience, or at least that such experience meaningfully alters the manner in which the government responds to contemporary crises.[12] This argument suggests that a form of "social learning" may occur when later generations look back in hindsight at government overreactions to national security threats, thus reducing the possibility that civil liberties violations will recur.[13]

No one has seriously examined forced patriotism laws in the wake of September 11th or attempted to identify whether political, social, or judicial reactions to such laws differ in any meaningful way from reactions to more instrumental policy measures. In this essay, I describe the historical pattern of forced patriotism laws and offer some explanations for the recurring national impulse to adopt such laws. This impulse is particularly curious in light of the fact that the unconstitutionality of such measures has been unequivocally clear for more than half a century.[14] The pattern is also unusual given our experience with such laws; while lawmakers claim that these laws promote unity, these regulations have in fact generated extraordinary divisiveness in American society.[15] I conclude that several factors distinguish forced patriotism laws from other measures that impair civil liberties, making the former less susceptible to the social learning that may occur in other areas.

I. THE CONCEPT OF FORCED PATRIOTISM

As with all speech regulations, laws promoting forced patriotism may operate in one of two basic ways – by chilling expression or by compelling it. In the first case, the government may adopt measures that punish persons for engaging in expression deemed to be disloyal or to undermine national unity. One needs only to look at the recent furor over presidential candidate John Kerry's reported treatment of medals from his service in Vietnam to understand the power of icons in American culture.[16] Laws forbidding flag burning or other forms of flag desecration are prototypical of this type of forced patriotism measure. Such laws dictate silence where dissident expression would undermine patriotism or respect for state-designated values or icons, yet do not advance, or even

12. *See, e.g.*, Tushnet, *supra* note 10, at 287-90.

13. *Id.*

14. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

15. As just one example, the Supreme Court's first flag salute case upholding a mandatory Pledge of Allegiance law, *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), led to waves of horrific violence against Jehovah's Witnesses across the nation. PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 22-23 (1988); Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette: *The Pledge of Allegiance and the Freedom of Thought, in* CONSTITUTIONAL LAW STORIES 443-45 (Michael C. Dorf, ed., 2004) [hereinafter, Blasi & Shiffrin]. Although this tragic episode demonstrates the breadth of hostility towards dissenters, the federal government did eventually take some action to compel state and local officials to address these attacks. ROBERT GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA 283 (1978) [hereinafter, GOLDSTEIN, POLITICAL REPRESSION].

16. *See* Wesley K. Clark, *Medals of Honor*, N.Y. TIMES, Apr. 28, 2004, at A21.

purport to advance, security in any meaningful way. These regulations could be described as "forced silence" patriotism laws.

More commonly, forced patriotism regulations appear in the form of regulations compelling public affirmations of patriotism, loyalty, and respect. Typical of these regulations are laws mandating that broad, undifferentiated categories of persons take loyalty oaths, laws forcing individuals to salute or otherwise gesture in support of national icons such as the United States flag, and laws directing individuals to recite or sing patriotic texts, such as the Pledge of Allegiance or the National Anthem. These measures might be labeled "forced speech" patriotism laws.

Both types of forced patriotism laws involve government efforts to venerate symbols of nationalism and otherwise foster a sense of national unity, as opposed to tangible measures, successful or not, to enhance security. In this way, forced patriot acts are distinguishable from specific policy initiatives that have been designed to protect the nation (e.g., internment, incarceration of activists who interfere with the draft), but have resulted in other civil liberties threats that have haunted Americans. When we look at laws that in one way or another compel patriotism, we are focused on government efforts to manipulate symbols as opposed to instrumentalist (or putatively instrumentalist) measures to address threats.[17] As I discuss later, this distinction becomes important when we examine the capacity for social learning about forced patriotism.

In terms of conventional free speech theory, both types of forced patriotism laws implicate values central to the First Amendment's protection of expression.[18] First, forced patriotism laws involve viewpoint discrimination because they regulate persons with reference to their dissident views. Forced silence patriotism laws censor those whose speech is deemed to undermine national unity or convey disrespect.[19] Similarly, forced speech patriotism laws discriminate against those who do not agree with the compulsory imposition of the government's prescribed message. Those who agree with the mandatory recitation of the state's script, and the corresponding compulsion of political orthodoxy, are un-

17. I am grateful to both Richard Fallon and Mark Tushnet for helping me to clarify this important distinction.

18. U.S. CONST. amend I. It is beyond the scope of this essay to explore the nuances of First Amendment theory. For elaboration on such theory, see, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-1-12-2, at 785-94 (2d ed. 1988); LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213-18 (1972); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

19. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 413 n.9 (1989) ("[S]urely one's attitude toward the flag and its referents is a viewpoint.").

burdened by the law, whereas those who disagree with the state's message (or agree with the *message*, but still wish to remain silent) may be penalized for failing to comply.[20]

The state's favoritism of patriotic, loyal viewpoints, in turn, compromises free speech values by distorting the composition of public discourse often described as the marketplace of ideas, thus portraying a false sense of national unity. Moreover, censorship of dissent may have implications for democracy and the possibilities of normal political change. Electoral upheaval is unlikely where false perceptions of uniform public satisfaction are pervasive.

In addition to these considerations, forced speech patriotism laws implicate distinct and independent free speech concerns. First, government compulsion to speak a particular word or set of words implicates a fundamental constitutional value because the First Amendment guarantees individuals' right to refrain from speaking.[21] One aspect of this speech interest is to ensure that the speaker not be wrongly associated with the government-prescribed message, which may not represent her actual beliefs.[22] On this account, the state offends the First Amendment by forcing the speaker to act as the government's mouthpiece. The Court endorsed constitutional protection of this interest in *West Virginia Board of Education v. Barnette*,[23] which invalidated a school board rule forcing students to recite the Pledge of Allegiance. As Justice Jackson wrote in his majority opinion, "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[24] This

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20. *See, e.g.*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 644 (1943) ("[L]aws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.").

21. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 18 (1986) (invalidating regulation requiring utility company to include solicitations for reform organization with its bills four times a year because it risked forcing the utility "to speak where it would prefer to remain silent."); Wooley v. Maynard, 430 U.S. 705, 714 (1977) (striking down state law forbidding residents to cover up the message "Live Free or Die" on state-issued license plates); *Barnette*, 319 U.S. at 645 ("The right of freedom of thought . . . as guaranteed by the Constitution against State action 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." (Murphy, J., concurring)).

22. *See, e.g.*, *Wooley*, 430 U.S. at 713-15. Some commentators question whether this value is truly at stake in forced speech cases. *See* Blasi & Shiffrin, *supra* note 15, at 433, 456.

> [T]he mandatory recitation of the pledge did not require any individual to speak her mind or to make any statement that even appeared to represent her thoughts as an individual . . . . There is really scant risk here that a participant will be understood or misunderstood as communicating her personal patriotism or her authentic pledge of allegiance.

Id.

Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 474 (1995) ("[S]o long as the speech act is compelled and is known by a reasonable observer to be compelled, it would be unreasonable for such an observer to view the message contained in the communication as necessarily a revelation of the speaker's beliefs.").

23. *Barnette*, 319 U.S. 624.

24. *Id.* at 642.

concern relates to what Jed Rubenfeld calls the "anti-orthodoxy principle," which suggests that it is simply not within the state's power to mandate acceptable positions on issues of public importance.[25]

A broader argument suggests that forced speech laws compromise the right of autonomy rather than of pure speech. This understanding of *Barnette* and its progeny asserts that forced speech laws fundamentally interfere with individuals' internal deliberative processes more so than the freedom to not speak.[26] As Professors Blasi and Shiffrin have recently written:

> Requiring potentially insincere recitation, and especially rote and periodic recitation, poses constitutional problems because it utilizes disrespectful methods of communication and persuasion. These methods constitute efforts forcibly to inculcate and to instill rather than to persuade through direct, transparent arguments, reasons, or even direct, transparent emotional appeals.[27]

These autonomy-related ideals also find support in *Barnette*. There, the Court recognized that "compelling the flag salute and pledge transcends constitutional limitations" on local authorities' police powers and that such forced patriotism laws invade "the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."[28]

Notwithstanding the recognition of these foundational free speech interests, the nation has repeatedly turned to forced patriotism measures in response to perceived crises. A discussion of these cycles reveals a historical pattern in which public officials have perpetuated the mistakes of the past despite the clear constitutional barriers to the enforcement of these laws.

II. NATIONAL INSECURITY – THE HISTORICAL CYCLES OF FEAR

As the historian Cecilia Elizabeth O'Leary has written, the tendency toward nationalism in the United States is a relatively recent phenome-

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25. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 818-21 (2001). Another element of this interest in silence is maintaining the right to keep one's actual views from being publicly disclosed. Greene, *supra* note 22, at 473 ("[T]he right not to speak is the right not to reveal one's mind publicly."). This interest, however, is more likely implicated if one is forced to express one's *own* views, rather than those from a government script. Accordingly, this is not an important justification for invalidating forced speech patriotism laws.

26. TRIBE, *supra* note 18, at §15-5, at 1317 ("It is hard to take seriously the notion that those who saw the license plate on the Maynard's car . . . actually thought that the driver of the vehicle endorsed the state's motto . . . The real problem . . . is [that the law] 'invades the sphere of intellect and spirit.'" (quoting Wooley, 430 U.S. at 715)); Blasi & Shiffrin, *supra* note 15, at 457 ("[W]hat underpins *Barnette* is the First Amendment interest in the speaker's freedom of thought and freedom of conscience."); Greene, *supra* note 22, at 480-82 (arguing that compelled speech laws may be viewed conceptually as violating constitutional rights of personhood and autonomy even if they do not violate the right of free expression).

27. Blasi & Shiffrin, *supra* note 15, at 457-58.

28. *Barnette*, 319 U.S. at 642.

non.[29] Prior to the Civil War, there was much more affinity for regional and statewide units than for a unified national polity.[30] With some notable exceptions, there were few celebrations of nationalism or icons for which respect was widely shared. Indeed, there was no National Anthem, no Pledge of Allegiance, and no celebration of patriotic holidays other than the Fourth of July.[31] Proponents and opponents of the temperance movement adopted and parodied *The Star-Spangled Banner*, whose tune was borrowed from an old English drinking song.[32]

Toward the end of the nineteenth century, however, the first widespread efforts of private organizations to instill a sense of nationalism in American culture emerged. In the 1880s, private patriotic groups began organized campaigns to fortify nationalist sentiments, including promoting daily recitations of the Pledge of Allegiance and other forms of respect for the flag.[33] Perhaps sparked by the Spanish-American War, the first major international conflict in which the United States had engaged since the war with Mexico, formal and informal efforts to instill patriotism proliferated. Indeed, in 1898, on the day after war on Spain was declared, the New York legislature adopted the first state flag salute law.[34] Another factor in this development was the emergence of the first important veterans' organization, the Grand Army of the Republic.[35] Also during this period, Francis Bellamy wrote the original version of the Pledge of Allegiance[36] and pro-flag advocates founded the flag protection movement, which enjoyed early success.[37]

Substantial government action to promote patriotism, however, did not commence until World War I.[38] From World War I through the present, there now have been six identifiable cycles of fear generated by international conflict, threats to national security, or in one case, sheer

29. CECILIA ELIZABETH O'LEARY, TO DIE FOR: THE PARADOX OF AMERICAN PATRIOTISM 10 (1999).

30. *Id.* That is not to say that related issues of nativism, xenophobia, and racism did not exist, but those issues implicated slightly different concerns from the type of nationalism discussed here.

31. *Id.* at 3, 20.

32. *Id.* at 20-21 (noting that the anthem was "popular, but by no means sacred.").

33. *Id.* at 49.

34. IRONS, *supra* note 15, at 16. The law imposed a duty on the state school superintendent to prepare a program providing for flag salutes at the beginning of every school day. DAVID MANWARING, RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY 3 (1962). Typical of these earlier flag laws, the New York statute did not formally compel students to participate, but the actual practice effectively made such laws compulsory. *Id.* at 4.

35. O'LEARY, *supra* note 29, at 29-48.

36. *Id.* at 160-62. Though different interpretations exist as to Bellamy's motivations, there is at least some historical evidence that he had a financial interest in a flag producing business, and that the Pledge may have been designed to boost sales. Blasi & Shiffrin, *supra* note 15, at 434 (citing sources).

37. ROBERT JUSTIN GOLDSTEIN, FLAG BURNING AND FREE SPEECH 20-21 (2000) [hereinafter, GOLDSTEIN, FLAG BURNING]; O'LEARY, *supra* note 29, at 232-33.

38. O'LEARY, *supra* note 29, at 221.

political will.[39] Below, I briefly describe the forced patriotism measures spawned by each of these cycles.[40]

A. The First Cycle: World War I, Espionage, and the First Red Scare[41]

As students of First Amendment history are well aware, freedom of speech first emerged as an important constitutional doctrine during the period surrounding World War I.[42] At that time, Americans were concerned with a number of different factors associated with the war. There was strong domestic opposition to the United States's involvement in the war, spurred in part by an emerging Socialist party that was gaining political influence.[43] At the same time, the United States was concerned about internal political strife in Russia and initial fears of domestic Communism began to develop.[44] Coinciding with these events were trepidations about the increasing immigrant population and the ascendance of the labor movement.[45] From these factors arose serious concerns about the loyalty of citizens and other residents, with great suspicion of those who did not support the United States's involvement in the war.

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39. One could reasonably argue that the prevalence of this phenomenon in just ninety years demonstrates that the United States has been in a *continuous* state of perceived fear since the beginning of World War I. As each era can be defined in contrast to other eras and to periods of restraint, however, I think these recurrences can be fairly labeled as cycles. Moreover, the cycles I refer to are, with one exception, commonly recognized as relevant markers of civil liberties concerns. *See, e.g.*, Tushnet, *supra* note 10, at 285 (calling references to these periods typical in discussions of civil liberties and wartime).

40. Another possibility I do not consider here is the symbiotic effect of forced patriotism laws. It may be that such laws foster periods of fear, as well as respond to them. I am grateful to Ann Scales for suggesting this perspective to me. *See generally* DAVID I. KERTZER, RITUAL, POLITICS, AND POWER (1988) (describing the role of political ritual and symbolism in constructing actual political environments).

41. Two other historical periods in which one might examine civil liberties deprivations resulting from nationalistic concerns are the beginning of the nineteenth century, when the Sedition Act was, briefly, in place, see Law of July 14, 1798, ch. 73, 1 Stat. 596 (expired 1801), and the Civil War, when President Lincoln attempted to suspend the writ of habeas corpus, see REHNQUIST, *supra* note 10, at 24-25, and the federal government imposed loyalty oath requirements. HAROLD HYMAN, THE ERA OF THE OATH 41-47 (1978). I do not discuss them here because they did not arise in the context of serious threats external to the United States, a theme that connects most of the cycles I discuss. Congress arguably enacted the Sedition Act for internal political purposes, though there was ostensibly concern about threats from France. Lewis, *supra* note 10, at 264-65. The Civil War involved an internal security threat, not one generated by another nation. It is true that during Reconstruction, the federal government imposed loyalty oath requirements on southern citizens, particularly Confederate prisoners. HYMAN, *supra*. While loyalty oaths always may suggest concerns about forced patriotism, given the level of domestic strife following the conclusion of the war, these oaths can be viewed more as an instrumental tool for enhancing stability than as a purely symbolic gesture of nationalism. In any event, it can be argued that the same sense of nationalism and devotion to icons strongly associated with forced patriotism laws was not prevalent during either of these periods.

42. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 969-83 (2001).

43. *See* GOLDSTEIN, POLITICAL REPRESSION, *supra* note 15, at 105-08.

44. Tushnet, *supra* note 10, at 285.

45. O'LEARY, *supra* note 29, at 220-26.

Throughout this period, private organizations and individuals continued their efforts to encourage a sense of nationalism.[46] Groups such as the Boy Scouts jumped on the patriotism bandwagon.[47] Individuals carried out acts of vigilantism, many of them violent, against persons perceived to be disloyal.[48] At the same time, patriotic songs, including the absurdly mindless *My Country Right or Wrong*, increased in popularity.[49] In 1919, following the war's conclusion, the American Legion began a national campaign to lobby for flag salute laws, seeking to foster "one hundred percent Americanism."[50]

In addition to these private movements, the state began to actively involve itself in influencing patriotic ideals during this era. For instance, the federal government tried to influence public feelings of loyalty through propaganda campaigns led by the Committee on Public Information.[51] As Professor O'Leary observes: "The government became an active participant and catalyst in mobilizing the patriotic movement and in promoting a particularly intolerant and authoritarian brand of patriotism."[52]

More direct measures to chill disloyal speech became prevalent. Much has been written about the wave of prosecutions under the federal Espionage Act of 1917 and the subsequent ascendance of First Amendment doctrine. While many of these cases involved charges that individuals actually interfered with the United States war effort or undermined the military draft, thus putatively addressing tangible security interests, federal law also contained more overt forced patriotism measures. The Sedition Act, for example, forbade any person to utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the form of government of the United States, the Constitution, or the flag.[53] In some anti-sedition cases during this period, the courts described the danger of the prohibited messages in terms of their non-patriotic qualities.[54]

Forced patriotism measures at the state and local level also began to show up during this period. Although numerous states already had flag

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46. Other commentators have also associated this period with the rise of militarism and masculinism in American culture. *See* O'LEARY, *supra* note 29, at 227-32. *See generally* Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25 (1989).

47. O'LEARY, *supra* note 29, at 222-36.

48. *Id.* at 235.

49. *Id.* at 227.

50. *See* IRONS, *supra* note 15, at 16.

51. O'LEARY, *supra* note 29, at 229.

52. *Id.* at 221.

53. Act of May 16, 1918, ch. 75, §1, 40 Stat. 553.

54. *See, e.g.*, Masses Pub. Co. v. Patten, 246 Fed. 24, 36-37 (2d Cir. 1917) (describing political cartoon as punishable because "[i]ts voice is not the voice of patriotism, and its language suggests disloyalty").

desecration laws in place by the beginning of World War I,[55] many states increased the criminal penalties for desecration.[56] Texas broadened the language of its flag desecration law to punish those who publicly, or even privately, used language that cast contempt on the flag.[57] In 1918, a Montana man was convicted and sentenced to twenty years of hard labor when he refused to kiss an American flag and verbalized his opposition to doing so.[58]

Public laws governing flag salutes in schools during this period were also stricter. Organizations ranging from the American Legion to the Ku Klux Klan pushed these laws in conjunction with a broader patriotism movement.[59] The laws did not necessarily compel students to recite the Pledge, but compulsion was understood as a condition of educational culture.[60] The laws did, however, impose legal duties on teachers or other school officers to lead the Pledge of Allegiance or be subject to dismissal or criminal punishment.[61] As one commentator noted:

> The changed temper reflected in these later laws is striking. Unlike the earlier statutes, which represented nothing more than benevolent meddling with the curriculum, they evidence strong legislative fears that without the stringent application of rewards and punishments, many teachers would not seek to inculcate loyalty and patriotism in their charges at all.[62]

Governmental command for respect and loyalty during this era is emblematic of the fundamental dangers of forced patriotism. The Sedition Act, for example, implicated free speech concerns by demanding loyalty through silence. Similarly, flag desecration laws forbade public and, in some cases, private acts of disrespect toward a national icon. The government's objective underlying these measures, as in forced speech laws, was formal unity; the absence of dissent falsely implied a unified polity.

B. The Second Cycle: World War II and Pearl Harbor

Most Americans are probably more familiar with the civil liberties issues emerging from the period surrounding the Second World War than

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55. ROBERT GOLDSTEIN, BURNING THE FLAG: THE GREAT 1989-90 AMERICAN FLAG DESECRATION CONTROVERSY 5 (1996) [hereinafter, GOLDSTEIN, FLAG CONTROVERSY].

56. O'LEARY, *supra* note 29, at 234. There was some ambivalence about the application of flag desecration laws to commercial and political campaign use, though the main application of laws during this era was toward dissidents and immigrants. *Id. But see* Halter v. Nebraska, 205 U.S. 34 (1907) (upholding law restricting commercial use of flag as applied to company selling "Stars and Stripes" beer depicting images of American flags).

57. O'LEARY, *supra* note 29, at 234-35.

58. *Id.* at 236.

59. IRONS, *supra* note 15, at 16.

60. MANWARING, *supra* note 34, at 3-4.

61. *Id.* at 4.

62. *Id.* at 3-4.

in any other era. The focal point, of course, is the internment of Japanese American citizens upheld by the Supreme Court in *Korematsu v. United States*.[63] Although the military's exclusion order at issue in that case was clearly not a forced patriotism measure because it was more instrumental than symbolic, loyalty was a central rhetorical focal point of the Court's analysis.[64] In disputing military officials' claims of legitimate national security concerns, Justice Murphy's dissent cited the congressional testimony of General DeWitt justifying the order.[65] The tenor of DeWitt's remarks illustrates a focus on the patriotism of American citizens and surely contributed to an atmosphere of fear.

> There is no way to determine their loyalty. . . . The danger of the Japanese was, and is now – if they are permitted to come back – espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. *American citizenship does not necessarily determine loyalty*. . . . But we must worry about the Japanese all the time until he is wiped off the map.[66]

Moreover, Justice Murphy's dissent pointed out that government officials relied upon evidence that some Japanese Americans residing in the United States continued to practice Japanese cultural customs relating to iconic representations and ceremonies, though there was no nexus between such activities and the loyalty of those engaged in them.[67]

The connection between patriotism and the participation or nonparticipation in ritualistic exercises of loyalty, however, preceded the Japanese internment. Even before the formal involvement of the United States in the war, concerns about patriotism were embedded in the national consciousness. The Supreme Court decided the first flag salute case, *Minersville School District v. Gobitis*,[68] in 1940, just as the potential of United States involvement in the war was growing stronger. In that case, children adhering to the Jehovah's Witness faith objected to their expulsion for failure to obey a school board regulation requiring all schoolchildren to salute the flag and recite the Pledge of Allegiance.[69] Because their religious faith forbade them to engage in worship of graven images, they claimed that the regulation interfered with both their

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63. 323 U.S. 214 (1944).

64. *Korematsu*, 323 U.S. at 218-19 (noting that the exclusion order "was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country"); and *id.* at 223-24 ("There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.").

65. *Id.* at 236 n.2 (Murphy, J., dissenting).

66. *Id.* (quoting testimony of Lt. General DeWitt before the House Naval Affairs Subcommittee to Investigate Congested Areas (emphasis added)).

67. *Id.* at 237, 237 n.5 (Murphy, J., dissenting) (arguing that participation in "emperor worshipping ceremonies" was not correlated with disloyalty).

68. 310 U.S. 586 (1940), *overruled by* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

69. *Gobitis*, 310 U.S. at 591.

right of free speech and their right of free exercise of religion under the First Amendment.[70] While recognizing that the government may not interfere with expressions of belief or disbelief, the Court upheld the school's regulation, concluding that the state has a legitimate interest in maintaining security through mandatory ceremonial acts.[71] Justice Frankfurter's majority opinion strongly endorsed the state's claimed interests. He wrote that "[a] society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties."[72]

In one of the ugliest periods of our nation's history, *Gobitis* led to widespread acts of private violence against Jehovah's Witnesses throughout the United States. The Department of Justice reported hundreds of attacks on Jehovah's Witnesses within two weeks of the *Gobitis* decision.[73] In one incident, a Witness hall of worship was burned.[74] In West Virginia, law enforcement officers forced a group of Witnesses to drink castor oil and then tied them together and marched them through the streets.[75] Vigilantes in Nebraska abducted a Witness and beat and castrated him.[76]

Gobitis was decided in 1940, a year and a half before the Japanese invasion of Pearl Harbor. Shortly after the Pearl Harbor attack, and the United States's formal entry into World War II, measures directed at patriotism and loyalty proliferated. In 1942, Congress enacted the federal Pledge of Allegiance statute. While not mandating the Pledge, the federal law codified the language of the Pledge and advised that it should be recited while standing at attention with the right hand over the heart.[77]

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70. *Id.* at 591-93.

71. *Id.* at 593, 600.

72. *Id.* at 600. In contrast, Justice Stone's dissent observed that the uniformity sought by such laws was not likely to be accomplished by state compulsion:

> [W]hile such expressions of loyalty, *when voluntarily given*, may promote national unity, it is quite another matter to say that their compulsory expression by children in violation of their own and their parents' religious convictions can be regarded as playing so important a part in our national unity as to leave school boards free to exact it despite the constitutional guarantee of freedom of religion.

Id. at 605 (Stone, J., dissenting) (emphasis added). Justice Stone also noted the free speech implications of such laws. *Id.*; *see also* Colin Bessonette, *Q & A*, THE ATLANTA JOURNAL-CONSTITUTION, June 30, 2002 at 2C ("Pledges of allegiance are marks of totalitarian states, not democracies, . . . I can't think of a single democracy except the United States that has a pledge of allegiance." (quoting anthropologist David Kertzer)).

73. IRONS, *supra* note 15, at 22-23; MANWARING, *supra* note 34, at 163-66. At least one scholar has disputed whether the wave of violence can be attributed entirely to *Gobitis*, though he concedes that the persecution was probably broader and more intense as a result of the Court's decision. MANWARING, *supra* note 34, at 163.

74. IRONS, *supra* note 15, at 23; MANWARING, *supra* note 34, at 164-65.

75. IRONS, *supra* note 15, at 23.

76. *Id.*

77. 4 U.S.C. § 4 (2002).

In West Virginia, about a month after the Pearl Harbor attack, the state board of education adopted a regulation requiring all teachers and pupils to participate in a salute honoring the nation as represented by the flag and recite the Pledge of Allegiance.[78] Failure to comply would be treated as insubordination.[79] The connection between mandated loyalty and national security was manifest in the Board's resolution, which expressed its sentiment that:

> [N]ational unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression.[80]

Notwithstanding the strong national feelings sympathetic to this type of statement, the Supreme Court overruled *Gobitis* in *West Virginia Board of Education v. Barnette* and invalidated the school board's regulation.[81] The Court's opinion expressed an unequivocal commitment to invalidating forced speech patriotism measures as a fundamental violation of the freedom of conscience and speech.[82]

C. The Third Cycle: McCarthyism and the House Un-American Activities Committee

Despite a short respite from major civil liberties concerns coinciding with the end of World War II,[83] by 1947 a new cycle of forced patriotism emerged as the Cold War began and public officials began to fear Communist infiltration into government agencies.[84] The renewed sense of urgency about loyalty and patriotism was symbolized by the activities of the House Un-American Activities Committee ("HUAC"), which was created in 1938, but converted to a standing committee in 1945.[85] The activities of HUAC in the late 1940s and the emergence of Senator Joseph McCarthy as a leader of anti-subversive hysteria in 1950, coinciding with the onset of the Korean War, led to numerous threats to civil liberties.[86]

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78. *Barnette*, 319 U.S. at 625-27.
79. *Id.* at 626.
80. *Id.* at 626 n.2 (quoting Board resolution).
81. *Id.* at 642.
82. For other examples of state laws promoting forced patriotism, see GOLDSTEIN, POLITICAL REPRESSION, *supra* note 15, at 282-83 (describing sedition laws of Mississippi and Louisiana).
83. *Id.* at 287-88.
84. *Id.* at 289-98.
85. *Id.* at 240, 292.
86. *See generally id.* at 292-396.

Many of these efforts were instrumental, rather than symbolic, such as the widely reported efforts of congressional leaders in conducting investigative hearings to root out Communist subversion and the prosecution of Communist leaders under laws such as the Smith Act. But more general concerns about patriotism also manifested themselves in a wide range of federal and state laws requiring certain classes of persons to recite loyalty oaths, usually as a condition of government employment.[87] Because of their breadth and generality, loyalty oaths for public employees, though not targeted at the general population, fit within the definition of forced patriotism.

First Amendment doctrine pertaining to loyalty oaths is a mixed bag. While a number of Supreme Court decisions uphold some types of loyalty oaths for public employees, the Court has limited the application of such laws to persons who were actively affiliated with an organization that advocated unlawful activity, who knew about those objectives, and who specifically intended to further those unlawful goals.[88] In other words, the Court itself appears to recognize a constitutional distinction between loyalty oaths that address specific threats to security and the open-ended compulsion of fealty pledges. Toward the end of this cycle, the Court also invalidated some loyalty oath provisions under the doctrines of vagueness and overbreadth.[89]

In addition to the specific focus on loyalty symbolized by congressional investigations and loyalty oath statutes, Congress amended the federal law defining the Pledge of Allegiance to add the words "under God" during this cycle.[90] Spurred by the efforts of the Knights of Columbus, a private fraternal organization, Congress adopted the revision at least in part "to distinguish the American system of government from

87. *Id.* at 298-305, 348-60.

88. *Compare, e.g.*, Adler v. Bd. of Educ. of New York, 342 U.S. 485, 496 (1952) (upholding law prohibiting employment in public schools of persons who advocated the overthrow of the government by force or violence), *overruled in part by* Keyishian v. Bd. of Regents, 385 U.S. 589, 605-06 (1967), *with* Wieman v. Updegraff, 344 U.S. 183, 190 (1952) (invalidating law requiring public employees to take oath swearing that they were not members of the Communist Party or any group that advocated violent overthrow of the government). The scope of First Amendment law in this area is also complicated by the subsequent adoption of a stringent test limiting the government's authority to punish advocacy of unlawful conduct. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (limiting punishment of subversive advocacy unless the "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

89. *See, e.g.*, Baggett v. Bullitt, 377 U.S. 360, 366-70 (1964) (invalidating loyalty oath provisions for public university employees as unconstitutionally vague); Shelton v. Tucker, 364 U.S. 479, 487-88 (1960) (invalidating state law requiring teachers to provide information about organizational memberships as unconstitutionally overbroad). The relevance of loyalty oaths has not diminished for some public employees, though it is no longer an issue that sits in the limelight. *See* Gabriel J. Chin & Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITT. L. REV. 431 (2003).

90. Pub. L. No. 396, 68 Stat. 249 (1954).

communism and to underscore the commitment to inalienable, individual rights guaranteed by God."[91]

D. The Fourth Cycle: The Vietnam War

As Cold War fears of creeping Communism extended into southeast Asia, the United States's military involvement in Vietnam became the focal point of the next cycle of forced patriotism measures. The political divisions within the nation over this issue generated substantial domestic conflict, and fears about the lack of unity spawned efforts to silence disloyal speakers. Not surprisingly, during this period government officials actively prosecuted cases against protestors for mistreatment of the United States flag.[92] Indeed, one commentator has argued that "[t]he flag . . . became the greatest single symbol of the cultural and political divide that ripped the country apart during the Vietnam War."[93]

The Court addressed the constitutionality of flag desecration prosecutions in three important cases during this cycle. In the first case, *Street v. New York*,[94] the Court reviewed a man's conviction for flag desecration. After the murder of civil rights leader James Meredith, the defendant went into public, burned a United States flag, and said "If they let that happen to Meredith we don't need an American flag."[95] The Court concluded that New York's desecration law was so broad that it allowed Street to be convicted based only on his words, and that the law was therefore unconstitutional as applied to his conduct.[96] It did not, at that time, hold that flag burning itself was constitutionally protected. In fact, the *Street* decision came just a year after Congress passed a federal flag desecration law.[97]

A few years later, the Court decided *Spence v. Washington*[98] and *Smith v. Goguen*.[99] In *Spence*, the Court invalidated the conviction of a man who was prosecuted for "improper use" of a flag when he displayed an upside down U.S. flag on which he had formed a peace symbol with black tape.[100] In *Smith*, the Court struck down a state law prohibiting

91. Blasi & Shiffrin, *supra* note 15, at 471 (citing legislative history).

92. An influential law review article concerning punishment of conduct toward the flag also appeared during this period. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). Also during this cycle, the Court upheld the conviction of a man who publicly burned his draft registration card in protest of the United States's involvement in the Vietnam War. *See* United States v. O'Brien, 391 U.S. 367, 386 (1968). Although this case could be placed into the matrix of forced patriotism cases, it focused more specifically on the elusive speech-conduct distinction. *O'Brien*, 391 U.S. at 376-77.

93. GOLDSTEIN, FLAG CONTROVERSY, *supra* note 55, at 12.

94. 394 U.S. 576 (1969).

95. *Street*, 394 U.S. at 578.

96. *Id.* at 581.

97. GOLDSTEIN, FLAG CONTROVERSY, *supra* note 55, at 13.

98. 418 U.S. 405 (1974).

99. 415 U.S. 566 (1974).

100. *Spence*, 418 U.S. at 415.

contemptuous treatment of the American flag as unconstitutionally vague.[101] The state had attempted to enforce the law against a man who wore a flag patch on the seat of his blue jeans.[102]

The Court decided this trilogy of forced patriotism cases on fairly narrow grounds, but did broach the broader subject of the state's power to control loyalty. In *Street*, for example, the Court relied on *Barnette* in stating that the First Amendment encompasses "the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."[103] In *Spence*, however, the Court refused to directly address whether the state has a legitimate interest in preserving the integrity of the United States flag.[104] While recognizing that the state may not punish people for failing to show respect for the flag, the Court hinted that it might give weight to the state's interests in future cases when it acknowledged that if the flag "may be destroyed or permanently disfigured, it could be argued that it will lose its capability of mirroring the sentiments of all who view it."[105] In his dissent, then-Associate Justice Rehnquist argued that the majority failed to give appropriate recognition to the state's interest in preserving the flag as a symbol of nationhood and unity.[106] He distinguished the flag misuse law from flag salute requirements, arguing that the former does not demand allegiance.[107] He expressed similar sentiments in his dissent in *Smith*.[108]

E. The Fifth (?) Cycle: The 1988 Presidential Election and the Flag Burning Cases

During the late 1980s, the United States was not at war, and no real or perceived external national security threats of any significant dimension existed.[109] Yet, in the heat of the 1988 presidential campaign, Vice

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101. *Smith*, 415 U.S. at 567-68.
102. *Id.* at 568.
103. *Street*, 394 U.S. at 593.
104. *Spence*, 418 U.S. at 413-14.
105. *Id.* at 412-13.
106. *Id.* at 421 (Rehnquist, J., dissenting).
107. *Id.* at 422 (Rehnquist, J., dissenting).
108. *Smith*, 415 U.S. at 601-04 (Rehnquist, J., dissenting). At the state and local level during this cycle, the prevalence of "red squads" investigating subversive political activities suggested a widespread government distrust of American citizens. GOLDSTEIN, FLAG CONTROVERSY, *supra* note 55, at 504-09. These squads were notorious for engaging in surveillance of political activists and maintaining investigative files on numerous citizens engaged in ordinary (and constitutionally protected) political activism. *Id.* As these efforts were at least nominally instrumental, however, I do not include them in the category of forced patriotism.
109. No period of American history, of course, is without any conflict. During this period violence in the Middle East continued, and United States troops engaged in fleeting involvement in Grenada and Panama. *Once and Future Veterans*, N.Y. TIMES, Nov. 12, 1990, at A18 (noting that more than 230,000 U.S. troops were currently serving in the Persian Gulf; in 1989 27,000 troops had invaded Panama,; and in 1983 8,000 troops went to Grenada). And though Cold War tensions persisted through President Reagan's two terms in office, they largely dissipated with the fall of the Berlin Wall. *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1496 (2003) (quoting JOHN LEWIS GADDIS, AND NOW THIS, LESSONS FROM THE OLD ERA FOR THE NEW ONE, IN THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11, at 1 (Strobe Tal-

President George H.W. Bush and his political advisors successfully manufactured a major patriotism issue to attack his Democratic opponent, Massachusetts Governor Michael Dukakis.[110] Insofar as is discernible, this cycle is the only example of a period of patriotic hysteria that was artificially produced entirely for partisan purposes.

Bush chose to highlight Dukakis's veto of a Massachusetts law that would have required public schoolteachers to lead students in the daily recitation of the Pledge of Allegiance.[111] Little if any notice was given to the fact that Dukakis had vetoed the law in response to an advisory opinion from the highest court in Massachusetts[112] and the advice of the Massachusetts attorney general that the measure was patently unconstitutional under *Barnette*.[113] Indeed, a Republican governor of Massachusetts had vetoed essentially the same law just six years before Dukakis did.[114] Bush also made much of Dukakis's admission that he was a card-carrying member of the ACLU and promoted his own candidacy with a high profile visit to an American flag factory.[115] Bush successfully made doubts about Dukakis's loyalty a centerpiece of his campaign, which had trailed in public opinion polls before he introduced the patriotism issue.[116]

Perhaps not coincidentally, less than a month before the 1988 presidential election, the Supreme Court agreed to hear *Texas v. Johnson*, a flag burning protestor's constitutional challenge to his conviction under a state flag desecration statute.[117] At the end of that term, well after Bush's election, the Court invalidated the Texas law as a viewpoint discriminatory regulation that violated the First Amendment.[118] In doing so, the Court recognized that while the state has a legitimate interest in preserving the flag as a symbol of the nation, it cannot advance that interest in a manner that favors respectful treatment and disfavors treatment that conveys opposition to the government's view.[119]

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bott & Nayan Chanda eds., 2001)); Peter J. Schraeder, *Cold War to Cold Peace: Explaining U.S.-French Competition in Francophone Africa*, POL. SCIENCE Q., Sept. 22, 2000, at 395.

110. GOLDSTEIN, FLAG CONTROVERSY, *supra* note 55, at 73-76. That this cycle was artificially created is supported by the fact that this is not one of the periods regularly incorporated into discussions of wartime civil liberties. *See, e.g.*, REHNQUIST, *supra* note 10; Cole, *supra* note 10; Tushnet, *supra* note 10.

111. GOLDSTEIN, FLAG CONTROVERSY, *supra* note 55, at 73-74.

112. Opinions of the Justices to the Governor, 372 Mass. 874, 878-79, 363 N.E.2d 251, 254 (Mass. 1977).

113. GOLDSTEIN, FLAG CONTROVERSY, *supra* note 55, at 74.

114. *Id.*

115. *Id.* at 75; Robert D. Richards & Clay Calvert, *Nadine Strossen and Freedom of Expression: A Dialogue with the ACLU's Top Card-Carrying Member*, 13 GEO. MASON U. CIV. RTS. L.J. 185, 185-86 (2003).

116. GOLDSTEIN, FLAG CONTROVERSY, *supra* note 55, at 74.

117. 488 U.S. 907 (1988) (order granting writ of certiorari on Oct. 17, 1988).

118. Texas v. Johnson, 491 U.S. 397 (1989).

119. *Johnson*, 491 U.S. at 412-13, 418.

The Court's sharply divided opinion in *Johnson* was met with extraordinary hostility.[120] Opponents called for a constitutional amendment to establish a flag burning exception to the First Amendment, a movement that was somewhat mollified by Congress's enactment of the federal Flag Protection Act.[121] In that law, Congress attempted to avoid the constitutional infirmities of the Texas flag law by prohibiting public destruction of the flag for any reason, rather than only in circumstances that would likely offend others.[122] In its next term, however, the Court also invalidated the new federal flag law.[123] In *United States v. Eichman*, the Court inferred that the government's only purpose for prohibiting the public desecration of a privately-owned flag could be to preserve the flag as a national symbol, an overtly content-based justification.[124] Thus, in both *Johnson* and *Eichman*, the Court repudiated the idea that the government could compel respectful treatment of the flag by punishing acts that destroyed the flag.[125] In this manner, the cases represented the strongest rebuke of forced patriotism since *Barnette*.

Another incident that fueled the patriotism controversy during this period was a well-publicized dispute over a display created by art student "Dread" Scott Tyler.[126] While *Johnson* was pending in the Court, Tyler created an installation for a juried art exhibition of minority students' work at the School of the Art Institute in Chicago.[127] The installation displayed the exhibit's title, *What Is the Proper Way to Display the American Flag?*, posted on the wall along with provocative photographs, including a picture of South Korean demonstrators burning an American flag and images of flag-draped coffins.[128] Beneath the wall display was a platform holding a book in which viewers could write their own feelings about the flag, while spread out on the floor underneath the platform was an actual American flag.[129] Some people claimed that viewers had to step on the flag in order to write their thoughts in the book, though it was possible to reach the book from the side without stepping on the flag.[130]

Tyler's display inflamed public opinion and generated widespread condemnation and national media attention. Individuals tried to physically remove the flag from the exhibit.[131] The art school and its officials were the subject of bomb scares and death threats.[132] A group of veterans

120. GOLDSTEIN, FLAG CONTROVERSY, *supra* note 55, at 113-56.
121. *Id.* at 189-230.
122. United States v. Eichman, 496 U.S. 310, 315 (1990).
123. *Eichman*, 496 U.S. at 318.
124. *Id.* at 315-16.
125. *Id.* at 318; *Johnson*, 491 U.S. at 415-16.
126. *See* GOLDSTEIN, FLAG CONTROVERSY, *supra* note 55, at 77-88.
127. *Id.* at 77.
128. *Id.*
129. *Id.*
130. *Id.* at 77-78.
131. *Id.* at 81.
132. *Id.*

filed an unsuccessful lawsuit attempting to ban the exhibit.[133] Many protests targeting the exhibit were held, culminating with two demonstrations involving thousands of people, mostly veterans, marching on the school and the Art Institute of Chicago.[134] Lawmakers at the federal, state, and local level responded by adopting or amending flag desecration laws to specifically forbid the display of flags on the ground.[135] The Illinois legislature terminated public funding for the art school.[136]

The synergy of these multiple episodes regarding patriotism and loyalty shaped an intense public discourse for several years. *Johnson* and *Eichman* spawned early efforts to amend the Constitution to exempt flag burning from First Amendment protection, efforts that continue, albeit with less fervor, to this day.[137] Despite the intensity of this cycle, serious and widespread efforts to mandate patriotism did not again arise until after the tragic events of September 11, 2001.

III. FORCED PATRIOTISM AND SEPTEMBER 11TH

In the time since the September 11th terrorist attacks, fifteen states and many local governments have either adopted laws in some way requiring the regular recitation of the Pledge of Allegiance by schoolchildren or modified their existing laws regarding the Pledge.[138] Most, if not all, of this resurgence in legislative interest in forced Pledge requirements can be attributed directly to public officials' desire to respond in some way to new threats to national security and the aspiration for national unity.[139] The New York City Board of Education, for example,

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133. *Id.*

134. *Id.* at 81-82.

135. *Id.* at 85-86. The Chicago ordinance was quickly enjoined by a state court in a suit by a group of artists including Tyler. Aubin v. City of Chicago, No. 89 CH 8763 (Cook Co. Cir. Ct.).

136. *See* GOLDSTEIN, FLAG CONTROVERSY, *supra* note 55, at 78.

137. *See generally id.*; *e.g.*, Flag Protection Act of 2004, S. 516, 108th Cong.; Flag Protection Act of 2003, H.R. 2162, 108th Cong.; H. Con. Res. 51, 108th Cong. (2003) (expressing the sense of Congress that Congress should have the power to prohibit desecration of the flag); H.J. Res. 4, 108th Cong. (2003) (proposing an amendment to the Constitution authorizing Congress and the States to prohibit the act of desecration of the flag); S.J. Res. 4, 108th Cong. (2003) (same). At least one state has followed suit. *See* H.B. 2694, 46th Leg., 2d Reg. Sess. (Az. 2004) (outlawing flag burning with intent to intimidate any person or group of persons).

138. *See, e.g.*, COLO. REV. STAT. § 22-1-106(2); 24 PENN. STAT. § 7-771; FLA. STAT. ANN. § 1003.44 (2004); MO. REV. STAT. § 171.021 (Vernons 2004); TEX. EDUC. CODE ANN. § 25.082 (Vernons 2004). *But see* OHIO REV. CODE § 3316.602 (adding provision indicating that policies adopted under Pledge provision shall not require students to participate in recitation of the Pledge, and protecting such students from intimidation aimed at coercing participation).

139. It is possible, of course, that some of this resurgence was a reaction to the Ninth Circuit's decision in *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), *rev'd*, 124 S. Ct. 2301 (2004) (dismissing case for lack of standing). In that case, the court of appeals held that all recitations of the Pledge in public schools violated the First Amendment's Establishment Clause because of its inclusion of the words, "under God." *Newdow*, 292 F.3d at 612. The *Newdow* case itself was filed before September 11, 2001, but the Ninth Circuit's decision declaring the California law to be unconstitutional was issued on June 26, 2002. To the extent state Pledge laws were enacted after September 11th but prior to the Ninth Circuit's *Newdow* decision, they can fairly be said to have responded to the attacks. After the *Newdow* decision, it is difficult to determine which factor, or if both factors, contributed to the proliferation of Pledge laws.

specifically referred to the September 11th attacks in its resolution establishing a forced Pledge requirement.[140] Perhaps it is still too close to this period to examine it in context, but preliminary signs indicate that a sixth forced patriotism cycle is emerging.

The most extreme of these laws was enacted by the State of Colorado.[141] Colorado imposed a mandatory requirement for both students and teachers in public schools to "recite aloud" the Pledge on a daily basis.[142] Under the law, a student could be excused from reciting the Pledge, but only if his or her parents first submitted a written note to the school's principal asserting the objection and, implicitly, explaining the grounds for that objection.[143] The law exempted teachers who had religious objections or who were non-citizens, but compelled teachers with other objections of personal conscience to recite the Pledge.[144] Thus, neither teachers nor students (by themselves) could refrain from reciting the Pledge by asserting their own political or other non-religious scruples or beliefs.

Shortly after the Colorado law became effective, several students and teachers filed a lawsuit challenging its constitutionality. A federal district court judge issued a temporary restraining order forbidding the state and the defendant school districts from enforcing the law.[145] In its ruling, the district court found that *Barnette* created a bright-line First Amendment rule against government compulsion of the Pledge for students, teachers, administrators, and, indeed, any citizens.[146] The court also determined that the law was overtly viewpoint discriminatory in two distinct ways. First, it discriminated between those who chose to recite the Pledge and those who did not wish to recite it.[147] Second, it discriminated between students and teachers by permitting different legal

140. State Bd. of Educ. Res. (N.Y. Oct. 17, 2001), *available at* http://www.nycenet.edu/secretary/calendar/10-17-01/calendar.htm#20; *see also* Edward Wyatt, *Board Votes to Require Recitation of Pledge at Public Schools*, N.Y. TIMES, Oct. 18, 2001, at D1.

141. *See* COLO. REV. STAT. § 22-1-106(2).

142. *Id.*

143. *Id.*

144. *Id. Barnette* can be read to establish a First Amendment right for teachers as well as students to refrain from reciting the Pledge, though it does not address the issue explicitly. Several lower court opinions have, however, applied *Barnette*'s protections to schoolteachers. *See, e.g.*, Russo v. Central Sch. Dist. No. 1, 469 F.2d 623, 630-33 (2d Cir. 1972); Hanover v. Northrup, 325 F. Supp. 170, 172-73 (D. Conn. 1970); Opinions of the Justices to the Governor, 372 Mass. 874, 878-79, 363 N.E.2d 251, 254 (Mass. 1977); State v. Lundquist, 262 Md. 534, 553-55, 273 A.2d 263, 273-74 (Md. 1971); *accord* Cary v. Bd. of Educ. of Adams-Arapahoe Sch. Dist., 598 F.2d 535, 541 (10th Cir. 1979) (recognizing that *Barnette* distinguished between legitimate curriculum requirements and mandatory recitation of the Pledge). *But see* Palmer v. Bd. of Educ., 603 F.2d 1271, 1274 (7th Cir. 1979) (holding that probationary public school teacher did not have constitutional right to refuse to participate in the Pledge of Allegiance, the singing of patriotic songs, and the celebration of national holidays). For a commentary on this issue, see Laurie Allen Gallancy, Comment, *Teachers and the Pledge of Allegiance*, 57 U. CHI. L. REV. 929 (1990).

145. Lane v. Owens, Civil Action No. 03-B-1544 (PAC) (D. Colo.).

146. Transcript of Ruling 4-5, Lane v. Owens, Civil Action No. 03-B-1544 (PAC), D. Colo. (copy on file with author) [hereinafter, Transcript].

147. *Id.* at 9.

grounds for refusing to recite the Pledge.[148] In rejecting an argument by some defendant school boards that they had adopted policies to alleviate the burden on non-consenting students, the court observed that Colorado's law placed a direct legal burden on the students and teachers, independent of whatever policies local schools had in place.[149] Finally, the court rejected all government claims that the Pledge requirement served any legitimate curricular goals. "Pure rote recitation of a pledge such as this every day of the school year for one's tenure and matriculation through the school system," the court stated, "cannot be said to be reasonable or legitimate in a pedagogical sense."[150]

In Pennsylvania, the state legislature adopted a Pledge law requiring officials at both public and private schools to provide for either the recitation of the Pledge of Allegiance or the singing of the National Anthem at the outset of each school day.[151] The statute allowed students to decline to recite the Pledge or salute the flag if they had religious or other personal objections to doing so, but required school officials to report such refusal in writing to an objecting student's parents.[152] In a lawsuit challenging the constitutionality of the Pennsylvania law, a federal district court held that the law's exemptions made it non-compulsory, and therefore in compliance with *Barnette*.[153] Nonetheless, the court held that the provision requiring schools to notify parents of their children's objections to reciting the Pledge constituted discriminatory treatment of children based on their viewpoints, and was therefore unconstitutional.[154] Though this provision did not impose direct penalties on students who objected, the court concluded that the "parental notification provision . . . offers a disincentive for students to opt out of reciting the Pledge or the Anthem and thus it coerces students into reciting a state-sponsored message."[155]

Although not all of the post-September 11th Pledge laws were as extreme as Colorado's or Pennsylvania's, the proliferation of these regulations has generated a renewed atmosphere of forced patriotism. Some lawmakers may have drafted the laws in an attempt to avoid constitutional problems, but it is not altogether clear their efforts are sufficient.

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148. *Id.*

149. *Id.* at 10-11.

150. *Id.* at 11. In response to the lawsuit and restraining order, Colorado has repealed the part of the law imposing an obligation to recite the Pledge on students and teachers, and instead requires schools to provide an opportunity for "willing students" to recite it. *See* COLO. REV. STAT. § 22-1-106(3).

151. 24 PENN. STAT. § 7-771.

152. *Id.*

153. The Circle School v. Phillips, 270 F. Supp. 2d 616 (E.D. Pa. 2003), *aff'd*, 381 F.3d 172 (3d Cir. 2004).

154. *Id.* at 625-26.

155. *Id.* at 623-26 (comparing parental notification requirements in Pledge context with parental notification in abortion regulations).

Many of the statutes, for example, contain no direct enforcement provisions.[156] Pledge laws, however, need not have an explicit enforcement mechanism in order to produce mandatory compliance. When Congress first enacted a law endorsing the Pledge, it deliberately neglected to implement an enforcement scheme.[157] This unusual regulatory paradigm serves several purposes that protect public officials, yet undermine civil liberties. If laws that lack formal enforcement mechanisms create the imprimatur of authoritative rules, other public officials may take action to enforce them under distinct legal provisions. For example, many state laws authorize school districts to fire teachers and expel or suspend students for insubordination or neglect of duty.[158] Even in the absence of formal enforcement mechanisms within the Pledge statutes, other state officials may use disciplinary laws to threaten individuals who refuse to recite the Pledge.

Second, as with Pennsylvania's law, some states' laws include provisions allowing students, and sometimes teachers, to decline to recite the Pledge. Although the Pennsylvania decision held that exemptions were sufficient to alleviate the compulsory nature of the laws,[159] it is not altogether clear that it was correct. As drafted, these statutes are internally contradictory. On the one hand, they create a legal duty for students to recite the Pledge. On the other hand, they attempt to comply with *Barnette* by providing some sort of exemption provision. The contradiction is even more severe in some jurisdictions because other states' laws are more direct than Pennsylvania's in imposing a legal duty on students and teachers to recite the Pledge.[160] That is, there is a more direct contradiction in these laws between the obligation and the exemptions. The confusion generated by conflicting directives in many of the Pledge laws enacted since September 11th increases the chance that local school districts will unconstitutionally apply these statutes or that coercion will arise from the group enterprise of daily recitation of the Pledge. In other words, even with formal exemption provisions in place, the actual practices in schools may result in the violation of *Barnette*'s principles.

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156. *See, e.g.*, COLO. REV. STAT. § 22-1-106(2); 105 ILL. COMP. STAT. 5/27-3 (2004); MISS. CODE ANN. § 37-13-6 (2004).

157. Blasi & Shiffrin, *supra* note 15, at 435 (noting that American Legion lobbyists stated that the law was intended to be obeyed as an enactment of Congress without regard to the absence of penalties).

158. *See, e.g.*, COLO. REV. STAT. § 22-33-106(1)(a) (providing that students may be suspended or expelled for "continued willful disobedience or open and persistent defiance of proper authority."); UTAH CODE ANN. § 53A-11-904 (2004) (same); COLO. REV. STAT. § 22-63-301 (providing that teachers may be dismissed for insubordination); MO. REV. STAT. § 168.114 (same).

159. *Circle School*, 270 F. Supp 2d. at 621-22.

160. *See, e.g.*, FLA. STAT. ANN. 1003.44 (mandating that students shall recite Pledge every day with the right hand over the heart, but requiring that students be informed of right not to participate). The Pennsylvania law appears to impose its obligations primarily on school officials. *See* 24 PENN. STAT. § 7-771.

What is more, the very practice of having a ritual recitation of the Pledge every day may be coercive in the context of the public school setting. Even precatory laws can create a culture of compliance that effectively establishes an enforceable regime. Indeed, it could be argued that laws requiring teachers to lead students in the recitation of the Pledge are unconstitutional even if they allow students to opt out. On this view, the psychological coercion to participate in this public ritual, as in the Establishment Clause context, may be the functional equivalent of legal coercion.[161] To the degree that the atmosphere created by group recital of the Pledge is one in which dissenters feel ostracized by the social setting, any public school ceremony incorporating the Pledge violates *Barnette*'s First Amendment principles.[162] Indeed, Governor Jesse Ventura vetoed a Minnesota Pledge statute that mirrored these states' laws on the ground that, even with the exemption provision, it violated *Barnette*.[163]

Finally, the exemption provisions themselves may be unconstitutional to the extent that they require parents, students, or teachers to disclose their reasons for seeking an exemption.[164] A government directive requiring one to state a religious, political, or other philosophical objection to the recitation of the Pledge could itself be an impermissible forced speech law.

In any event, the recent spate of Pledge laws reflects a renewed sense of urgency about nationalistic unity and loyalty to the United States, particularly in schoolchildren. At the same time, it demonstrates that as a society, we seem to evolve very little in our collective under-

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161. Greene, *supra* note 22, at 451-55. Abner Greene has argued that under current law, psychological coercion of students to participate in publicly-led group utterances, religious or not, might violate the Constitution. *Id.* Ultimately, however, Greene concludes that this result need not lead to the invalidation of Pledge laws. He contends that by adopting a structural view of Establishment Clause doctrine, from which the psychological coercion argument derives, and by reconceptualizing our current understanding of the basis of the right not to speak, constitutional doctrine may be read to forbid state-created psychological coercion of students to participate in religious exercises, but permit teacher-led Pledge recitations, so long as students have the option to not participate. *Id.* at 489.

162. *Id.* at 470-71. *But see* Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Township, 980 F.2d 437, 444-45 (7th Cir. 1992) (holding that schools may carry on with patriotic exercises so long as they are not compulsory, but that teachers leading students in recitation of the Pledge was not inherently compulsory); *see also* Lee v. Weisman, 505 U.S. 577, 638-39 (1992) (Scalia, J., dissenting) (noting possible inconsistency between Court's analysis of Establishment Clause coercion principle regarding prayer at public school graduation ceremony and its failure to recognize that the same students participated in a government-led recital of the Pledge of Allegiance).

163. *Minnesota Governor Vetoes Pledge of Allegiance Requirement*, Associated Press, May 23, 2002 *available at* http://www.firstamendmentcenter.org//news.aspx?id=3861&SearchString=ventura_veto (last visited September 14, 2004).

164. *See, e.g.*, ARK. CODE ANN. § 6-16-108(b)(2)(A) (2004) (exempting students from recitation of the Pledge if the student or student's parent objects to the recitation on religious, philosophical, or other grounds); COLO. REV. STAT. § 22-1-106(b) (requiring a parent to file a written note with the school principal stating an objection to the student's recitation of the Pledge in order to excuse student). It is also unclear whether allowing parents, as opposed to students, to object satisfies the non-compulsion requirement of *Barnette*.

standing of the civil liberties implications of laws that compel patriotism and, accordingly, strip us of individual autonomy.

IV. WHY SOCIAL LEARNING ABOUT FORCED PATRIOTISM DOES NOT OCCUR

Why does this pattern recur? Why do public officials repeatedly turn to forced patriotism laws during times of perceived national crisis in spite of obvious doubts about their constitutionality? Further, to the extent this pattern does recur, it seems worth examining whether it mirrors what happens in other areas of civil liberties violations that arise in response to national security crises.

A simple, but speculative, answer is that there is almost limitless, unadulterated political benefit to elected officials who advance these measures. At least one post-September 11th poll indicates that the majority of Americans believe that schoolchildren ought to recite the Pledge on a daily basis, suggesting implicitly that they disagree with the holding in *Barnette*.[165] Public support for and enactment of patently unconstitutional forced patriotism measures is certainly not unheard of. Following the Court's decision in *Texas v. Johnson*, for example, lawmakers continued to pass flag desecration laws in open defiance of the Court's decision.[166] Two-thirds of Americans disagreed with the decision in *Johnson* and supported a constitutional amendment exempting flag burning from First Amendment protection.[167] Thus, political expediency surely offers one explanation for the recurring pattern of forced patriotism laws.

A related, but distinct, point is that political actors are likely to turn to forced patriotism measures in the face of great uncertainty. During times of national crisis, and certainly after the United States has been attacked, there is likely to be a collective feeling of helplessness. Strong incentives exist for our government leaders to avoid the perception that they are doing nothing to address threats or perceived threats. Forced patriotism laws are a quick and simple, yet intangible, "fix" to more concrete problems of national security. They also provide officials with a safe harbor by generating distraction from actual security problems that

165. *See, e.g.*, G. Donald Ferree, Jr., *Patriotism and Its Place in Wisconsin Hearts and Schools*, University of Wisconsin Survey Center, *available at* http://www.wisc.edu/uwsc/badgrel4.pdf (reporting poll by University of Wisconsin Survey Center showing that 70 percent of Wisconsin residents believe the Pledge should be required in all U.S. schools) (last visited September 14, 2004). Furthermore, since the *Newdow* controversy, national polls show that 90 percent of Americans wish to retain the Pledge's "under God" language. Gina Holland, *Poll: Preserve Pledge Phrase*, THE CINCINNATI POST, Mar. 24, 2004, at A2. Of course, this is consistent with polls showing that most Americans do not support many of the provisions contained in the Bill of Rights. *See, e.g.*, Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1035-36 & n.184 (1978) (citing studies).

166. GOLDSTEIN, FLAG CONTROVERSY, *supra* note 55, at 127-28.

167. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 606 n.142 (1993) (citing poll data).

may require more instrumental, but also more complex and nuanced, solutions.

But neither of these explanations is unique to forced patriotism laws. If they explain the pattern of forced patriotism measures, they also ought to explain repetition of other civil liberties violations during national security crises. That is, political expediency and the desire to appear actively engaged in addressing security should be as likely to compel officials to repeat mass citizen internments as it would to spur them to adopt mandatory Pledge laws.

Despite these common incentives, it can be argued that the government does not repeat its mistakes as severely when it comes to more instrumental policy measures addressing national security concerns. Recently, scholars examining civil liberties in the wake of September 11th have suggested that in other areas of government policymaking, such as measures purporting to directly protect national security interests, there appears to be some form of "social learning" that occurs over time.[168] Social learning suggests that courts and other institutions tend to learn from past crisis periods that government claims of national security have, in retrospect, often been exaggerated, thus making people more skeptical about such claims in the present context.[169] Social learning may also occur because the revelation of this information also generates attention from media and public interest organizations vigilant about guarding against replicating past violations.[170]

Applying the social learning thesis, Mark Tushnet has "defended" the *Korematsu* case as an incidence of social learning that perhaps has prevented a direct recurrence of similar detentions during crises since World War II.[171] As Tushnet explains:

> The social learning is this: Knowing that government officials in the past have in fact exaggerated threats to national security or have taken actions that were ineffective with respect to the threats that actually were present, we have become increasingly skeptical about contemporary claims regarding those threats, with the effect that the scope of proposed government responses to threats has decreased.[172]

Tushnet elaborates on his thesis by tracing the historical patterns similar to those examined in this essay, but describing how social learning may account for why subsequent generations have generally not re-

168. *See, e.g.*, Tushnet, *supra* note 10, at 287-90.

169. *Id.* Other scholars, such as David Cole, are more skeptical about such claims. They argue that in fact such social learning may simply result in government decisionmakers learning to better mask the repetition of past civil liberties offenses. Cole, *supra* note 10, at 3-4.

170. Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1417 (2003).

171. Tushnet, *supra* note 10, at 307.

172. *Id.* at 283-84.

peated the civil liberties mistakes of the past in the context of instrumental policy measures.[173] At the very least, Tushnet argues, we learn from our mistakes to the extent that we do not repeat *precisely* the same errors.[174] Using *Korematsu* as an illustration, he describes how the retrospective view of the government's arguments about national security as having been greatly exaggerated has led us to be more skeptical about taking similar action in response to subsequent national threats.[175] Tushnet supports his claim by describing how the current crisis has not yielded policy measures as sweeping as those during the Japanese internment, and that many of the current potential civil liberties concerns are focused on non-citizens, as opposed to American citizens of foreign ancestry.[176]

Another example he could have drawn upon was the unsuccessful effort of Senator S. I. Hayakawa to amend federal law to permit the detention of Iranian nationals in the United States during the Iranian hostage crisis.[177] That episode may illustrate Tushnet's social learning thesis in two ways. First, the measure did not pass despite extreme national antipathy toward Iran. Second, had it passed, it would not have affected American citizens of Iranian descent.

If social learning does occur, to some degree, with respect to concrete policy measures designed to protect national security, the same learning experience does not appear to occur, or at the very least occurs at a slower pace, in the context of symbolic forced patriotism measures. As the repeated examples from the historical cycles of fear described above illustrate, government actors repeatedly turn to forced patriotism measures in times of national security crises, seemingly without regard for constitutional limitations. It seems worth exploring why social learning does not occur here.

Before doing so, however, I react to one possible critique of the thesis that social learning does not occur in the context of forced patriotism. One might reasonably challenge my assertion by pointing to the prevalence of exemption provisions in many of the current wave of Pledge laws. These exemptions might provide some evidence that learning has indeed occurred, and that legislators are cognizant of *Barnette*. One response to this is that if these exemption provisions manifest any learning, it is not the type of social learning that occurs from internalizing the wisdom and experience of past mistakes. If the experience in Colorado is at all representative, lawmakers have little use for *Barnette* or for federal courts that apply it. After a federal court barred enforcement of Colo-

173. *Id.* at 284-90.
174. *Id.* at 292.
175. *Id.* at 284-90.
176. *Id.* at 296-97; *see also* Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571 (2002).
177. *See* 127 CONG. REC. 178-79 (1981); 126 CONG. REC. 5815-18 (1980).

rado's mandatory Pledge law, the Governor and the majority leader of the State Senate publicly attacked the ruling, saying that there was no constitutional basis for it and boasting that the law would be upheld after a trial on the merits.[178] Such statements demonstrate no social learning, but rather illustrate that there is actually very little understanding among public officials about the problems with mandatory oaths. Indeed, based on their public statements, it is clear that lawmakers' goals in enacting mandatory Pledge laws today are often no different from in the era preceding *Barnette*. Another stark illustration of the lack of learning was demonstrated when students at one Denver public middle school were forced to recite the Pledge even after the temporary restraining order in the Colorado Pledge case.[179] Moreover, as pointed out earlier, the presence of formal exemptions in the face of legal commands to recite the Pledge does not necessarily eliminate problems of coercion and unconstitutional application. Finally, many of the laws enacted since September 11th do not exempt teachers from compelled recitation.[180] Thus, without regard to the existence of some exemptions, forced patriotism is alive and well in the twenty-first century.

If I am right that social learning has not occurred in the forced patriotism context, there are a few reasons that might explain that phenomenon. It may be that two preconditions necessary for social learning in other civil liberties contexts are not present in the forced patriotism area. First, scholars have argued that social learning occurs when officials overreact to threats of national security and develop policy responses that are not in fact well designed to enhance security.[181] In hindsight, such overreactions tend to be revealed, thus leading to greater skepticism in future generations.[182]

In the case of forced patriotism laws, no such precondition exists. Lawmakers who sponsor forced patriotism initiatives can be viewed as overreacting, but not because they have misrepresented any threats. No one pretends, except in the most abstract sense, that flag salutes and Pledge of Allegiance recitals directly enhance our national security. Thus, there is no hindsight, no second guessing, of patriotism measures because there has been no initial representation of their effectiveness.

178. Monte Whaley, *4 School Districts Can't Force Pledge; Ban Temporary; Hearing Set Friday*, DENVER POST, Aug. 17, 2003, at B1 (quoting Governor Bill Owens and State Senator John Andrews). Indeed, in a television appearance on a local public affairs talk show, Senator Andrews implied that *Barnette* was wrongly decided.

179. *See The Open Forum*, DENVER POST, Nov. 16, 2003, at E2 (describing the enjoined Colorado law as "requiring" students to recite the Pledge and quoting letters from students reflecting that they were being forced to recite the Pledge on a daily basis).

180. *See, e.g.*, COLO. REV. STAT. § 22-1-106(2) (not exempting teachers from compelled recitation on the grounds of personal conscience); FLA. STAT. ANN. 1003.44 (exempting unwilling students, but not teachers, from Pledge recital); MO. REV. STAT. § 171.021 (same).

181. Tushnet, *supra* note 10, at 287-90.

182. *Id.*

Later generations may look back with skepticism, but not because we think the state has lied to us.

Second, the stakes for lawmakers are simply not as high when forced patriotism measures are challenged. The social learning hypothesis depends to a significant degree on government institutions' responsiveness to retrospective factual analysis of historical national security crises.[183] At least part of that responsiveness may be attributable to legal sanctions and constraints that courts may externally impose in public interest litigation.[184] Legal challenges to tangible national security measures may result in high social costs, costs that may reflect adversely on the politicians who initially proposed and supported such laws. For example, unconstitutional regulations of conduct in the enforcement of national security laws may lead to suppressed evidence, invalidated convictions, or civil claims for substantial damages, at least against the law's enforcers. Such factors may be sufficient to deter government decisionmakers from repeating their past mistakes, or at least encouraging caution.

But constitutional remedies are also available in the context of forced patriotism measures. Surely these must provide disincentives even to lawmakers bent on reelection, as there are costs that may have to be weighed in determining whether to advance measures of highly questionable constitutionality.

Unlike other types of policy measures, however, forced patriotism laws may, in reality, be less susceptible to meaningful constitutional remedies than would more instrumental policy measures. First, legislative bodies, such as state legislatures or school boards, establish most forced patriotism measures. Despite the apparent unconstitutionality of such measures, legislators have little to fear from a constitutional attack on forced patriot acts. Under constitutional remedies law, legislators are absolutely immune for any actions taken in their legislative capacity, even if their acts are blatantly and intentionally unconstitutional.[185]

Moreover, it may be difficult for plaintiffs who wish to challenge such laws to find an appropriate defendant. Many Pledge laws, for example, do not provide for specific enforcement by the state or for state penalties for noncompliance. Accordingly, it may be difficult to identify an appropriate state defendant to sue for injunctive relief.[186] Lawmakers thereby make it difficult for civil rights litigants to stop the law's enforcement on a statewide level to the extent that they permit the decen-

183. *Id.*

184. Chesney, *supra* note 170, at 1417.

185. *See* Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (holding that state legislators are absolutely immune from constitutional tort damage actions).

186. *See Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (allowing suits against state officials for prospective injunctive relief barring enforcement of unconstitutional state laws).

tralization of the law's enforcement. As a practical matter, it may be difficult, with the possible exception of a defendant class action, to sue all the potential enforcers of such laws.

Local officials who do enforce forced patriotism laws may be subject to claims for damages. In the context of Pledge laws, school officials may be liable for compensatory damages should they force a teacher or student to engage in patriotic speech involuntarily.[187] The effectiveness of such a remedy may be limited, however, because it will often be difficult to prove actual damages in such a circumstance,[188] and nominal damages may provide little deterrence.[189] In some cases, student or teacher plaintiffs may be able to demonstrate entitlement to punitive damages, but they would first have to demonstrate a high degree of mental culpability in order to sustain such an award.[190] Moreover, it is unlikely that a jury would award punitive damages where local officials can claim that the state imposed upon them a legal duty to require the Pledge. Thus, deterrence that might ordinarily be generated by the possibility of damages actions in other civil rights contexts may not deter officials in forced patriotism cases.

Actions for injunctive and declaratory relief may yield substantial deterrence if meaningful costs are associated with their effective enforcement. Unlike structural reform injunctions, however, it is unlikely that it will be costly for public officials to comply with prohibitory injunctions. The state's officials may simply throw up their hands, cease enforcement of the unconstitutional policy, and blame the whole thing on the intervention of meddlesome, activist courts.

Moreover, savvy defendants may simply abandon their unconstitutional policies in the face of lawsuits, thus creating a moving target for

187. 42 U.S.C. § 1983 (2000).

188. *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) (holding that damages may be awarded for deprivations of rights only if the deprivation results in actual harm); Carey v. Piphus, 435 U.S. 247, 263-64 (1978) (holding that compensable injury must result directly from denial of constitutional right). In addition, local officials might try to claim qualified immunity from damages if they can successfully demonstrate that reasonable officials in their position would not have known that their actions violated a clearly established constitutional right. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). *But see* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1269 (11th Cir. 2004) (holding that a reasonable school official would have known that disciplining student for refusing to recite Pledge violated clearly established First Amendment rights).

189. What is more, attorneys' fees may not necessarily be awarded in cases where the sole remedy is nominal damages. Farrar v. Hobby, 506 U.S. 103, 115 (1992) (holding that in some cases where only relief obtained in civil rights action is nominal damages, it may be appropriate to award no statutory fee award at all). *But see* Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 1230-32 (10th Cir. 2001) (suggesting that fee awards might be appropriate in nominal damages cases where litigation achieves certain public goals).

190. Smith v. Wade, 461 U.S. 30, 56 (1983) (holding that punitive damages under 42 U.S.C. § 1983 may be awarded only where "defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others").

litigants challenging forced patriotism laws.[191] What is more, there is a more tangible consequence if officials abandon or even repeal their forced patriotism measures. Under the Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,[192] repeal or substantial modification of forced patriotism laws during the course of litigation may undermine plaintiffs' claims for recovery of attorneys' fees,[193] the only substantial financial consequence that might flow from the adoption of forced patriotism laws.[194] Thus, to the degree that attorneys' fees act as a general deterrent for future unconstitutional conduct in cases where other remedies do not, public officials might undermine that deterrent effect by avoiding fee liability if they abandon forced patriotism laws shortly after litigation begins. Accordingly, this too may limit the possibility of legal action serving as a meaningful deterrent to the future adoption of such laws.

In combination, these remedies problems limit the possibilities of effective constitutional enforcement in the context of forced patriotism laws. The lack of remedies, in turn, minimizes the chance that true social learning will occur.

CONCLUSION

Throughout our nation's experience the historical cycles of fear have led to the widespread adoption of forced patriotism measures. Given the apparent lack of social learning regarding forced patriotism measures, what can American society reasonably do to discourage continual repetition of these cycles? It seems worth exploring what types of conditions would be necessary to create social learning in the forced patriotism context.

Perhaps our society needs mechanisms to facilitate greater transparency in the discourse about the need, or lack thereof, for forced patriotism laws, or better understandings about the impact such laws have on the independent thinking of free citizens. Or perhaps we need to pay more attention to the history of forced patriotism laws and their profound impact on dissenters in the past century.

How can we best accomplish this? The paradoxical conclusion that I have come to, is that we do indeed need the Pledge of Allegiance in our

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191. *See* Monte Whaley, *Pledge Law Set Aside for 9 Months; Action Gives General Assembly a Chance to Rewrite or Eliminate Legislation*, DENVER POST, Aug. 24, 2003, at B1.

192. 532 U.S. 598, 605 (2001) (holding that plaintiffs may not be prevailing parties under fee-shifting statutes where the defendant voluntarily changes its behavior after the onset of litigation but before there is a "judicially sanctioned change in the legal relationship of the parties").

193. 42 U.S.C. § 1988(a) (2000).

194. *But see* Watson v. County of Riverside, 300 F.3d 1092, 1095-96 (9th Cir. 2002) (holding that *Buckhannon* does not preclude attorneys' fee award to plaintiff who secured preliminary injunction).

schools. But when I say this, I do not mean to endorse the ritualistic, value-inculcating, unthinking, rote recitation of the Pledge that is the hallmark of forced patriotism laws.

Rather, it is clear to me that American children ought to be taught about the Pledge in its historical context. We need education about the Pledge, where it came from, what its meaning is. We need meaningful and critical discourse about the multiple understandings and paradox of patriotism. We need to teach children the history of *Gobitis* and *Barnette*, and explain to them how shamefully our society has treated its dissident members in times of national crisis. In short, we need to teach students to think for themselves, and to do this we must enhance the real civic education of our youth.[195] Then, and only then, will we achieve social learning about forced patriotism.

195. At least one other scholar has come to a similar conclusion. In a thoughtful article published after this paper was presented, but before it was published, Professor Martin Guggenheim argues we should demand that teachers incorporate the Pledge into a valuable civics lesson that includes instruction about the right not to participate and the dangers of state compelled expression. Martin Guggenheim, *Stealth Indoctrination: Forced Speech in the Classroom*, 2004 U. CHI. LEGAL F. 57, 79-82.