

Compelled to Speak?

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

It’s not unusual that this Supreme Court Term has several cases about First Amendment protection for freedom of speech.

What IS unusual is that not one, not two, but three cases on the docket relate to a specialized, and somewhat obscure corner of Free Speech jurisprudence.

I refer to the “Compelled Speech doctrine” – essentially, the flip side of the normal First Amendment guarantee that people *can* speak. The Compelled Speech doctrine protects the right *not to* speak at government’s behest.

A classic case Compelled Speech case is the 1943 decision in *West Virginia Board of Education v. Barnette*. The *Barnette* Court held that the First Amendment prohibited the State from requiring public-school students to stand and salute the American flag. (An Interesting sidelight: Old photos show that the required flag-salute posture looked disturbingly like the “Heil, Hitler!” salute Germans gave during World War II.)

Fast forward to this Term’s three Compelled Speech cases. Each of them displays a common thread. But there are distinct variations.

I have already made one Compelled Speech case the focus of a November 2017 podcast (“TAKING (up) THE CAKE (case)”). The case is one of the most controversial and high-profile cases now before the Court. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* asks whether a self-described “cake artist” who objects to same-sex marriage on religious grounds can, without suffering state anti-discrimination penalties, refuse to design a specialty cake requested by a same-sex couple to commemorate their recent wedding. The cake baker claims that “This Court’s compelled-speech doctrine forbids the Commission from demanding that artists design custom expression that conveys ideas they deem objectionable.”

The second Compelled Speech case is no stranger to the Court or to controversy. Just argued on the last Monday in February, *Janus v. AFSCME* challenges a system in place in more than 20 states, where public employees are required to pay for advocacy by the union designated under state law as their exclusive bargaining agent. To protect the rights of employees against compelled speech, a precedent dating from 1977 already allows public employees to “opt out” of financially supporting union advocacy of political or ideological positions with which the employees disagree. But challenger Janus argues that *any* position taken by a union – even arguing that employees deserve higher salaries or improved working conditions – is inevitably “political”. (For example, teacher raises affect taxpayers and other budget priorities. Teacher class size is a question of educational policy.)

So Janus argues that *any* mandatory fee assessment compels him to support speech with which he disagrees, violating the First Amendment. (The State and the union argue that the Constitution doesn't require Janus to be a "free rider," benefitting from union advocacy he doesn't pay for.)

If this issue seems familiar to you, that's because it's already been before the Court several times. A likely 2016 decision against the unions failed to materialize because Justice Scalia's death left an equally divided Court. The betting is that the unions will lose this time, with Justice Gorsuch now providing the critical fifth vote.

A third Compelled Speech case, *NIFLA v. Becerra*, has yet to be argued. The challengers are crisis-pregnancy centers and other anti-abortion non-profit organizations providing advice to pregnant women. The providers argue that a recently enacted California law unconstitutionally compels their speech by requiring them to make disclosures to patients that have the effect of encouraging abortion.

This Term's trio of Compelled Speech cases will likely make significant course corrections for an important Free Speech tributary. And, the Court's handling of these controversies will significantly affect the ability of government at all levels to advance important objectives, including civil-rights promotion, public-sector employment and policy, and abortion rights.