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BARNETTE'S BIG BLUNDER

STEVEN D. SMITH*

And or or? Or or and? A lot can turn on the choice of a word—of a 2-letter or a 3-letter conjunction. Justice Robert Jackson (or I suppose it might have been a law clerk, or conceivably even a careless secretary or printer) opted for the 2-letter conjunction—and thereby committed the Court (and the judges and lawyers and scholars, and indeed the nation) to a course of massive collective delusion, and to a constitutional discourse reflecting and perpetuating that delusion.

"If there is any fixed star in our constitutional constellation..." The case was West Virginia State Board of Education v. Barnette,1 and Jackson, assigned to write the majority opinion, was already on the home stretch. The substance was already delivered, the outcome and supporting rationale clearly indicated. Jackson likely did not suspect that he was on the verge of writing what was destined to figure among the dozen or so most quoted and revered passages to appear in a Supreme Court opinion—words that would be praised as "eloquent and epochal," "among the great paens to human liberty," "a ringing endorsement of religious freedom," "haunting," and "among the most eloquent pronouncements ever on First Amendment freedoms."2 He may have written casually, carelessly, guided less by sober calculation than by the poetic muse that spoke through Jackson in more than one of his opinions. Who really knows?

What we can know is what he wrote. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion..."—and or or? or or and?—"... can prescribe what shall be orthodox, or force citizens to confess by word

* Warren Distinguished Professor, University of San Diego School of Law. I thank Larry Alexander, Nicole Garnett, Andy Koppelman, Bob Nagel, Michael Perry, and Mark Rosen for helpful comments on an earlier draft. I also benefited, of course, from commentary at the conference, and especially from Professor Shiffrin's response.
1. 319 U.S. 624, 642 (1943).
or act their faith therein.” Or. So with regard to orthodoxy (a term that derives from Greek and means “right opinion”3), the state cannot either “prescribe” or “force.” Or at least, so says Barnette.

Either conjunction would have served Jackson’s immediate purposes. Either would have supported the conclusion, that is, that West Virginia could not compel Jehovah’s Witnesses to recite the Pledge of Allegiance contrary to their beliefs. And would have worked. Indeed, and would have been more faithful to the overall position taken by the Court. After all, the Court was not suggesting that a state is somehow forbidden to conduct Pledge exercises in public schools and to encourage student participation. If the Pledge expressed a sort of terse orthodoxy (and unless Jackson was merely pontificating on matters irrelevant to the case, he must have thought that it did), and if articulating, endorsing, and officially sponsoring the Pledge amounted to “prescrib[ing]” it, then the Barnette Court was not in fact forbidding prescription in the case itself; it ruled only that the state could not force unwilling students to participate. (The discrepancy between what the Court said the state could not do and what it allowed the state to do already foreshadowed the incoherence that would come to plague First Amendment jurisprudence.)

But Jackson chose to say “or”—and, as another poetic Robert put it, “that has made all the difference.”4 We can imagine a jurisprudence that candidly acknowledges the reality and necessity of public pronouncements affirming, endorsing—yes, “prescrib[ing]”—what is taken at a given time to be “right opinion,” and that accordingly focuses on respecting pluralism and protecting conscience by developing rationales and devices for tolerating opinions that deviate from the orthodoxies of the day. But we do not have that sort of ruggedly honest jurisprudence. Instead, we have a jurisprudence of subterfuges and elusive (or illusory) distinctions—one that requires us to pretend, at least episodically, that in the realm of belief, government cannot and therefore does not prescribe—does not officially stand for—any “right opinions.” Large, labyrinthine discourses concerned with freedom of speech and religion have evolved in the effort to maintain that pretense.

I myself am indulging in some poetic license here, of course, or at least in some professorial hyperbole. For one thing, Jackson’s

3. PAUL TILLICH, A HISTORY OF CHRISTIAN THOUGHT 305 (1968).
Barnette opinion (like First Amendment doctrine generally) is susceptible to more than one interpretation—including more benign interpretations. And if courts and commentators were to converge in giving the case a more sensible construction—and were to do so consistently rather than sporadically and opportunistically—I would happily withdraw my criticisms. Some such development is after all what the author of an essay like this one dreams of (but does not seriously expect).

In addition, we cannot know—and it may seem implausible to assume—that a single judicial opinion, and a single word in that opinion, could alone have had such momentous consequences. It is more sensible, perhaps, to suppose that Jackson was merely expressing, in his inimitable way, a position that was already available and that would have been influential in any case. I concede the point, but add two cautionary observations.

First, Jackson’s resounding rhetoric in Barnette may have had more influence than this objection supposes. Small causes can produce large effects. “For want of a nail....” Borrowing from Pascal, we might call this the “Cleopatra’s nose” effect. Jackson did not invent the “no orthodoxy” position; but in the Darwinian struggle among competing views, a particularly enticing expression of one view might give it a competitive advantage over other views that have been articulated in cruder or clumsier form. That advantage might make a large difference. Who knows?

But, second and more importantly, it does not matter much whether Jackson’s Barnette opinion has been directly responsible for the sort of First Amendment jurisprudence that has unfolded in recent decades. I have no personal grudge against Robert Jackson. He was, as far as I know, an honorable man. For those of us who work in law, life would be more rewarding if more justices could write with his insight and flair. This Essay argues that the “no orthodoxy” position memorably articulated in Barnette has had a beguiling but baneful influence on our First Amendment discourses—and hence on our understanding of our community, and of ourselves. Barnette serves at least as a potent symbol or eloquent enunciation of that ill-conceived understanding. But whether Barnette itself is the principal

5. “Cleopatra’s nose: if it had been shorter the whole [face] of the earth would have been different.” BLAISE PASCAL, PENSEES § II, annotation 162, 202 (W.F. Trotter trans., Robert Maynard Hutchins et al. eds., William Benton 1980).
culprit or merely a glib spokesperson for a more diffuse set of culprits is not finally of much importance.

My argument, in sum, is that our constitutional discourse would be more cogent and candid and our self-conception more honest and healthy if Barnette's disjunctive formulation and all it entails were removed—"root and branch," as the saying goes—and replaced by a conjunctive formulation. The exhilarating rhetoric could be retained and embraced—and a fruitful discourse and honest self-understanding permitted (though not, of course, guaranteed)—with the amendment of only one word. An and for an or.

Section I briefly discusses the meaning and scope of Barnette's "no orthodoxy" position. Section II considers different though related ways in which the position is internally incoherent, practically untenable, and wholly inconsistent with the way government has operated, does operate, and will continue to operate in this or any other country. Section III considers five ways in which the "no orthodoxy" position is sometimes qualified—or might be qualified—in response to these difficulties, but argues that even so qualified the position is not viable.

The arguments and criticisms considered in these sections are neither novel nor especially insightful; on the contrary, they have been made before in various forms and contexts, and they are at least close to being obvious. Nonetheless, the objections seem to have no "sticking power." Why? Section IV considers, and criticizes, a familiar defense measure—what we might call the "plea of necessity"—sometimes adopted by the disciples of Barnette in an (so far successful) effort to fend off the obvious. I argue that this plea is misconceived and also, as Section V suggests, that the necessity is illusory.

There is an alternative to the delusional discourse inspired by Barnette. We could change a word. We could adopt the conjunctive formulation in place of the disjunctive formulation. An and for an or.

I. THE CONSTITUTION OF BARNETTE

Justice Jackson left no doubt that the constitutional commitment he was describing was not peripheral—not merely one commitment among many. The commitment was at—or simply was—the enduring core of our constitutional self-understanding. "If there is any fixed
BarneTrE's Big Blunder

star in our constitutional constellation. . .” If our constitution stands for anything, Jackson suggested, this is it.

And what is that “fixed star”—that core constitutional commitment? Taken at face value, the Barnette passage articulates a commitment consisting of two prohibitions. First, government may not “prescribe” what is orthodox in the realms of politics, nationalism, religion, or other matters of opinion. Second, government may not “force” citizens to “confess” any such orthodoxy.

These prohibitions are dramatically different in their scope. By itself, the second prohibition would amount to a sort of “no coerced professions of belief” or “no enforced orthodoxy” position. This position would resonate with, say, Justice Scalia’s dissenting opinion in Lee v. Weisman, the graduation prayer case. By contrast, the first prohibition—on “prescribing” beliefs—appears to be much broader, amounting to a general position eschewing any official or public orthodoxy (enforced or not).

To be sure, the meaning of “prescribe” is not perfectly clear. We may be tempted, in an effort to confine the scope of Barnette, to read “prescribe” narrowly. One way to do this would be to distinguish between “affirming” or “endorsing” a particular belief, on the one hand, and “prescribing” it, on the other. If I say “I believe all persons are of equal moral worth,” I affirm that proposition, maybe; but in order to prescribe the proposition perhaps I need to add “and you should believe it too.”

But this limiting distinction is at least elusive and probably illusory. That is because, to put the point simply, to say you believe something is to assert that you believe it is true; and to assert that something is true is necessarily to assert—or at least to imply—that other people who are interested in believing the truth should believe it too. Hence, to affirm something is necessarily to prescribe it, at least implicitly. (We will look at the possible distinction between “implicit” and “explicit” prescriptions later.)

To be sure, in our relativistic and truculently tolerant times we have grown accustomed to insisting that something can be “true for me” but not necessarily “true for you,” and vice versa. This usage presents complicated questions and equivocations that we cannot try to work through here. For present purposes it is enough to say that although the “true for me, not for you” ploy may sometimes serve a

valuable diplomatic function,\textsuperscript{7} it cannot maintain its integrity in the face of close reflection. Take the most promising case—what we sometimes call “matters of taste.” Suppose Dick says, “Strawberries taste better than raspberries.” Surely that sort of statement can be “true” for Dick but not for Jane, can’t it? But a charitable assessment will show, I think, that unless Dick means to assert something that is either nonsensical (such as that strawberries just have an “objective taste” that is not a taste to anyone) or manifestly false (such as that everyone in the world likes strawberries better than raspberries), then he is in fact saying, basically, that he prefers strawberries to raspberries. And that proposition—namely, that “Dick prefers strawberries to raspberries”—will be equally true (or false) for both Dick and Jane—and for everyone else. So even here, in a “matter of taste,” to affirm that proposition is necessarily to affirm it as true—and hence to recommend it for acceptance by anyone who is interested in the truth.

A different way to narrow Barnette’s “no prescription” prohibition would be to read the passage’s “or” as if it were an “and”: so prescription of belief would be forbidden only if coupled with coercion. We could accomplish a similar result by interpreting “prescribe” to mean not just any form of governmental sponsorship or endorsement of belief, but only sponsorship or affirmation backed by some sort of coercive pressure. Understood in one of these ways, Barnette would mean that government may endorse or promote favored beliefs so long as no undue pressure is put on citizens to go along.\textsuperscript{8}

\textsuperscript{7} Such talk may sometimes serve a diplomatic function because, as Professor Shiffrin correctly points out, there can be a difference between “logical entailment” and “social meaning.” In a related vein, I have elsewhere discussed and acknowledged the diplomatic use of the conceptually problematic vocabulary of “equality” and “neutrality” in the context of religion. See Steven D. Smith, Getting Over Equality: A Critical Diagnosis of Religious Freedom in America 22-25 (2001). But it also needs to be acknowledged, I think, that this distinction is a slippery one that can serve to permit an insulating self-deception (by those who explicitly or tacitly rely on it) as easily as it can be used to promote legitimate diplomacy. For example, if I understand his comments at the conference correctly (and I may not), Shiffrin believes that when the state (through its schools) teaches evolution, this teaching does not in its “social meaning” disapprove a six-day creationist view even though such disapproval is “logically entailed” by the state’s teachings. Hmm.... It is evident here that the notion of “social meaning” is distracting someone from fully appreciating what is logically entailed by the state’s teachings, but whom: is it the creationists, whose views are disapproved (but only as a matter of “logical entailment,” not “social meaning”), or is it the proponents of the public school curriculum,... or perhaps someone else? See also infra notes 51, 68.

\textsuperscript{8} Other readings are also possible, of course. For example, any sort of governmental endorsement might be construed as a subtle form of compulsion: Justice Kennedy’s majority opinion in Lee v. Weisman might gesture in this direction. This interpretive move would in
This sort of construction would be consistent with what the Court did in Barnette: as noted, the Court did not actually proscribe school-sponsored Pledge exercises, but merely forbade the state to force unwilling students to participate. In addition, a good deal of what Jackson wrote in the opinion—including his statement of the question and his repeated references to and condemnations of coercion or compulsion in matters of belief—might be cited in favor of some such narrower construction. Whether Jackson actually intended this narrower construction is unclear, however, in part because he depicted the alternative that was permitted—that is, school-sponsored Pledge exercises from which conscientious objectors would be excused—as “patriotic ceremonies [that] are voluntary and spontaneous.” It is as if school children were just spontaneously and wholly of their own volition congregating around the flag each morning to recite the Pledge. As the school prayer decisions later recognized, this depiction of a school-sponsored daily exercise seems manifestly unrealistic, and it muddies the question of whether officially prescribed ceremonies should be viewed as inconsistent with the position announced in Barnette. Still, whatever Jackson’s intent may have been, Barnette could be read more narrowly.

But the language of Barnette resists these narrowing constructions. The passage says “or”—not “and”—thus suggesting two related but still independent prohibitions. Conversely, interpreting “prescribe” to mean something like “prescribe coercively” renders the phrase introduced by the “or” redundant.

Read in its most natural sense, in sum, Barnette declares two prohibitions. Government cannot force us to confess any “right effect inflate the “no coercion” prohibition to make it coextensive with the “no prescription” prohibition. In that sense, it moves in the opposite direction from the interpretations mentioned above in the text, which effectively collapse the “no prescription” prohibition into the “no coercion” prohibition.

9. “The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority. . . .” W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 635-36 (1943) (emphasis added).

10. See, e.g., id. at 631 (“. . . we are dealing with a compulsion of students to declare a belief”), (“a compulsory salute”); id. at 632 (“. . . attendance is not optional”); id. at 633 (“It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief. . . .”), (“involuntary affirmation”); id. at 634 (“the compulsory flag salute”); id. at 640 (“The problem is whether under our Constitution compulsion as here employed is a permissible means. . . .”); id. at 641 (“attempts to compel coherence”), (“coercive elimination of dissent”), (“[c]ompulsory unification of opinion . . .”).

11. Id. at 641.

opinions.” But beyond that, government cannot prescribe any “right opinions.” And this broader proscription logically covers official affirmations and endorsements of particular opinions.

In reality, as we will see, this natural interpretation of Barnette has not been—and indeed could not be—consistently implemented. Often (as in Barnette itself) the courts, and other governmental institutions, have acted in a way more consistent with a narrower reading. Professor Shiffrin points out—correctly, I think—that no one can really believe and subscribe to the full scope of Barnette, and therefore almost no one does.13 In practice, judges or scholars may use the Barnette “no orthodoxy” passage opportunistically—brandishing the idea to dispatch orthodoxies they disapprove of, but sheathing it when a more congenial “right opinion” comes along. Or they may hold—in fact this seems to be a common view—that Barnette applies with full force in the realm of religion, but that outside the religious domain only the “no coercion” prohibition applies. With respect to religious beliefs, that is, government may neither “force” nor “prescribe,” but with respect to nonreligious opinions government may “prescribe” but not “coerce.”14

We will consider this “religion-specific” rendering of Barnette more closely later.15 For now, two observations are in order. First, Barnette itself does not so limit its scope. On the contrary, Barnette asserts that government is forbidden to “prescribe what shall be orthodox” not only in religion, but “in politics, nationalism, religion, or other matters of opinion.” And Justice Jackson went out of his way to make clear that the decision did not depend on the fact that the Jehovah’s Witnesses had a religious objection to participating in the Pledge.16

14. Thus, an early school prayer case ruled that it was not enough for public schools to avoid coercing students to participate in prayer; the schools had to forego the exercise altogether. Engel v. Vitale, 370 U.S. 421, 430-31 (1962). More generally, modern establishment doctrine holds that government must be “neutral” in matters of religion, and that government can neither speak nor act in ways that send messages (coercive or not) endorsing or disapproving of religion. Conversely, free speech doctrine forbids government to coerce professions of belief but does not preclude government officials, “high or petty,” from throwing their support behind particular beliefs.
15. See infra Section III.E.
16. “Nor does the issue as we see it turn on one’s possession of particular religious views.... While religion supplies appellee’s motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.” Barnette, 319 U.S. at 634–35.
Second, even as they adopt a "religion-specific" version of the "no orthodoxy" or "no prescription" prohibition, both courts and scholars commonly offer rationales that subvert the distinction between "religious" and "nonreligious" prescriptions and point to a broader application of *Barnette*—one more consistent with what the case itself explicitly said. Thus, by contrast to older free speech doctrines that used balancing or category tests mainly to prevent coercive restrictions on expression, modern free speech doctrine has come to be dominated by the ideal of *content neutrality*. Under this newer jurisprudence, regulatory "content distinctions" are presumptively dubious, and "viewpoint-based restrictions ... are almost automatically unconstitutional." And the rationale commonly given for this doctrine is that government must not "skew public discourse" by throwing its weight behind one side in a contested matter. But this rationale suggests that *Barnette*’s "no prescription" prohibition should not be limited to religion. After all, if government throws its considerable weight behind one side in a controversy (even in a noncoercive fashion), isn’t such prescription likely to "skew" the debate?

By the same token, the rationale commonly given for prohibiting prescriptions in the area of religion makes it difficult to explain why that prohibition should be confined to religion. Explaining the modern "no endorsement of religion" doctrine, justices have emphasized that government actions or utterances either endorsing or disapproving of any religion might cause some citizens to become alienated, or to feel like "outsiders" or "second-class citizens"—and on the basis of beliefs that they have a constitutional right to hold. But this phenomenon is hardly limited to religion. Citizens care deeply about matters of belief that would not typically be classified as "religious" and that they have a constitutional right to hold, and they may be alienated if they perceive government to be taking a position contrary to these central beliefs.

19. See infra notes 30–32 and accompanying text.
So it is too simple to say without qualification that *Barnette*'s prohibition on "prescrib[ing] what shall be orthodox" is limited to religion. We can say, perhaps, that this prohibition is most secure in the field of religion, where indeed it is widely taken as axiomatic, or as the one certainty in a notoriously chaotic jurisprudence. Thus, Andrew Koppelman argues that in the midst of raging controversies about the meaning of religious freedom it is nonetheless a secure "axiom" that the "Establishment Clause forbids the state from declaring religious truth."\(^{21}\) Kent Greenawalt concurs that "[t]he core idea that the government may not make determinations of religious truth is firmly entrenched," and Greenawalt himself heartily approves of that idea.\(^{22}\) Not only the clear language of *Barnette* itself, but also the rationales commonly offered in support of modern doctrines in both the religion and free speech areas, suggest a more general "no prescription" prohibition.\(^{23}\)

Consequently, the following discussion will first examine the "wide" interpretation of *Barnette* before proceeding to consider the more religion-specific version.

22. Kent Greenawalt, *Five Questions about Religion Judges Are Afraid to Ask*, in *OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH* 196, 197 (Nancy L. Rosenblum ed. 2000); see also Douglas Laycock, *Equal Access and Moments of Silence: the Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 7-8 (1986) ("In my view, the establishment clause absolutely disables the government from taking a position for or against religion. . . . The government must have no opinion because it is not the government's role to have an opinion."). Michael Perry elaborates on the theme:

No matter how much some persons might prefer one or more religions, government may not take any action based on the view that the preferred religion or religions are, as religion, better along one or another dimension of value than one or more other religions or than no religion at all. So, for example, government may not take any action based on the view that Christianity, or Roman Catholicism, or the Fifth Street Baptist Church, is, as a religion or church, closer to the truth than one or more other religions or churches or than no religion at all—or, if not necessarily closer to the truth, at least a more authentic reflection of the religious history and culture of the American people. . . . Similarly, no matter how much some persons might prefer one or more religious practices, government may not take any action based on the view that the preferred practice or practices are, as religions practice . . . . better—truer or more efficacious spiritually, for example, or more authentically American—than one or more other religious or nonreligious practices or than no religious practice at all.


II. Barnette's Soothing Delusion

Barnette's "no orthodoxy" position has achieved widespread acceptance among both justices and scholars, and its appeal is readily understandable. For government as for the rest of us, taking sides on controversial issues can be difficult and unpleasant. We are aware of our fallibility. And especially if the issue is passionately contested, we are likely to alienate those who disagree. So for many purposes, it would indeed be wonderful if we—if government—could simply avoid these difficulties—could maintain a position dispassionately above the fray.

Unfortunately, the "no orthodoxy" position is also embarrassed by several closely related objections. To begin with, the "no orthodoxy" principle is internally contradictory. And it demands what is impossible. Far from being a "fixed star in our constitutional constellation," the principle is in fact radically incongruent with our constitutional traditions. Finally, real compliance with the principle, even if it were possible and not wholly contrary to our traditions, would likely be injurious or even devastating to the political community. These are hardly trivial objections, so we need to look at them a bit more closely.

Barnette's "no orthodoxy" passage is self-contradictory because the passage itself comprises a sort of mini-orthodoxy, or a prescription of what shall be orthodox in an important "matter of opinion" centrally affecting "politics" and law (and "religion," and probably "nationalism" as well). It is not foreordained, after all, that government officials must avoid prescribing what beliefs are favored within the subject matter categories listed in Barnette. Governments have often issued such prescriptions—indeed, as we will notice shortly, governments in this country have issued and continue to issue such prescriptions routinely—and many people have believed that governments should so prescribe. Barnette flatly declares these "pro-prescription" beliefs to be not orthodox—not "right opinion"—and it declares the contrary view to be the constitutional orthodoxy; indeed, Barnette's phrase "fixed star" is little more than a metaphorical equivalent for "orthodoxy." In this respect, Barnette's "‘no orthodoxy' orthodoxy" contradicts itself; it is like the pastor who repeatedly declares during worship that there must be absolutely no talking, or like the sign on the school wall that says no signs are permitted on the wall.
This embarrassment may seem to be more a conceptual curiosity than a substantial objection—one that can be cured with the help of a small exception: there shall be no official orthodoxy except this one. But a second objection is more practical and less easily dismissed. This objection argues that the anti-orthodoxy principle asks the impossible, because government inevitably will endorse and in that sense prescribe some beliefs, and will explicitly or tacitly disapprove of other beliefs.

Sometimes the endorsement will be merely implicit. Whenever government acts—by passing a law, by declaring a policy—it acts on the basis of factual beliefs about how the world is and of normative beliefs about how the world should be (and on the basis of rejecting factual and normative beliefs contrary to those it accepts and acts upon); and government thereby at least tacitly endorses some beliefs and rejects others. Andrew Koppelman observes that "[t]he most obvious way in which the government expresses an opinion is through the passage of legislation. In this arena, the government has available to it a particularly powerful type of symbolic conduct that is unavailable to other actors." Often, though, the prescriptions are more overt. Governments and their agents will often issue official statements, or official preambles or explanations, or will sponsor informational campaigns or teaching. Thus, there was no question during much of the last century that governments in this country were for capitalism and against communism, for democracy and against totalitarian regimes, for abstinence from and against addiction to drugs and tobacco. Governments tried in a whole variety of ways to approve certain beliefs (for democracy, for free market economics, for drug and tobacco abstinence) and to induce citizens to accept those beliefs.

24. Of course, such exceptions (of the "I forbid everyone except myself to do X" variety), though they may overcome the charge of formal inconsistency, do little to deflect more substantive suspicions of inconsistency. ("If you think X is so bad, why is there an exception for you?")

25. Koppelman, supra note 21, at 111. Koppelman illustrates his point:
Suppose a statute is passed that makes it a crime for anyone to break the commandment to obey the Sabbath, as the commandment is understood by Orthodox Jews. That is, the law makes it a felony to operate machinery on the Sabbath, to drive a car, to turn on an electric appliance, or to make a telephone call, and the law applies to private as well as public conduct, so that one can violate it by turning on the television while one is alone at home. There is no substantive constitutional right to do any of these things. The problem with this law lies in the message it contains: It implicitly asserts the correctness of the commandment to keep the Sabbath holy and the Orthodox rabbis' interpretation of that sentence.

Id. at 111-12.
Probably the most obvious and pervasive prescription of belief occurs in the context that generated Barnette itself—that is, in public schools. Under the insistent tutelage of the Supreme Court, for example, schools typically teach children to understand and accept the tenets of evolution, and the schools avoid (or are supposed to avoid) teaching "creationism" to children.26 And of course the public schools teach or "prescribe" what shall be "orthodox" or "right opinion" on a whole host of other (often controversial) matters as well. Justice Jackson was able to hide (at least from himself) the huge discrepancy between the "no orthodoxy" position he announced and the reality of public education only by depicting the school curriculum in quite fantastic (though by now fairly standard) terms—as "not... partisan or enemy of any class, creed, party, or faction."27 In this respect, Justice Frankfurter's dissent was more honest in recognizing that the state does attempt, through its schools, to inculcate controversial orthodoxies in a variety of matters.28

If these various pronouncements and measures are not ways of "prescrib[ing] what shall be orthodox" in matters of opinion, then it is not clear what content that phrase might have. This sort of prescription of belief, it seems, is inevitable: it is a central part of what government does. A government must act, and hence it must act on some set of beliefs: so government could hardly avoid endorsing the

28. See id. at 659-60 (Frankfurter, J., dissenting) (citations omitted):

Consider the controversial issue of compulsory Bible-reading in public schools. The educational policies of the states are in great conflict over this. . . . The requirement of Bible-reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great English educational literature. Is this Court to overthrow such variant state educational policies by denying states the right to entertain such convictions in regard to their school systems because of a belief that the King James version is in fact a sectarian text to which parents of the Catholic and Jewish faiths and of some Protestant persuasions may rightly object to having their children exposed? On the other hand the religious consciences of some parents may rebel at the absence of any Bible-reading in the schools. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching a biology that contradicts such Biblical account. What of conscientious objections to what is devoutly felt by parents to be the poisoning of impressionable minds of children by chauvinistic teaching of history? This is very far from a fanciful suggestion for in the belief of many thoughtful people nationalism is the seed-bed of war.
beliefs it acts upon. Nor will government’s prescription of beliefs be limited to this sort of tacit endorsement—unless, that is, we want government not only to get out of the business of public education but, more radically, to cease giving explanations of its decisions. It is hard even to imagine what such a world would look like—executive orders without explanations, statutes enacted without committee reports or preambles or findings, judicial decisions that strictly confine themselves to terse decrees such as “Plaintiff loses” or “Judgment reversed.” We can be confident that no such world is in the offing—which is to say that the “no orthodoxy” position is not one that government will or could adhere to, even approximately.

So it is not surprising that in our history, governments in this country have routinely violated the anti-orthodoxy principle on a massive scale, and they continue to do so. Given this reality, the notion—one that, as noted, has become the core of modern free speech jurisprudence—that government must not regulate speech on the basis of content in order to avoid “skewing public debate” seems almost laughable. The argument here does not necessarily imply that the “content neutrality” focus of modern free speech doctrine is misguided—only that the “no skewing” rationale commonly given for that doctrine is wildly out of touch with reality. Sanford Levinson describes the incongruity:

This image of the state as . . . benignly neutral . . . is quite naive, not least because it almost wholly fails to pay adequate attention to the fact that the state is often an active participant in the intellectual marketplace. The easiest examples, of course, involve presidents giving major policy addresses or teachers using state-mandated

29. Nor could government avoid this consequence by simply refusing ever to act, because passivity itself will be consistent with one set of beliefs and not with others: a government that adopts an aggressively passive *laissez faire* stance toward issues of economic regulation, for example, does not thereby avoid endorsing some controversial economic and political views over others.

30. Larry Alexander notices the conundrum:

When government becomes an educator or patron of scholarship, research, and the arts, its tension with the First Amendment’s central values is most acute. If the government may not establish an evaluative orthodoxy regarding citizens’ exchanges of information, why may it do so when it speaks itself, as it does through public education, the funding of research, scholarship, the arts, public broadcasting, family planning counseling, and myriad other enterprises? . . . Why the government may monetarily subsidize speech that promotes live birth over abortion but may not subsidize labor speech by granting an exemption from a general ban on demonstrations near schools is a theoretical mystery.


textbooks within the public school system. Both regularly articulate, clothed in the full symbolic and actual authority of the state, highly contestable—and completely unneutral—views on important political and cultural matters. The danger facing those who disagree with the state’s views comes, most often, not from any plausible fear of classic censorship—i.e., overt punishment for offering views repugnant to state authorities—but, rather, from being drowned out of the marketplace by the often superior resources of the state.  

Nor has this governmental practice of endorsing and promoting particular beliefs over others—and in this significant sense “prescribing what shall be orthodox”—been viewed as merely an unfortunate necessity. On the contrary, many of the most revered events and chapters in our constitutional tradition have resulted directly from this practice, and indeed consist of just such “prescriptions.” What were Jefferson’s Virginia Statute for Religious Freedom, or the Declaration of Independence, or Lincoln’s Gettysburg and Second Inaugural addresses, or the Fourteenth Amendment (which was designed and has been celebrated for its rhetorical value as well as for its positivist legal content), or John Kennedy’s Inaugural Address—or, for that matter, the “no orthodoxy” passage in Barnette itself—if not officially issued endorsements of what were taken to be important truths, and thus were recommended to citizens (and others) for acceptance as the “right opinion”—the orthodoxy?  

Given this history, John Courtney Murray came closer to capturing our constitutional tradition than Justice Jackson did. Murray observed that our constitutional order—or what he called “the American Proposition”—

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

These are weighty objections to Barnette’s “no orthodoxy” declaration; I confess that I do not see how the declaration can survive them (though we will look at some standard rejoinders and defenses


33. William Nelson suggests that the framers of the Fourteenth Amendment understood it “as a rhetorical venture designed to persuade people to do good, rather than a bureaucratic venture intended to establish precise legal rules and enforcement mechanisms.” William E. Nelson, The Fourteenth Amendment 9 (1988).

34. John Courtney Murray, We Hold These Truths ix (1960).
shortly). Suppose, though, that these objections could somehow be deflected—that government could somehow carry on its business without ever expressing its official support for one set of controversial beliefs over others, and that we were willing to disregard any tradition-based reasons that might favor such endorsement. Would it be wise henceforth to shun any official prescriptions favoring some beliefs?

We have already noticed one powerful rationale favoring a policy of governmental silence in matters of belief: any governmental endorsement or prescription runs the risk of alienating those citizens whose beliefs are incongruent with the position favored by government. But there is a competing (and, to my mind, overriding) consideration, which might be presented in this way: the concern about alienating some citizens already presupposes something that people might be alienated from. More specifically, the concern presupposes a political community represented by a government that is more or less securely in place, and hence that enjoys at least some degree of allegiance from the broad mass of citizens. Academics in particular often seem remarkably complacent in taking that community and secure government for granted, as if these things were somehow given by nature. But of course a quick glance around the world should be enough to show that stable government supported by broad citizen allegiance is not guaranteed. So what is the basis of the general allegiance necessary to a secure government?

The answer is complex, no doubt, but at least part of the answer surely is that most citizens suppose that the government stands for certain beliefs that they and their fellow citizens share. If government were suddenly to adopt a stance of standoffish agnosticism toward these beliefs, therefore, it is true that citizens who happen to reject those beliefs would have less cause to feel alienated; but, conversely, the citizenry in general would have less reason to give their loyalty to the government in the first place.

These assertions raise complicated questions, obviously. One view, common today, sees people largely as “interest-seekers”: for example, public choice theory and evolutionary psychology (both increasingly popular among law professors), adopt this conception of the person.35 By this view, perhaps, citizens support government not

35. For a discussion, see Steven D. Smith, Believing Persons, Personal Believings: The Neglected Center of the First Amendment, 2002 U. ILL. L. REV. 1234 [hereinafter Smith, Believing Persons].
so much because it stands for beliefs they share, but rather because (and insofar as) it promotes their "interests." One version of this approach suggests that our own political community has persisted and flourished not so much on the basis of any shared commitment to fundamental propositions, such as the "self-evident truths" of the Declaration of Independence, but rather because we have managed to devise institutions and policies that have promoted a successful commercial republic. In this vein, defending the Supreme Court's rejection of free exercise exemptions in *Employment Division v. Smith*, George Will argued that the framers "wished to tame and domesticate religious passions of the sort that convulsed Europe. They aimed to do so... by establishing a commercial republic—capitalism. They aimed to submerge people's turbulent energies in self-interested pursuit of material comforts."

More generally, a good deal of modern liberal theory—John Rawls's theorizing is a leading example—attempts to separate the constitution of the political community from (and to insulate it against) claims about truth. "Political liberalism's preferred strategy," Jody Kraus explains, "is to substitute the idea of reasonableness for truth." Critics argue that the modern liberal aversion to truth claims is self-defeating, culminating in a "Nietzschean self-dissolution of enlightenment." Be that as it may, *Barnette's* resonance with this truth-coy strain of modern liberalism may help account for the opinion's remarkable popularity.

My own view, by contrast, is that what makes us persons—and the particular persons we are—is not so much our "interests" as our central, constitutive beliefs, and that a community that neglects or ignores this dimension of our personhood will have at best a weak claim on our respect. I have argued at length for this view elsewhere; for now, it is enough to say that if something like this view is right, then it would be imprudent—indeed, potentially devastating—for the political community to eschew official declarations of belief on matters of importance, even though those declarations will be contro-

versial. A republic that stands for something may indeed alienate those who disagree, but a republic that stands for nothing will have no claim on anyone’s allegiance.

Evidence of this danger may already be apparent in the changed tactics and attitudes that some conservative Christian groups have adopted in recent years. Kathleen Brady reports that “[t]he triumphant effort of the 1980’s to convert and reclaim American culture has ended”; instead, there is a “growing belief among conservative religious groups that religion is best promoted and protected through private expression and activity rather than through state action in the public realm.”\(^4\)

If Brady is right, these developments presumably ought to be gratifying to proponents of the “no orthodoxy” position. But Brady also notes that this altered agenda signifies a sort of withdrawal from the public realm. “[I]nstead of battling for the reform of public education,” she observes, “many conservative Christians are looking towards a solution in private religious schools and home-schooling.” And “[i]n politics as well, conservative Christians have been withdrawing. . .”\(^4\)

This phenomenon of withdrawal should not be surprising. If a politician is unwilling to affirm what you believe, you will probably not vote for her or donate time or money to her campaign. In the same way, if a political community disdains to commit itself to truths that citizens think important, those citizens will naturally have less reason to commit themselves to the community.

In sum, for all of its initial appeal (at least if we are thinking narrowly about the potential for alienation), the “no orthodoxy” position is self-contradictory, impossible to implement, and radically incongruent with the way governments in this and other countries have behaved or could behave; and it is very likely subversive of the political community as well.

How then has the position managed to maintain such widespread support?

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\(^4\) Id. at 1157–58.
III. RETURN TO REALITY? CONFINING THE "NO ORTHODOXY" POSITION

At least part of the answer is that the understanding of Barnette's "no orthodoxy" position has incorporated, at least tacitly, qualifications and distinctions that are calculated to make the position more viable without compromising its basic prohibition on governmental prescription of belief. In this section we will notice five possible distinctions that might be and sometimes are employed (though often subtly or perhaps even subconsciously) to qualify the "no orthodoxy" position. I will argue that none of these distinctions succeeds in salvaging the "no orthodoxy" position or in deflecting the objections discussed in the preceding section.

A. Public and Private Prescriptions

The first qualification explains that the prohibition on prescribing what shall be orthodox applies only to government; hence, private individuals are perfectly free to declare their beliefs to be orthodox, or the "right opinion," as are persons who happen to be government officials so long as they are not acting as officials. Supplementing Barnette, we might say that the prohibition on prescribing what shall be orthodox applies to "officials, high or petty, when they are acting as officials." Some such qualification is suggested by current First Amendment jurisprudence: free speech doctrines seek to prevent discrimination against the private expression of anyone's views on the basis of content, even if the content is religious, while establishment doctrine forbids government to send messages endorsing or disapproving of religion. Though much in our law turns on the so-called public/private distinction, that distinction is hardly serviceable for the purpose of maintaining Barnette's prohibition on "prescribing[ing] what shall be orthodox" as against the objections noted earlier. One criticism, recall, asserts that every law, every governmental decision, every

44. For some scholars and jurists, this combination of speech and religion doctrines is the response of choice to the question of "religion in the public square." See, e.g., Douglas Laycock, Freedom of Speech That Is Both Religious and Political, 29 U.C. DAVIS L. REV. 793 (1996); Laycock, supra note 22; see also Kathleen A. Brady, Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Divisions on the Court Regarding Religious Expression by the State, 75 NOTRE DAME L. REV. 433, 554-59 (1999).
policy (including, most conspicuously, the decisions and policies that shape and implement the public school curriculum) reflects—and thereby at least tacitly endorses, and hence "prescribes"—the set of beliefs that provides the reason for the decision, law, or policy (and the rejection of contrary beliefs). It is no answer to this objection to say that the officials who make those decisions or policies hold the supporting beliefs as private individuals, but that government does not thereby endorse the beliefs. Government is not some Platonic abstraction, after all, or some ghostly superentity with a mind and beliefs of its own; it is composed of persons, who do not come bifurcated into public and private dimensions. Or even if they were so bifurcated, it is precisely the beliefs that animate their public decisions and actions that are in question.

Not surprisingly, therefore, even so qualified the "no orthodoxy" position remains radically inconsistent with the way government has operated in this country, and with the way it continues to operate. Are we to suppose, for example, that the Virginia Statute for Religious Freedom, when it declared coercion to be inconsistent with the plan of "Almighty God" and "the holy Author of our religion," was merely expressing the private opinions of Jefferson and Madison? Or that the solemn affirmations of the Declaration of Independence are no more than an expression of Jefferson's (and other signatories') personal views? Perhaps, with effort, we can imagine that Lincoln was speaking as a private citizen when he delivered the Gettysburg Address—he was a noted orator, perhaps, invited for the occasion, who incidentally happened to be president—but any such characterization defies plausibility with respect to his monumental Second Inaugural Address. Lincoln was, after all, being reinaugurated as president. It would be similarly fantastic to describe the affirmations of the Fourteenth Amendment—or the majority opinion in Barnette—as mere private expressions.

In short, our constitutional tradition is importantly composed of public affirmations of important truths. And on a more mundane level, when teachers in the public school system teach the approved curriculum—when they teach, say, evolution but not creationism (or, subversively, vice versa)—they are surely speaking as public employees; if they were not, then there should be no constitutional objection to their proselytizing on behalf of their religious opinions.45

45. I have argued here that clarifying Barnette's prohibition to make clear that it applies only to governmental prescriptions of opinion does nothing to avoid the objections asserting that
For all of its usefulness in some contexts, the public/private distinction usually has a fictional aspect to it. Fictions sometimes serve a useful purpose in law. In this context, though, the fiction is utterly transparent—too transparent to preserve the pretense required by the "no orthodoxy" position.

B. Explicit vs. Implicit Prescriptions

A different (and probably more controversial) qualification might suggest that *Barnette* means only that government cannot *explicitly* prescribe what shall be orthodox in matters of opinion; implicit endorsements are permissible. In this vein, Franklin Gamwell concedes that government simply cannot avoid implicitly taking positions on what he calls "the comprehensive question" or the question of "human authenticity as such." For example, "teaching constitutional or statutory prohibitions of racism more or less obviously implies that a religious assertion of white supremacy is false." Even so, Gamwell argues, government is constitutionally forbidden to take any position on these questions *explicitly.* In a similar spirit, Kent Greenawalt argues that in some contexts government officials may rely on religious or other controversial grounds in making decisions but should avoid expressing those grounds in their public justifications.

This qualification seeks to deflect the objection that every governmental decision or action will necessarily convey approval of some beliefs and disapproval of others: the qualification in effect concedes the objection but attempts to mitigate its force by confining the prohibition to explicit approvals and disapprovals. But limiting the *Barnette* prohibition to explicit prescriptions does not avoid the embarrassments noted earlier. In the first place, as noted earlier, it is

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47. *Id.* at 185–95.
hard to imagine a world in which government manages to act without explicitly affirming the beliefs on which it acts, at least in many instances. And in any case, such an image is less a pleasant fantasy than a nightmare, because such a government—one which acts and decides without articulating the reasons for its actions and decisions—would be contrary to the ideals of openness and public rationality that have been so strenuously cultivated during our history (in due process jurisprudence, for example, or in administrative law).

The "no explicit orthodoxy" position also remains radically incongruent with both our constitutional tradition and our current practice. For example, all of the expressions noted above—the Virginia Statute for Religious Freedom, the Declaration of Independence, the Gettysburg Address, the Fourteenth Amendment, and the Barnette "no orthodoxy" passage—were plainly explicit affirmations, not implicit ones. The same is true, obviously, of the teachings contained in the public school curriculum.

More generally, the proposed distinction between explicit and implicit prescriptions is too delicate to do useful work in this context. "Explicit" and "implicit" do not denote distinctly marked categories. Suppose we are forced to choose between alternatives A and B (Bush or Gore, perhaps), and you say, "Choose A": Is your disapproval of B explicit or merely implicit? Given these alternatives, is there any real difference (or, if we are concerned about "social meaning," will there be any perceived difference) between saying "Choose A" and saying "Choose A, not B"? Or, to borrow Gamwell's example, if the government teaches that racial discrimination is wrong, is the obvious corollary that groups who advocate racial discrimination are wrong on the issue an explicit or merely an implicit part of that teaching? If a science teacher tells the class that life on earth evolved gradually over millions of years, he clearly indicates that living things didn't appear suddenly in their present form within a six-day period: is this rejection of the six-day theory explicit or implicit?

Imagine the teacher who, accused by fundamentalist parents of having taught the falsity of their religious beliefs, protests, "I said the process took hundreds of millions of years, yes; but I never said it wasn't completed in six days. Don't put words in my mouth." Imagine how we would react to this defense. "What do you take us for? Imbeciles?"
More importantly, it is hard to imagine why anything of constitutional significance should hinge on this subtle distinction. The courts have not been fooled—and have not cared about the distinction—when an implicit message advocates religion, for example ("We said 'creation,' but we didn’t actually say 'God'"; and it is hard to see why they should care. Gamwell admits that an implicit message will sometimes be "more or less obvious"; consequently, an implicit but obvious disapproval of someone’s beliefs is likely to produce exactly the same kind of alienation that an explicit disapproval would.

Sometimes, of course, an "implicit" message might be less alienating. But then sometimes it might be more alienating (because it might appear insidious or surreptitious). Religious parents, for example, might feel that if the public schools are going to teach ideas contrary to the faith their children have learned at home or at church, the schools should be upfront about what they are teaching rather than subtly subvert the children’s faith while purporting to be “neutral” and “objective” in matters of religion. And in any case, the pertinent distinction for these purposes would not be “explicit/implicit,” but rather something like “perceptible/imperceptible,” or perhaps “offensive/inoffensive.”

In sum, the explicit/implicit distinction is an elusive one that has no status in our constitutional traditions and little or nothing to recommend it as a constitutional boundary regulating what the government can and cannot say and do.

49. Cf. Koppelman, supra note 21, at 110–11 ("It is a familiar point in free speech law that conduct which is not itself speech may nonetheless communicate a message and so be appropriately treated as speech. . . . If government cannot declare religious truth, then it cannot engage in conduct the meaning of which is a declaration of religious truth.").


51. In this respect, I accept Professor Shiffrin’s observation that there can be a difference between “logical entailment” and “social meaning”—which is to say that the meaning that different observers in different contexts will perceive in a message will not be coextensive with the message’s logical implications—but I doubt that this distinction can do the work that Shiffrin hopes it can. See supra note 7; infra note 68.


After all, if I am in a minority position, I would rather possess my religious identity in the face of a majority religious order overtly at odds with me—so long as my subordinate existence is constitutionally ensured—than to stand in the midst of a scheme whose mask of neutrality will strip my identity from me—or from my children—without our even realizing it.
C. "Consensus" vs. "Sectarian" Prescriptions

A third, Rawlsian-inspired distinction, might try to differentiate between beliefs that are supported by a "consensus" of diversely-minded citizens and, conversely, beliefs that are "sectarian"—a species of opinion to which Enlightenment liberalism has always been hostile. By this view, government should be permitted to teach and "prescribe" views supported by a democratic consensus; the prohibition on "prescri[bing] what shall be orthodox" would be limited to "sectarian" views.

An initial and obvious challenge for this proposal is to define what counts as a "consensus" opinion. In ordinary usage, "consensus" seems to be a numerical notion, or a matter of counting noses: a "consensus" opinion is one that a majority of citizens, or perhaps nearly all citizens, would agree with. So government could prescribe opinions that most citizens hold. But this numerical approach seems radically alien to the essential spirit of Barnette, which sought self-consciously to protect minority views from just this sort of majoritarian imposition.

A more promising approach would understand "consensus" as a term of art, meaning something like "reachable by more than one route," or "held by different citizens on different kinds of grounds." In a Rawlsian scheme, for example, the "overlapping consensus" is not necessarily one that enjoys majority support—Rawls seems blissfully unconcerned about how many citizens actually embrace the "overlapping consensus" he celebrates—but rather one that citizens might converge on from a variety of different (though emphatically not all) "comprehensive views."

53. In saying that this distinction is "Rawlsian-inspired," I do not claim to be offering a correct interpretation of Rawls's own position. Hopelessly hazardous claims should be avoided where possible. Cf. Paul J. Weithman, Citizenship, Reflective Endorsement and Political Autonomy, 78 MOD. SCHOOLMAN 135 (2001) (observing that "[m]uch of Rawls's exposition and argument is extremely puzzling. The anomalies multiply when some of his more recent remarks in 'Public Reason Revisited' are juxtaposed with some of his earlier ones in Political Liberalism.").


55. See, e.g., W. Va. Bd. Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities. . . .").

Thus understood, the distinction between "consensus" and "sectarian" views offers an initially promising prospect for rehabilitating Barnette's "no orthodoxy" position. The crucial claim might assert that "consensus" opinions, because they presumptively reflect a variety of different substantive positions, are not an "orthodoxy" per se so much as a sort of common meeting place. This claim then suggests a way of deflecting all of the criticisms noted in the preceding section. First, insofar as different citizens might subscribe to the "no orthodoxy" position itself on a variety of different grounds, that position would not count as an "orthodoxy," so the charge of internal contradiction would be answered. In the same way, the argument that government necessarily endorses and acts upon beliefs while rejecting other beliefs could be deflected. Although it is true, that is, that government acts upon and endorses beliefs of various kinds, so long as those beliefs are held by different citizens on different grounds, they are not "sectarian" and hence are not a forbidden "orthodoxy." Likewise, although the Declaration of Independence, the Virginia Statute for Religious Freedom, the Gettysburg Address, and other such celebrated pronouncements may come to us dripping with solemn affirmations of belief, those beliefs are perhaps not an "orthodoxy" in the offensive sense.57 Finally, by limiting itself to prescribing beliefs supported by a consensus, government adopts a course calculated to elicit the allegiance of citizens of a variety of different views.

So, does this construction salvage Barnette's "no orthodoxy" position, rendering it consistent with the practices and demands of government? The construction surely identifies an important political and prudential consideration—one that has operated powerfully throughout our history to secure stability and loyalty from a diverse citizenry. Governments in this country have often striven—and politicians have an obvious incentive—to be as inclusive and "nonsectarian" as circumstances permit.58 Taken as an interpretation of Barnette, however, or as a construction of a constitutional prohibition

57. The same conclusion would seem to hold for the Pledge of Allegiance itself, however, which surely enlists the support of differently-minded citizens on different grounds. The Pledge, in other words, would seem to be more a "consensus" type of statement than a "sectarian" one,... and hence not an "orthodoxy" (by this interpretation),... and hence not within the scope of Barnette's prohibitions. Thus, adoption of this interpretation of Barnette might entail overruling the actual decision in the case.

58. See, e.g., Noah Feldman, Nonsectarianism, 18 J.L. & POL. 65 (2002); Smith, Believing Persons, supra note 5.
on "prescrib[ing] what shall be orthodox," this consensus proposal comes to look like little more than a piece of trickery, or semantic sleight of hand.

After all, beliefs and belief-systems do not come nicely sorted into those that can be reached through a variety of different routes and, conversely, those that can be supported only from a single position and hence are "sectarian." Take, as an example, Christianity. Although it may be rhetorically useful for some purposes to depict "Christianity" as a monolithic position, this depiction seriously distorts the historical reality. "Christianity" in this country plainly encompasses Catholics, Protestants, and Orthodox believers, with the inclusion of some other groups—Mormons, for instance—generating more controversy. And this description still simplifies drastically, because there are huge differences—theological, ethical, aesthetic, cultural, and political—among different sorts of Catholics, and perhaps even larger differences among different species of Protestants. Some Christians cherish and defend, while others spurn, creedoal statements of belief; those who favor creeds often disagree as to the contents. In addition, Christians differ tremendously in what we might call the epistemological and existential routes they take to arrive at a "Christian" outlook. Some have credited the various philosophical or "rationalist" arguments developed over the centuries by the likes of Anselm and Aquinas. Others have rested more on scripture and tradition, . . . or institutional authority, . . . or personal spiritual experience. A few may embrace the sort of thinking developed by Pascal, who suggested that Christianity is more faithful than competing views to what we know about the human condition, with its paradoxical combination of implicit dignity and visible degradation. And there are surely people—millions of them, possibly—who embrace Christianity in some form or another mostly for its this-worldly (one might even say "secular") benefits in providing community and guidance, for example, and who may even be agnostic or

59. The "secular" commitment to Christianity has deep roots in this nation's history. Philip Hamburger notes that in the founding period, "late eighteenth-century establishment writers . . . stressed that civil government financed religion for civil ends—that religion had civil benefits, which civil government supported for its purely civil purposes." Hamburger describes this as a "secular argument" for religious establishment. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 67 (2002). Dissenters accepted the premise, though not the conclusion. "More substantively, [the dissenters] agreed with establishment writers that religion and especially the religion of their country provided an essential moral basis for government. . . ." Id. at 73. As Hamburger's study shows, this theme has been pervasive (though often controversial) throughout the country's history.
apathetic regarding the theological content of traditional Christianity. Amid all of these differences, the monolithic depiction of "Christianity" looks farfetched; indeed, it is very hard to say whether there is any common core that gives coherent meaning or scope to a term like "Christianity," or what that common core is. 60

These variations in no way undermine the value of political efforts to be as inclusive or "nonsectarian" as varying circumstances permit. But for those who favor a constitutional prohibition on governmental prescription of "orthodoxy" (now understood to be limited to "sectarian" or monolithic positions), such complexity creates a dilemma. Suppose that government issues a proclamation, for example, asserting that "Christianity is the favored religion in this country. We are a 'Christian Nation.'" Does this proclamation offend the "no orthodoxy" prohibition?

One answer, accepting in good faith the view that "orthodoxy" occurs only when a belief represents only "one position" or can be arrived at in only one way, would conclude that "Christianity" is not an "orthodoxy"—far from it. (And this conclusion would hold a fortiori for "theism"—as in the phrase "one nation, under God"—which could encompass not only Christianity but also Judaism, Islam, and various other faiths.) But this conclusion surely would be unacceptable to supporters of Barnette in any plausible version. More generally, if Barnette prohibits the prescription and enforcement only of monolithic views that can be reached by only one route, then it prohibits precious little (if anything).

But the practical alternative, it would seem, is to use the terms "consensus," "sectarian," and "orthodoxy" in a more ad hoc and intuitive fashion, labeling "sectarian" those positions that (however arrived at by their adherents) seem inappropriate for public prescription, while arguing that those positions one favors for such prescription are not "orthodoxies" but rather reflections of an "overlapping consensus." "Christianity" may be at least as theologically and epistemically and culturally and politically diverse as "liberal democracy"; nonetheless, Barnette's devotees somehow know that a "Christian Nation" proclamation would be "sectarian" and, conversely, that teaching the ostensible tenets of "liberal democracy" is merely prescribing what is supported by a "consensus."

60. For a recent study highlighting many of the variations on a global level, see PHILIP JENKINS, THE NEXT CHRISTENDOM, ch. 6 (2002).
This more rhetorical deployment of notions like "consensus" is familiar enough: just spend a few hours reading Rawls or like-minded theorists.\(^6\) And perhaps the rhetoric provides some sense of comfort, or of self-satisfaction, for those who use the rhetoric in this way and who already share the conclusions that are being argued for. But it is hard to perceive any other advantages—much less any theoretical justification—for this manipulative use of the notion of "consensus."

D. "Negative" vs. "Positive" Prescriptions

A fourth way of qualifying the *Barnette* "no orthodoxy" position might suggest that although government may not prescribe what *shall* be "orthodox," or "right opinion," government is permitted to prescribe what *shall not* be "orthodox." *Barnette,* in other words, might be understood as prohibiting positive prescriptions of belief while allowing what we might call "negative" prescriptions of belief. This sort of distinction might serve to excuse some common public teachings ("Don't do drugs." "Don't smoke." "Don't commit violence." "Communism is bad."): government isn't "prescribing" in a positive sense, we might say, so much as it is "prescribing against."

This qualification of *Barnette*'s "no orthodoxy" position, like the previous one, might at first inspection seem attractive because "negative" prescriptions seemingly would leave citizens free to decide what they *do* believe, and would merely encourage them *not* to accept certain disfavored opinions. Consequently, some theorists occasionally appear to invoke something like this positive/negative distinction.\(^6\) But I am not aware of any sustained defense of this qualification. And the omission is not surprising, because upon consideration this distinction has little to recommend it.

The main difficulty with this position is that the distinction between "negative" and "positive" prescriptions is illusory. As a logical matter, "not not-p" equals "p." Hence, any prescription of belief can be phrased in either positive or negative terms: "God exists" and "Atheism is false" are substantially equivalent propositions. And historically, from the early Christian period through the medieval inquisition through modern "Red Scare" persecutions through anti-evolution laws like the one struck down in *Epperson v. Arkansas,*\(^6\)

\(^6\) For further discussion, see Smith, *Enlightenment,* supra note 38.
\(^6\) See, e.g., infra notes 75–76 and accompanying text.
\(^6\) 393 U.S. 97 (1968).
the suppression of opinion has often been carried out through "negative" prescription—that is, through the identification and attempted elimination of "heresy" or perceived error.

Moreover, even if the distinction were conceptually viable, the rationales for the "no orthodoxy" position would not support it. Telling citizens that a belief they hold is false is as likely to produce alienation, or a sense of "second-class" status, as is an affirmation of a contrary belief. Conversely, "positive" prescriptions might leave citizens as much or more space to decide what they actually believe as "negative" prescriptions would. "Theism is true" (or "one nation, under God") is logically and practically compatible with a much broader range of views than, say, "Anti-trinitarian views are not true" is. Despite its initial appeal, in short, a qualification based on an ostensible distinction between "positive" and "negative" prescriptions, or between "prescribing" and "prescribing against," does nothing to deflect the objections to the "no orthodoxy" position.

E. Religious vs. Secular Prescriptions

A fifth qualification of Barnette's "no orthodoxy" position would apply the Barnette prohibition on prescription only to religious beliefs or opinions. As discussed earlier, Barnette itself does not limit its prohibition in this way, but rather describes its scope as "politics, nationalism, religion, or other matters of opinion." Nonetheless, courts and scholars, fortified perhaps by the fact that the First Amendment contains a clause specifically disestablishing religion,64 have often supposed that the prohibition applies largely or solely to religious prescriptions.

So, can Barnette, thus truncated, avoid the objections to a "no orthodoxy" position discussed above? We might start with an obvious point: even when limited to religious prescriptions, the "no orthodoxy" position runs contrary to our constitutional traditions and

64. The exact connection between a religion-specific Barnette prohibition and the fact of a clause disestablishing religion is loose and complicated. It would be hard to argue, I think, that the framers of the First Amendment's Establishment Clause consciously intended to create this sort of prohibition, see STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17-54 (1995), nor does the text itself mandate such a construction. There are plenty of other (at least equally plausible) constructions. For example, the provision might easily be read to support Barnette's prohibition on coercion but not the prohibition on prescription. But such is the nature of constitutional argument: the clause is there, we suppose, so we have to make it mean something of consequence (unless, of course, it is the Third Amendment, or the Contracts Clause, or . . . ), and thus we obtain license to make it mean what we would like it to mean.
current practice, because governments in this country have repeatedly prescribed “what shall be orthodox,” or “right opinion,” in matters of religion. Indeed, many of the leading examples discussed above—including the Virginia Statute for Religious Freedom, the Declaration of Independence, and Lincoln’s Second Inaugural Address—contain explicit affirmations of specific religious beliefs. For example, Lincoln’s speech contained, within the space of twenty-five sentences, “fourteen references to God, many scriptural allusions, and four direct quotations from the Bible.”

And government continues to issue such affirmations: in the national motto (“In God We Trust”), in presidential addresses, and in various other ways.

But of course there are good traditions and bad traditions; “separationists” often argue that this longstanding practice of religious affirmations is a bad tradition that we ought to repent of. So what about the other objections to the “no orthodoxy” position? I have argued above, for example, that government necessarily endorses beliefs in a variety of contexts, and hence that a “no orthodoxy” position asks what is impossible. Is this criticism avoided if we stipulate that it is only religious belief that government cannot prescribe?

The religion-specific construction of Barnette necessarily assumes, of course, that it is possible to define “religion” with sufficient clarity to permit reliable judgments about which prescribed beliefs are “religious” and which are not. This assumption is hardly a secure one—it might be argued, in fact, that it is untenable—but for present purposes let us set this problem aside. There is, I think, a deeper difficulty afflicting the religion-specific construction of Barnette. The difficulty is that this construction necessarily depends on one or more of the distinctions that we have just considered—the distinctions between “explicit” and “implicit” prescriptions, “consensus” and “sectarian” prescriptions, and “positive” and “negative” prescriptions—and that I have argued to be illusory or unworkable.


66. Though the point might be argued, I will assume for present purposes that a religion-specific prohibition on prescription avoids the criticism that asserts that such a prohibition is self-contradictory by virtue of being itself a prescription of orthodoxy.

To see how this is so, we can once again consider what may be the starkest ongoing example of the conflict of opinions in the public sphere—that is, the teaching of Darwinian evolution as part of the school curriculum. Though the subject is obviously controversial, for present purposes let us quickly concede all contested issues in favor of the proponents of evolution, and of teaching evolution in the public schools. So let us assume, at least for purposes of argument, that the scientific evidence overwhelmingly demonstrates Darwinian evolution, that Darwinism is not itself a "religion" but is also not intrinsically incompatible with "religion," and that the proponents of Darwinism as part of the curriculum are not in fact motivated by a desire either to promote or discredit "religion." The fact remains that Darwinian theory is incompatible with beliefs held and taught by some religions—religions embraced, it seems, by millions of American citizens. And the inescapable implication of this fact is that by teaching evolution, the public schools teach that the relevant beliefs held by those religions and their adherents are false. In that sense, it would seem, the schools prescribe an orthodoxy, or a "right opinion": they prescribe that the right opinion is to reject the pertinent religious beliefs of, for example, biblical literalists and six-day creationists.

How then can the teaching of evolution be squared with even a religion-specific construction of Barnette? It seems that the practice might be (and typically is, if often only tacitly) defended by invoking one of the distinctions discussed above. Though it is true that a biology curriculum that includes Darwinism will contradict the teachings of some religions, we might suggest that the condemnation will be merely implicit: science teachers will not explicitly say (though they may believe) that the six-day theory is preposterous. Or we might say that Darwinian evolution is supported by a "consensus"—not only atheists but also many religionists can accept it—while creationism is a "sectarian" belief. Or we might argue that evolution

68. Professor Shiffrin's emphasis on the distinction between "logical entailment" and "social meaning" seems to have been directed in opposition to this conclusion. I acknowledge the distinction, and also acknowledge that it may indeed be significant for some purposes. See supra notes 7, 51. But if the claim is that evolution (and the teaching of evolution in the public schools), though logically incompatible with the biblical literalist view of creation, is nonetheless not in its "social meaning" popularly perceived as opposing such religious beliefs, then I can only say that in view of the long history of the evolution-creationism contest from the Scopes trial through Edwards v. Aguillard, through more current controversies in places like Kansas, that claim seems to me (as the Supreme Court sometimes says) "remarkable." Cf. Wallace v. Jaffree, 472 U.S. 38, 48 (1985) (describing as "remarkable" the lower court's conclusion that the Constitution does not forbid a state to establish a religion).
as taught is in effect a sort of "negative" prescription—it implies that certain views, such as six-day creationism, are wrong—but does not positively prescribe among an array of intellectual options: the orthodox Darwinism of Richard Dawkins, say, or the "punctuated equilibrium" version of Stephen Jay Gould, or the providentially "guided evolution" that many religious believers gravitate toward. So students are still free to make up their own minds among those alternatives. (And of course they can also defy the prescription and believe in six-day creationism anyway.)

We can say any or all of these things, and they might be worth saying in certain contexts and for certain purposes. The point for now is simply that we cannot escape invoking these distinctions by turning to a different qualification and saying that *Barnette* is limited to religious prescriptions. If we are to explain why teaching Darwinism is consistent with *Barnette*, in other words, we cannot merely invoke a distinction between "religion" and "nonreligion"; we will need to resort to these other distinctions as well. But all of these distinctions are spurious or at least highly elusive, as we have seen, and they do not lose their dubious character just because "religion" is involved. Consequently, if *Barnette*’s more general "no orthodoxy" position was not viable even with the aid of these dubious qualifications, it will not become viable by being limited to the domain of "religion."

Nor is this conclusion limited to the evolution-creationism controversy, or to the situation in which public employees (school teachers) undeniably teach a theory or set of beliefs that is plainly inconsistent with some religious views. In reality, the school curriculum implicates a whole range of religious issues; it is not just biology classes that speak to religious issues, but also classes in health, home economics, social studies, literature, and general reading. Many of these conflicts in which the curriculum "prescribes against" an array of religious opinions might be surprising to most citizens—and even more surprising to most law professors (whose experience in this realm is likely to be quite limited). But if you want to get a taste of the wide-ranging impact of the curriculum on the religious beliefs


I have never heard a colleague, at any of the three law schools where I have taught, make a religious claim in an academic context. When the student chapter of the Christian Legal Society at [the University of Texas needed a speaker, I knew of only three or four church-attending colleagues on a faculty of sixty-five, none in the evangelical mode the students were seeking.
held by some citizens, it should be enough to read the opinions in *Mozert v. Hawkins County Board of Education*\(^70\) or *Smith v. Board of School Commissioners of Mobile County*.\(^71\)

Moreover, the public school curriculum is merely the scene of the most explicit public teachings implicating religious beliefs. In reality, virtually every action taken by government at least tacitly teaches, if not the truth, then the falsity of some religious beliefs. A colleague points out to me that even a law prohibiting murder implicitly teaches the falsity of the Aztec belief in human sacrifice.\(^72\) In short, it seems likely that every governmental action, every public decision, every law reflects some sort of orthodoxy and thereby at least implicitly rejects contrary orthodoxies (at least some of which will be religious in nature). Consequently, the religion-specific construction of *Barnette* still pervasively depends on the dubious distinctions criticized earlier.

Finally, we should notice that the qualified, religion-specific “no orthodoxy” position does not avoid the final objection discussed in the previous section—the objection, that is, which asserts that even if it were possible for the political community to remain noncommittal on matters of belief, the result of such a policy would be to undermine loyalty to that community. Indeed, this objection may apply a fortiori to the religion-specific position. Though the matter is complex, our history clearly shows that the allegiance of many citizens (certainly not all) is grounded in their belief that this is “one nation, under God,” as the Pledge of Allegiance says (except perhaps in the Ninth Circuit).\(^73\) A similar understanding is conveyed by the national motto, “In God We Trust.” In case anyone thinks the point is controversial, I simply incorporate by reference Robert Bellah’s seminal work on

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\(^70\) 827 F.2d 1058 (6th Cir. 1987).
\(^72\) I owe the example to Andy Koppelman who, I should say, offered it as a *reductio ad absurdum* of the kind of argument I am making here. For my part, I readily acknowledge the absurdity, and merely point out that this absurd implication follows not from my argument but from the “no orthodoxy” prohibition.
\(^73\) *See Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002). In the Pledge itself, as is often noted, these words are only about a half-century old. That fact has no obvious implications for my argument here, but it may be worth pointing out that although additions to a received text can be made for the purpose of *changing* its meaning, they can also be made for the purpose of *reaffirming* or perhaps clarifying something that was long thought to be understood but that has more recently been called into question. In any case, associations of religion with the central meaning of the republic surely go back to the founding and colonial periods. *See infra* note 74.
"civil religion." Subsection 74 A religion-specific "no orthodoxy" position, if it were in fact maintainable, would not only forfeit this ground of allegiance: by insisting that among all of the families of contestable beliefs it is only religious beliefs that are automatically and a priori disqualified from participating in a public orthodoxy, the qualified position might well be more repugnant to citizens of this mind than a more general "no orthodoxy" position would be.

F. The Rhetoric of Obfuscation

The previous section argued that the "no orthodoxy" position is inconsistent with the way governments in this country have traditionally operated and must operate. This section has considered five distinctions that might be and sometimes are invoked to clarify or qualify the "no orthodoxy" position in an effort to deflect those objections. Though some of these distinctions do identify legitimate public considerations, I have argued that none of them succeeds in salvaging Barnette or in explaining how government has respected or could possibly respect a prohibition on "prescrib[ing] what shall be orthodox."

When employed for this purpose, however, those distinctions do serve to sponsor an intricate discourse in which inconsistencies can be conveniently lost. Thus, we begin with what looks like a categorical prohibition. "If there is any fixed star in our constitutional constellation," we declare with gusto, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." We repeat the mantra when particular disfavored practices—school prayer, or perhaps the words "under God" in the Pledge of Allegiance—come before our view. "If there is any fixed star. . . ." Then some nonconforming practices that we are loathe to relinquish (like the public school curriculum) present themselves, and we hasten to explain that what we meant was that no official acting as an official can explicitly prescribe in a positive way sectarian beliefs in matters of religion. But if officials prescribe beliefs in their private capacity, or if their prescriptions are merely implicit, or limited to matters supported by a "consensus" (properly understood as a term of art, of course, not a crude matter of counting noses), or negative rather than positive in character, or concerned

with beliefs that are not "religious" (a term that conveniently defies clear definition) ... well, of course those sorts of "prescriptions" (if anyone is so indelicate as to describe them under that heading) are an entirely different matter.

This supple rhetoric—composed of a broad categorical prohibition redirected and qualified by a host of protean distinctions—makes it possible, depending on our inclination, to say that just about anything government does or says either is or is not in violation of Barnette: clear cases, if there are any, are mostly relegated to law professors' hypotheticals. That supreme flexibility may make the rhetoric issuing from Barnette attractive as a practical matter, especially for those with the power to say what the conclusions will be. But the same fluidity makes the "no orthodoxy" position quite useless as a way of understanding what the constitutional norms actually are or should be.

IV. A PLEA OF NECESSITY

Proponents of a "no orthodoxy" position occasionally acknowledge that in some situations, government cannot avoid endorsing some beliefs and rejecting others; and having conceded as much, rather than draw the most natural conclusion—namely, that for all its allure the "no orthodoxy" position is simply not viable—they instead make a dispensation from the prohibition for cases in which such deviations are unavoidable. Kent Greenawalt provides an example. (I use Greenawalt for this purpose precisely because he is a deservedly respected scholar in the field who, unlike justices and many scholars, at least addresses this problem.) As noted above, Greenawalt embraces the idea that "government may not make determinations of religious truth."75 But he also notices one of the difficulties discussed above: government cannot avoid determining that some religious beliefs are not true. Greenawalt gives examples:

A court orders a state to desegregate its schools, the country goes to war, educational funds are made available equally to men and women. The government has implicitly rejected religious notions that (1) God wishes rigid racial separation, (2) all killing in war violates God's commandments, (3) all women should occupy them-

75. Greenawalt, supra note 22, at 197.
selves with domestic tasks. A vast array of laws and policies similarly imply the incorrectness of particular religious views.\textsuperscript{76}

One might think that this concession would prompt doubts about the original proposition—that "government may not make determinations of religious truth." But in a legal culture in which a Barnette-style "no orthodoxy" position is virtually axiomatic, it seems that proposition is beyond suspicion. So instead, Greenawalt treats the "vast array" of inconsistencies he has just noticed as a minor inconvenience, disposing of the problem in a paragraph. In that paragraph he makes—or at least summarily suggests—four basic points, three of which involve distinctions discussed above. First, although the governmental actions that Greenawalt has described concededly reject particular religious beliefs, they do not affirm any religious beliefs.\textsuperscript{77} As discussed, however, this distinction between negative and positive prescriptions can carry little or no weight, nor does the doctrine developed by the Supreme Court authorize any such double-standard.\textsuperscript{78} Second, the decisions mentioned might be adopted on a variety of different grounds, which might be either religious or secular.\textsuperscript{79} As discussed, however, the same might be said of virtually any governmental decision—even including, for example, a decision favoring "Christianity." Third, the rejection of religious beliefs is merely implicit, not explicit.\textsuperscript{80} But, as discussed above, it is not clear that this distinction is workable, and even less clear why it should have constitutional significance.\textsuperscript{81}

Finally, and primarily, Greenawalt relies on a plea of necessity. "Since this implicit rejection of religious views is inevitable," he argues, "it cannot be unconstitutional."\textsuperscript{82} This last point (which assumes that the Constitution cannot have a tragic dimension) might be debated, but for present purposes let us grant Greenawalt's point.

\textsuperscript{76} Id. at 199 (emphasis added). For further similar examples, see Edward B. Foley, \textit{Political Liberalism and Establishment Clause Jurisprudence}, 43 CASE W. RES. L. REV. 963, 973–78 (1993).

\textsuperscript{77} "The state's action, by itself, does not assert the correctness of the religious reason." Greenawalt, supra note 22, at 199 (emphasis added). As discussed above, of course, many public pronouncements do affirm particular religious beliefs.

\textsuperscript{78} The case law consistently says that government must be "neutral" toward religion, and must avoid either endorsing or disapproving of religion.

\textsuperscript{79} Greenawalt, supra note 22, at 199 ("The desegregation order, for example, could be supported by a secular view that all human beings are inherently equal or by a religious view that in God's eyes all people are equal.").

\textsuperscript{80} Id. (describing "this implicit rejection of religious views").

\textsuperscript{81} See supra Section III.B.

\textsuperscript{82} Greenawalt, supra note 22, at 199 (emphasis added).
The curious position that results from this reasoning now looks something like this:

(1) Government is constitutionally forbidden to make determinations of the truth of religious propositions.
(2) In a “vast array” of situations, government must make (at least negative) determinations of the truth of religious propositions.
(3) Therefore, government must not make determinations of the truth of religious propositions except when it must do so.

This is at best an awkward constitutional position. And it is worth noting how the usual conventions of reasoning are suspended. Normally, the statement of counterexamples or nonconforming instances leads to the rejection or at least the re-examination of the original argument or premise. In this case, proposition (2) acknowledges the existence of counterexamples—numerous counterexamples, it seems—to proposition (1).83 So one might imagine the following argument, that uses for its premises only assertions that Greenawalt makes:

(1a) If government cannot avoid performing a particular function, then that function cannot be unconstitutional.
(2a) Government cannot avoid making (at least negative) determinations of religious truth in a “vast array” of cases.
(3a) Therefore, (at least negative) governmental determinations of religious truth cannot be unconstitutional.

(This conclusion might then prompt a discussion of whether there is any good constitutional reason for letting the government make negative but not affirmative determinations of religious truth—an issue considered earlier.)

In Greenawalt’s presentation, however, this variation of the argument is not considered. On the contrary, the concession of proposition (2) does not lead to the rejection or even the rethinking of proposition (1). Instead, in a move typical of First Amendment

83. Or at least it does so on Greenawalt’s assumption that what is unavoidable cannot be constitutionally forbidden.
jurisprudence in general, Greenawalt simply tries to hold incompatible propositions together in a sort of adverse and unstable union.

The difficulty might be manageable if the unavoidable departures from the "no orthodoxy" position were minor and exceptional. First Amendment jurisprudence might then be like the person who resolves to be totally honest, but in practice claims an occasional indulgence for a "little white lie." But as Greenawalt admits, deviations from the "no orthodoxy" rule are at least implicit in "a vast array of laws and policies"; indeed, it is arguable that every law or policy constitutes a potential deviation (though many such deviations may not be offensive to anyone, and hence may not provoke controversy or litigation\textsuperscript{84}). So in reality the course we are consigned to by Barnette is more comparable to the plight of the person who solemnly vows to practice a strict fast from all food during Lent; and when questioned about his regular appearances in the cafeteria, he explains: "Oh, yes, I'm standing by my vow. It's very important to me. You need to understand: I'm only eating these meals because it's necessary for me to do so—to live, you know, and to function. If I need to eat, it can't be wrong, can it?" Well, perhaps not, but... .

V. "AND" FOR "OR": TOWARD A MORE FORTHRIGHT JURISPRUDENCE

The previous two sections have considered various attempts to salvage the "no orthodoxy" position, either by qualifying it or by excusing inevitable departures from it; and I have argued that these attempts are unpersuasive. The result has been a jurisprudence of deception and inconsistency—one that sporadically strikes down the occasional governmental act or pronouncement for violating the Barnette prohibitions while more often winking at (or explaining away or, most often, simply not noticing) massive transgressions. It is little wonder that First Amendment jurisprudence—as well as governmental practice as regulated by that jurisprudence—has become renowned for its haphazard quality.

So, could we have a more satisfactory and honest jurisprudence? In principle it seems we could, though we might have to sacrifice our self-gratifying pretensions of neutrality and complete inclusiveness. We could, that is, forthrightly admit that government does, must,

\textsuperscript{84} For example, there do not appear to be any Aztec representatives bringing challenges to murder laws. See supra note 72 and accompanying text.
always has, and always will “prescribe what shall be orthodox”—not in all matters of “politics, nationalism, religion, and other matters of opinion,” to be sure, but in many. A political community will affirm those (perceived) truths that provide its reason for being, . . . and also those (perceived) truths that support the particular political decisions it makes, . . . and probably also those (perceived) truths that it and its citizens believe to be especially important or necessary or part of a good and acceptable life. And if the community is pluralistic, then of course not all citizens will agree with the (perceived) truths so affirmed. With wisdom and a good measure of luck, such public affirmations conceivably might, to paraphrase Lincoln, satisfy some of the citizens all of the time, and all of the citizens some of the time; but they will surely not win the assent of all of the citizens all of the time. So the distinctive mark of a free society—or at least one distinctive mark—is not that it will refrain from believing anything, or from affirming what it believes, but rather that it will refrain from coercing professions of belief from unwilling citizens.

Barnette says as much; or rather it would say something like this if it were amended to replace the “or” with an “and.” The jurisprudence that would result from this revised understanding would focus the attention of jurists and scholars on the question of coercion (which of course is hardly a purely empirical, “yes or no” matter). What sorts of governmental actions impermissibly “force” citizens to “confess” to orthodoxies that they do not hold (or at least that they do not wish to confess)? This is not an easy question to answer, as the clashing “coercion” opinions by Justice Kennedy and Justice Scalia in Lee v. Weisman make clear. If coercion is defined too narrowly, conscience will not be well protected; if it is defined too broadly (so that, for example, any governmental endorsement of a controversial

85. Comments at the conference, including Professor Shiffrin’s commentary, lead me to emphasize that this statement is offered merely as a generic description of the sorts of things that any government or political community is likely to prescribe. The present Essay does not pretend either to offer any particular substantive orthodoxy for the country or even to propose constitutional criteria that should govern the formulation of such an orthodoxy. To put the point differently, the purpose of this Essay is to argue that the Barnette “no prescription” criterion does not work; it is not to offer some other orthodoxy, or some other criterion for establishing an orthodoxy, as a replacement for Barnette. I understand Shiffrin’s comments in essence to propose a version of Millian liberalism as the orthodoxy. Well, Millian liberalism is surely one candidate; for present purposes my only point (and I am not sure that Shiffrin disagrees) is that it should be recognized for what it is—that is, a proposed orthodoxy that the state would embrace and “prescribe.”

86. For a cogent and provocative essay along these lines, see Walker, supra note 52.
belief is deemed coercive), then we will be back facing the same problems that the “no orthodoxy” position encounters. But the question of coercion is at least one that is not inherently misleading or disingenuous; it does not require us to pretend that government is not doing what in fact it is doing (and cannot avoid doing).

It may be helpful to give a couple of examples of how this altered jurisprudence might affect our discourse. My first example comes from the pages of this journal. In an essay discussing Stephen Macedo’s version of political liberalism, Michael McConnell criticizes Macedo for supporting what McConnell calls a “new establishmentarianism.”

McConnell defines “establishmentarianism” as “[t]he idea that a nation should be animated by a set of common values and beliefs, backed by governmental authority.” He acknowledges that such “establishments,” as he calls them, “can range from highly coercive (compelling affirmation of belief and persecuting dissenters) to tolerant”; but in his view either kind of “establishment”—the coercive kind or the noncoercive, tolerant kind—is incompatible with liberal democracy. Criticizing Macedo for maintaining that “[t]his society stands for certain common values[,]” McConnell describes at greater length the position he finds objectionable:

Contrary to what is usually thought, [Macedo believes] liberal states may espouse an orthodoxy about the good life. So long as they do not engage in outright “coercion,” they may use “subtle” and “gentle” instruments of government power—including taxation and selective funding—to promote their view of patterns of good citizenship.

McConnell’s version of “nonestablishmentarianism” is consistent with the natural, broad reading of *Barnette*. But as the foregoing discussion has suggested, that position is hopelessly quixotic, and inconsistent with the way governments in this country have in fact behaved. Does McConnell believe in the sort of “value-free” education in public schools that has long come to be recognized as spurious

89. Id. at 453.
90. McConnell seems ambivalent about whether a tolerant establishment is forbidden by the U.S. Constitution, but he is more confident that any sort of establishment is inconsistent with liberal democracy. Id. at 469–70.
91. Id. at 467–68.
(and that McConnell’s own writings effectively show to be an illusion)?

If not, doesn’t candor compel the admission that the public schools have in fact been “promot[ing] their [our?] view of patterns of good citizenship”? And if the nation cannot be “animated by a set of common values and beliefs,” then what are we to make of, say, the Declaration of Independence, with its solemn affirmation of “self-evident truths” as the basis of our independent nationhood? And how is government (or its officials) to answer if we citizens ask why the political community has any claim on our loyalty and respect? Plead the Fifth?

Conversely, Macedo’s general position, as described by McConnell, seems not only attractive but inevitable. This is not to say, of course, that the specific substantive orthodoxy advocated by Macedo is the correct one. But the cogent response is not to complain that Macedo thinks “[t]his society stands for certain common values” or that he would have the political community stand for something, but rather to consider or criticize the substance of what Macedo would have the community stand for.

A second example is provided by the Ninth Circuit’s recent controversial decision declaring the words “under God” in the Pledge of Allegiance unconstitutional. Quoting the Barnette passage, the court ruled that these words endorsed religion and in effect prescribed an orthodoxy. Conversely, the concurring and dissenting opinion by Judge Fernandez conceded that the words endorsed religion but argued that two short words in the Pledge were “de minimis” and should not be removed.

This is of course the sort of debate that the Barnette regime mandates, but it is also bound to be a fruitless and less than candid debate.


If the public school day and all its teaching is strictly secular, the child is likely to learn the lesson that religion is irrelevant to the significant things of this world, or at least that the spiritual realm is radically separate and distinct from the temporal. However unintended, these are lessons about religion. They are not “neutral.” Studious silence on a subject that parents may say touches all of life is an eloquent refutation.

93. In fairness, it must be said that McConnell criticizes Macedo on these terms as well—persuasively, in my view.

94. Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002).

95. Id. at 609.

96. Id. at 612–15 (Fernandez, J., concurring in part and dissenting in part).
By any fair reading, the words "under God" in a state-sponsored pledge do endorse religion, at least in a generic theistic variety; in that sense they "prescribe what shall be orthodox." And if the words are merely "de minimis," or of no real significance, it would be hard to explain the uproar that the Ninth Circuit's decision provoked. At the same time, as discussed, the government will—inevitably, and in a variety of ways—be prescribing an orthodoxy (or a complex variety of orthodoxies): the Pledge itself, which the Ninth Circuit did not enjoin, does that (as does the Ninth Circuit's own opinion). Moreover, those orthodoxies will inevitably have implications, sometimes favorable and sometimes unfavorable, for a whole spectrum of religious beliefs. In this case, the forcible removal of the words "under God" may lead some citizens to believe that the judiciary and perhaps the revised Pledge are hostile to religion; but even if that is not so, the excised Pledge clearly if implicitly rejects or at least marginalizes the view—undoubtedly held by many citizens and easily discernible in, say, the Declaration of Independence, and memorably propounded by Justice Douglas in a moment of reckless lucidity—97—that the nation and its rights and constitutional system are grounded in a religious foundation.

So there is no getting around two facts: first, that with or without the words "under God," the Pledge of Allegiance contains affirmations of beliefs that amount to an orthodoxy; and second, that however those beliefs are formulated, some citizens will find them objectionable and probably alienating. Barnette, decided before the words "under God" were added to the Pledge, recognized both facts. And once those facts are acknowledged, it becomes apparent that neither the Newdow majority's argument (basically, that the words "under God" affirm something that some citizens do not accept) nor the dissent's argument (basically, that the words do not amount to any substantial affirmation) can provide a plausible and adequate basis for resolving the case. Having disposed of those nondispositive claims, we might then go to consider whether there is anything else about the Pledge and the way it is practiced in the schools that offends the Constitution.

97. "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952).
CONCLUSION

"If there is any fixed star in our constitutional constellation. . . ."

The phrase marks a question of identity and self-interpretation that any political community must sometimes ask itself. What is the essential character of our community? In what ways are we distinct— in what ways are we different from other communities? Through much of our own history, this sort of question has been asked with an implicit contrasting reference to the nations and kingdoms from which Americans departed to come to this land. How are we different than, say, the English nation? Typically, these nations had maintained religious “establishments,” and that fact often figured in our efforts to distinguish ourselves. In the mid-twentieth century it became natural to contemplate a further comparison (and one that did not as conspicuously implicate “religion”): how are we different from the authoritarian regimes of Nazi Germany and Soviet Russia?

*Barnette* unmistakably reflects an attempt, with such comparisons in the background, to consider this question of identity or self-interpretation. What sort of community are we? What is the “fixed star in our constitutional constellation” that makes us the distinctive community we are?

One possible answer picks up on the fact that other regimes to which we often contrast ourselves have been committed—publicly committed—to some set of beliefs. They might be committed to a “religion,” as in the historical comparisons, or to an “ideology,” as in the mid-twentieth century comparisons; but in any case they are publicly committed to some sort of “orthodoxy.” And it seems to follow from this way of framing the comparison that if our community is distinctive, its distinction lies in the absence of any public commitment to any orthodoxy.

This is a tempting interpretation, for reasons that have been noted. But for other, more potent reasons that have also been discussed, it is not a viable position that ours or any other community ever has followed or ever could follow. Consequently, this interpretation, if legally embraced, virtually ensures an unstable jurisprudence and a delusional discourse.

Fortunately, there is another possible interpretation. Perhaps our community is distinctive *not* because it does not believe anything, or does not affirm its beliefs; its constitutive aspiration, rather, is to be
open and free in allowing those central beliefs to be formulated through ongoing debate, to treat such formulations as provisional, and even once such beliefs have been provisionally formulated to allow for and indeed to cherish dissent. So our community refrains—or at least this is its ideal—from coercing citizens to accept beliefs to which they do not assent.

The stirring rhetoric in *Barnette* might be invoked in favor of either of these interpretations; or at least it *could* support either interpretation with the alteration of a conjunction. Deliberately or not, Justice Jackson chose the conjunction "or," and thereby cast the weight of his historic opinion behind the first, "no orthodoxy" interpretation. This is a community, he mused, that is distinctive because... because it is committed to no orthodoxy, no "right opinions." Publicly, as a community, it stands for nothing. Jackson's choice was a mistake—one that did not and could not honestly convey even his own considered views. It is time the mistake was rectified by changing a word. An *and* for an *or*.