California Western Law Review

Volume 44 | Number 2 Article 2

2008

Listener Interests in Compelled Speech Cases

Laurent Sacharoff
Temple University

CALIFORNIA WESTERN LAW REVIEW

VOLUME 44 SPRING 2008 NUMBER 2

LISTENER INTERESTS IN COMPELLED SPEECH CASES

LAURENT SACHAROFF*

* Abraham L. Freedman Teaching Fellow, Temple University Beasley School of Law; J.D., Columbia Law School, 1997; B.A., Princeton University, 1985. The author is grateful to Anna Pervukhin, Kent Greenawalt, and Marc Isserles for their invaluable help.

I. INTRODUCTION

The First Amendment prohibits the government from compelling speech, from requiring, for example, that students pledge allegiance to the flag[1] or that motorists display on their license plates the state motto, "Live Free or Die."[2] The Supreme Court has eloquently defended the right against compelled speech as on par with the First Amendment's right to speak.[3] But numerous scholars have identified a fundamental problem with the compelled speech doctrine: it is unclear exactly why the First Amendment should protect against compelled speech.[4] As Professor Larry Alexander wrote, "[t]he harm in compelled speech remains elusive, at least for me."[5]

---

1. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding compelled pledge of allegiance unconstitutional under the First Amendment's Free Speech Clause).

2. Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding a state requirement that motorists display the state motto "Live Free or Die" unconstitutional under the First Amendment's Free Speech Clause).

3. *Id.* at 714; Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796-97 (1988) (holding state requirement that solicitors for charities disclose charity overhead costs unconstitutional under Free Speech Clause).

4. Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, *passim* (2006) (demonstrating failure of most justifications for the compelled speech doctrine); Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette: *The Pledge of Allegiance and the Freedom of*

This article suggests that the harm remains elusive because the Supreme Court, in justifying the compelled speech doctrine, began from the wrong premise: protecting the speaker's "freedom of mind."[6] As the Court announced in *West Virginia Board of Education v. Barnette* and repeated many times since, compelled speech violates the First Amendment because it invades the speaker's freedom of mind.[7] Reliance on the speaker's freedom of mind sounds promising, but fails as an explanation because much compelled speech neither affects what the speaker believes nor misleads the listener about that speaker's actual beliefs. In short, compelled speech does not invade the speaker's freedom of mind. Worse, by almost exclusively focusing on the speaker's mind, the Court excludes from consideration nearly all the traditional justifications for the First Amendment which developed from suppression of speech cases—justifications that rely heavily on listener interests rather than speaker interests.[8]

This article argues that the Court should abandon any consideration of the speaker's freedom of mind; instead we should

---

Thought, *in* CONSTITUTIONAL LAW STORIES 433, 454, 456 (Michael C. Dorf ed., 2004) (noting that *Barnette* is surprisingly hard to justify); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 475 (1995) (arguing that the Court has been wrong in holding that the government violates the Free Speech Clause when it compels speech that reasonable observers understand to have been compelled); Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 853 (2005) (noting difficulty in justifying the holdings in *Barnette* and *Wooley*).

5. Alexander, *supra* note 4, at 148.

6. The Court often does not define what it means to invade the speaker's freedom of mind. *See infra* notes 28-29. Under the most straightforward definition, freedom of mind forbids the government from literally coercing a person to think certain thoughts or hold certain beliefs. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977) ("[I]n a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.").

7. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

8. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 565 (1969) (stating government may not control a person's mind by deciding what he may read); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[A] major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs."); Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (stating the purpose of the First Amendment is "to supply the public need for information"); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

simply apply the traditional justifications for free speech to compelled speech cases by analyzing them from a listener's point of view. Shifting to traditional free speech justifications will move the focus to listener interests because most justifications for the Free Speech Clause actually rely on listener interests rather than on the speaker's mind or interests.[9] Listeners, namely the public, have social and political interests in hearing information from many sources, free from government distortion. These interests include deciding whom to vote for, discovering the best way to live, and being treated by the government as autonomous citizens able to distinguish true from false.[10] When the focus changes to listener interests in compelled speech cases, then a more satisfactory explanation of the First Amendment protections against government-compelled speech emerges.

Government-compelled speech violates the First Amendment because the compulsion distorts the total mix of information available to the populace, making the government the super-editor of all we hear. Put another way, the government can distort the marketplace of ideas through the use of compelled speech. The government artificially amplifies its own message through the mouths of unwilling citizens, giving listeners a mix of information skewed to the government viewpoint.

The leading compelled speech cases illustrate how the government can distort what listeners hear and thereby violate the First Amendment. For example, in *Wooley v. Maynard*,[11] New Hampshire compelled motorists to display the state motto, "Live Free or Die," on their state issued license plates.[12] The Court held the compulsion violated the Free Speech Clause because the government

9. *E.g.*, T.M. SCANLON, *Freedom of Expression and Categories of Expression*, *in* THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 84, 93 (2003) [hereinafter SCANLON, *Categories of Expression*] (noting that traditional justifications for the Free Speech Clause focus on the interests of listeners, what he calls the "audience").

10. *E.g.*, 3 ROSCOE POUND, JURISPRUDENCE 63-67, 313-17 (1959) (focusing on a "social interest in free belief and free expression of opinion as guaranteeing political efficiency and promoting general progress, economic, political, and cultural").

11. Wooley v. Maynard, 430 U.S. 705 (1977).

12. *Id.* at 707.

invaded the "freedom of mind" of the plaintiffs,[13] even though the compulsion was unlikely to have any effect on their minds. When the analysis is shifted to listener interests, however, we see that the government action violated the First Amendment because it invaded the mind of everyone *reading* the motto by improperly barraging them with a politically charged and government-favored message. Listener interests are harmed by this distortion just as they are if the government deprives us of one side of a political debate through suppression.

In *Abood v. Detroit Board of Education*,[14] the Court reviewed an "agency shop" arrangement in which the government essentially compelled public school teachers who did not wish to join a union to pay the union fees equal to dues.[15] The union used those fees, in part, to fund political speech that lay outside its collective bargaining.[16] The Court held the arrangements unconstitutional as applied to those teachers who disagreed with the union's political speech.[17] In so holding, the Court focused on the rights of the dissenting teachers, particularly each teacher's "freedom of belief."[18] But again, it is very unlikely that compelling subsidies will affect the teacher's beliefs, much less compel them. The real harm in *Abood* lay with listeners and the political system because the compelled subsidies permitted the union message to become unfairly amplified, out of proportion to the support it genuinely enjoyed.

Focusing on the listener's point of view not only helps explain the harm in compelled speech cases, but also serves a practical function in disentangling the ultimate conundrum of compelled speech cases. In compelled speech cases, there are *two* different speakers—whose interests are at odds. For example, in *Wooley*, the government sought to speak through its citizens' license plates, while the Maynards wished to remain silent;[19] in *Abood*, the union wished to speak, while

13. *Id.* at 714-17.
14. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).
15. *Id.* at 211.
16. *Id.* at 235-36.
17. *Id.* at 236.
18. *Id.* at 235.
19. Wooley v. Maynard, 430 U.S. 705, 707-08 (1977).

the individual teachers wished to refrain.[20] This issue of two speakers arises most clearly in a recent compelled subsidy case, *Johanns v. Livestock Marketing Ass'n*.[21] In that case, a government program exacted contributions from cattlemen to support advertising even if they disagreed with it.[22] The Court upheld the exactions on the grounds that it was the government speaking through the advertisements, not the cattlemen.[23]

The compelled speech cases do not generally frame the problem as a battle between two speakers; rather, the Court usually deems as "speaker" only the speaker who ultimately prevails. But this article argues that in reality compelled speech cases present two speakers with legitimate and contradictory interests,[24] and compelled speech cases require us to choose whose interests should prevail. A focus on the speaker's point of view provides little assistance in determining which of the two speakers in compelled speech cases should prevail because each speaker has a strong interest in speaking.

Focusing on listener interests provides a neutral and detached viewpoint from which to decide which speaker in compelled speech cases should prevail. This article does not suggest speaker interests should not also be taken into account, but a listener point of view helps arbitrate when both speaker and listener interests are strong and irreconcilable. Since listener interests also promote First Amendment values, this neutral listener viewpoint also helps to ensure we pick the right speaker in a way that promotes free speech values.

This article has two goals. The first is to show how the longstanding focus on the speaker's freedom of mind by the Court and scholars does not explain why the First Amendment should protect against compelled speech, and, in fact, has hampered reaching a satisfactory explanation. The second goal is to show how focusing on listener interests explains the harm that arises from compelled speech and why that harm is protected by the Free Speech Clause. Focusing

20. *Abood*, 431 U.S. at 235-36.

21. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

22. *Id.* at 553.

23. *Id.* at 564.

24. See *infra* Part V.B, for a discussion of the competing interests of two speakers in compelled speech cases. See *infra* text accompanying notes 225-235, for a discussion of First Amendment protection when two speakers have aligned interests.

on listener interests will help to guide the proper application of the compelled speech doctrine in future cases. In fact, the frequency of compelled speech cases in the last three years[25] makes the need to ground the compelled speech doctrine more firmly into traditional First Amendment principles timely as well.

Part II of this article summarizes the leading compelled speech cases and traces the development of the speaker's "freedom of mind" or "freedom of belief" as the Court's justification for the compelled speech doctrine. The Court uses the two terms "freedom of mind" and "freedom of belief" interchangeably in compelled speech cases. Throughout this article, the term "freedom of mind" is used to embrace both. Part III shows why a focus on the speaker's freedom of mind, by both the Court and commentators, fails to justify or even explain the compelled speech doctrine. Part IV contains a general discussion of the central role listener interests play under traditional First Amendment theory. Part IV surveys traditional justifications for a strong free speech right against government suppression of speech and shows why the proponents of these justifications such as John Stuart Mill and Alexander Meiklejohn relied almost entirely upon listener interests. Part V shows how focusing on listener interests is a better explanation for why the First Amendment protects against compelled speech. This is accomplished by applying listener interests to the leading compelled speech cases and to particular problems raised in those cases. Finally, this article concludes that while a focus on listener interests does explain the compelled speech doctrine, such a focus also shows the compelled speech doctrine should have less force and narrower application than the First Amendment does when applied to suppression of speech cases.

This article treats compelled subsidy cases as a subset of compelled speech cases and therefore uses the latter term to include the former. This article does so because the cases establishing the compelled subsidy doctrine, in particular *Abood*, rest their

25. *See generally* Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372 (2007) (finding states may provide more protection for dissenting union members required to contribute dues than provided by the compelled speech doctrine); Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) (stating that the government has not compelled speech in violation of the First Amendment when it requires law schools to give military recruiters the same access to students as law firms and public interest organizations).

justifications on compelled speech cases such as *Barnette* and because a focus on listener interests shows that the harm wrought by the government compulsion in both types of compelled speech cases is the same—improper government distortion of what listeners hear. Examples include cases such as *Abood*, in which the government has compelled teachers to contribute money to support union political speech with which they disagree, as well as cases such as *Barnette*, in which the government compels the students to utter the actual words themselves.

II. THE CASES: THE DEVELOPMENT OF THE SPEAKER'S "FREEDOM OF MIND" AS AN EXPLANATION FOR THE COMPELLED SPEECH DOCTRINE

The concept "freedom of mind" sprung in part from the analogous liberties freedom of belief and freedom of conscience, which in turn referred to the freedom of religion.[26] Professor Thomas Emerson wrote: "The right to freedom of belief was first asserted in connection with religious belief. Early struggles for freedom of the mind centered around religious freedom, and legal protection for freedom of belief has developed most explicitly and most extensively in this area."[27] But starting with *Barnette*, the Court used the term "freedom of mind," not to describe freedom of religious belief or worship, but freedom of thought on many other topics, both political and commercial.

Although the Court divorced the terms "freedom of mind" and "freedom of belief" from freedom of religion, it failed to define precisely what it meant by this new "freedom of mind" or to explain convincingly how this freedom of mind could be invaded. In some cases, the Court suggested that freedom of mind forbids the government from literally coercing a person to think certain thoughts or hold certain beliefs.[28] In other cases, the Court used the term in a

26. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 23 (1970).

27. *Id.*; *see also* Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 77 (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing against religious restraints, Jefferson treats free opinion and belief as free religious opinion and belief, and asserts that "Almighty God hath created the mind free"). *See generally* JOHN LOCKE, A LETTER CONCERNING TOLERATION (Hilaire Belloc ed., William Popple trans., Kessinger Publ'g 2004) (1689) (writing in favor of absolute freedom of religious belief and opinion, but conceding government could restrain secular opinion).

28. *E.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977).

vaguer manner that suggests some connection between government conduct and the plaintiff's mind that goes completely unexplored.[29]

This article argues that the only definition of the term that is not hopelessly vague is this: the only government conduct that invades freedom of mind is conduct that either (i) improperly alters or coerces a person's actual thoughts or beliefs or (ii) improperly interferes with a person's refinement of his or her thoughts or development of his or her rational faculties. As shown below, the government's conduct in most or all of the compelled speech cases does not meet this standard—leading one to find another justification for the compelled speech doctrine, a focus on the affect of compelled speech on the listener.

This conclusion that government-compelled speech is not likely to coerce a person's actual thoughts should come as no surprise. Frederick Schauer largely rejected "freedom of thought" and "freedom of belief" as justifications for the First Amendment.[30] He noted that suppression of speech will not affect freedom of thought because "[w]e can think silently."[31] Even if we consider speaking as a means of refining our thoughts and improving our ability to think, Schaeur argued that freedom of thought does not justify free speech because in this sense the freedom to think is no different from the freedom to act—both are essential to self-development.[32] But even if we accept as a rationale for free speech the need to develop one's rational faculties, when we apply this rationale to the compelled speech context, we find that a government requirement that a person mouth the message of the government or another person is unlikely to hinder the person's development of his or her ability to think. As long as there is no suppression of speech, the ability of a person to refine his or her thoughts is left undisturbed.

Thus, the Court's attempt to apply the earlier concept of freedom of mind, so helpful in religion cases, to compelled speech cases puts the compelled speech doctrine on a shaky foundation from its outset.

---

29. Wooley v. Maynard, 430 U.S. 705, 714-16 (1977) (appearing to connect the harm wrought by a person outwardly fostering a government message with an invasion upon the freedom of mind).

30. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 53-59 (1982).

31. *Id.* at 53.

32. *Id.* at 53-59.

This article therefore outlines the main cases that have given rise to the concept of the speaker's freedom of mind in compelled speech cases. It shows how the application of that concept has traveled farther and farther from its origins in freedom of religion—traveling a path that takes us from a student refusing to pledge allegiance to the flag on religious grounds[33] to cattlemen complaining that they must contribute one dollar a head to fund generic beef advertisements.[34]

A. "Freedom of Mind" and Religion

Minersville School District v. Gobitis appears to be the first Supreme Court case to use the phrase "freedom of mind"—albeit in Justice Stone's dissent.[35] But the majority opinion also refers to the minds of the students as it endorses the authority of government to shape those minds through the forced pledge of allegiance.[36] The facts of *Gobitis* are simple. Pennsylvania school authorities required students to salute and pledge allegiance to the flag and the nation.[37] Several of the students who were Jehovah's Witnesses refused on religious grounds and were expelled.[38] The children's father sued on their behalf and his own.[39] The Court held that the local legislature could require all school children to pledge allegiance to the flag.[40] The Constitution permits "legislation of general scope not directed against doctrinal loyalties of particular sects."[41]

As for invading the students' mind, the majority opinion accepted and even embraced the fact that the government sought to affect and alter the minds of students, because such action was justifiable.[42] Thus, the Court assumed that the government had determined that the Pledge of Allegiance engenders students in a common experience of

33. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591 (1940), *overruled by* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

34. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 554 (2005).

35. *Gobitis*, 310 U.S. at 605, 607 (Stone, J., dissenting).

36. *Id.* at 599-600 (majority opinion).

37. *Id.* at 591.

38. *Id.* at 591-92.

39. *Id.* at 592.

40. *See id.* at 594.

41. *See id.*

42. *See id.* at 599.

national unity "when their minds are supposedly receptive to its assimilation."[43] Further, the ritual act of the pledge "evoke[s] in them appreciation of the nation's hopes and dreams."[44] The Court repeated that the pledge "evoked" certain "unifying sentiments" in the students, and stated that the school authorities had asserted "the right to awaken in the child's mind considerations as to the significance of the flag."[45]

This attempt by the government to affect the minds of children did not raise with the Court the specter of some gross invasion of freedom of mind because the Court viewed the method as a justifiable practice sufficiently similar to any other educational method.[46] In doing so, the Court deferred to school officials and local government stating "compulsions which necessarily pervade so much of the educational process is not for our independent judgment."[47] It repeated this theme by stating, "the courtroom is not the arena for debating issues of educational policy."[48] The Court is not warranted in substituting for the legislature its own "pronouncement of pedagogical and psychological dogma."[49]

The majority in *Gobitis* thus raised a difficult issue. The question was not whether the school may in the course of instruction affect the minds and beliefs of students. The question was whether compelling the pledge affected the minds of students in a manner that is impermissible because it was different from compelling students to recite, for example, the Gettysburg Address.

Justice Stone alone dissented. He asserted that the guaranties of civil liberty under the Constitution protect the "freedom of the human mind and spirit," and the freedom to express them.[50] But these words formed a thematic backdrop for his reasoning; really an explanation for why the Constitution protects freedom of religion and speech in the first place. In particular, he wrote that the Constitution "[i]s also an

43. *Id.* at 597.
44. *Id.*
45. *Id.* at 599.
46. *See id.* at 598-99.
47. *Id.* at 598.
48. *Id.*
49. *Id.*
50. *Id.* at 604 (Stone, J., dissenting).

expression of faith and a command that freedom of mind and spirit must be preserved."[51]

Despite broader recognition of protecting freedom of mind, Justice Stone provided specific reasons why the compelled pledge violated the students' First Amendment rights: first, these students were a discrete and insular minority deserving an exacting scrutiny of any government compulsion, and second, under this scrutiny, the compelled pledge impermissibly violated their freedom of religion.[52] In the end, the notion of "freedom of mind" was unnecessary to Justice Stone's dissent. Rather it was really just another way to phrase freedom of religion.

B. Origin of the Compelled Speech Doctrine

Three years after *Gobitis*, the Court in *Barnette*[53] also addressed a similar challenge by Jehovah's Witness students to the forced recitation of the pledge of allegiance, but with contrary results.[54] In reversing *Gobitis,* the Court in *Barnette* similarly relied upon the notion of the speaker's "freedom of mind" and "sphere of intellect and spirit."[55] But it was a different freedom of mind. Unlike Justice Stone's dissent in *Gobitis*, the Court in *Barnette* relied upon the Free Speech Clause.[56] The Court in *Barnette* simply asserted that the compelled pledge violated a person's right to freedom of mind—a freestanding right under the Free Speech Clause.[57]

---

51. *Id.* at 606.

52. *Id.* at 606-07.

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

54. *Id.* at 629, 642.

55. *Id.* at 637, 642.

56. The Court did not expressly ground its decision in the Free Speech Clause, but its reliance follows from several statements. First, the Court expressly stated that it was relying upon the First Amendment as applied to school boards by the Fourteenth Amendment. *Id.* at 634, 639, 642. Second, the Court disavowed reliance on religion. *Id.* at 634 ("Nor does the issue as we see it turn on one's possession of particular religious views . . . ."). Third, the Court referred to the pledge as "a form of utterance," and applied the clear and present danger test, a test employed under the Free Speech Clause. *Id.* at 632-34.

57. *Id.* at 642.

As a free speech case, the Court applied the clear and present danger test, which it found was not met.[58] The Court therefore held the statute unconstitutional because it violated the Free Speech Clause.[59] Justice Jackson provided several justifications why compelled speech is protected under the First Amendment.

The Court primarily reasoned that the compelled pledge violated the First Amendment because the government may not encroach on the self-determination of the pupils, or "invade[] [their] sphere of intellect and spirit"[60] or violate their "freedom of mind."[61] The Court did not define what it meant by freedom of mind nor how that freedom could be violated. In the course of its opinion, however, the Court provided three reasons for its conclusion connected to freedom of mind.[62]

In the first argument tied to freedom of mind, the Court implied that coerced speech may improperly change the beliefs of the students.[63] The Court stated:

> [C]ompulsory flag salute and pledge requires affirmation of a belief and *an attitude of mind.* It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning.[64]

The Court's conclusion seems to suggest that the compelled pledge may actually alter the students' beliefs: compulsion "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[65]

---

58. *Id.* at 633-34; *see also id.* at 662-63 (Frankfurter, J., dissenting) (noting that the Court wrongly applied the clear and present danger test because it was not intended to be a "formal rule").

59. *See supra* note 56.

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

61. *Id.* at 637.

62. *See id.* at 633-34, 637, 641.

63. *Id.* at 633.

64. *Id.* (emphasis added).

65. *Id.* at 642.

The *Barnette* Court's second argument tied to the speaker's freedom of mind relied on the notion that it is unconstitutional for the government to force a pupil to "utter what is not in his mind."[66] Interestingly, the Court did not say that this requirement may cause harm because others might mistakenly attribute the belief affirmed to the speaker. Rather, the Court stated that the harm caused by the pledge policy flowed from its cynicism, which the Court criticized as a bad method of teaching important principles of citizenship.[67]

The third argument arguably tied to freedom of mind relied on the concept that in a constitutional democracy based upon consent of the governed, the state cannot compel that very consent by means of a compelled pledge of allegiance to the nation.[68] Our constitutional democracy rests on the notion that we have each given our consent, at least metaphorically, to be governed by this form of government, and with our votes, by this particular regime. The pledge of allegiance aims at compelling the speaker's consent. But consent cannot be compelled; it must be given voluntarily. Compelled consent is no consent at all.

Though unstated this compelled consent presumably violates the First Amendment, at least in a general way, since the purpose of the First Amendment is to protect and enhance constitutional democracy, and since free speech is constitutive of such a system.[69] It is unclear whether the Court in *Barnette* meant that coerced consent invaded the students' freedom of mind; but the following quote from *Barnette* suggests it did: "To enforce those [individual] rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to

66. *Id.* at 634.

67. *Id.* at 637 ("That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

68. *Id.* at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent.").

69. *See* Ronald Dworkin, *The Coming Battles over Free Speech*, N.Y. REV. BOOKS, June 11, 1992, at 55 (reviewing ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991)) (arguing the Free Speech Clause is constitutive of constitutional democracy aside from its usefulness in promoting democracy).

officially disciplined uniformity for which history indicates a disappointing and disastrous end."[70]

C. Freedom of Mind and the Press

The next major compelled speech case after *Barnette* was *Miami Herald Publishing Co. v. Tornillo*.[71] In *Tornillo*, the Court departed from express reliance on freedom of mind, though the Court in subsequent cases understood the holding in *Tornillo* to have relied on precisely that concept.[72] In *Tornillo*, the Court reviewed a Florida right-of-reply statute that required a newspaper which "'assails the personal character of any candidate . . . or charges said candidate with malfeasance or misfeasance in office'" to publish, free of cost and upon request by the candidate, "'any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to.'"[73]

The advocates for this statute argued that the principle underlying the Free Press Clause is that the public should receive a wide variety of views.[74] They further argued that the Free Press Clause arose when there were many competing newspapers and pamphlets representing varying and divergent viewpoints, and that this situation guaranteed that the public received divergent views.[75] In contrast, a few newspapers dominate the market in such a way that the public does not receive the full range of information it ought to.[76] The First Amendment supports rather than prohibits right-of-reply statutes and other measures meant to diversify access to newspapers.[77]

---

70. *Barnette*, 319 U.S. at 637.

71. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

72. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797 (1988). *See infra* text accompanying note 137.

73. *Tornillo*, 418 U.S. at 244 n.2 (quoting FLA. STAT. 104.38 (1973)).

74. *Id.* at 247-48.

75. *Id.* at 248.

76. *Id.* at 249.

77. The appellee agreed that the "government has an obligation to ensure that a wide variety of views reach the public." *Id.* at 248. Previous Court's decisions suggest that the "First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press

The Court acknowledged that the arguments may have had validity, but pointed to a fundamental problem: to enable access to a wider group of speakers, as a right-of-reply statute does, and enable the public to hear a diversity of views, the government must coerce newspapers into providing that access.[78] The Court emphasized that although the government itself did not dictate the message, *Tornillo* concerned content discrimination. Therefore, the Florida statute exacted "a penalty on the basis of the content of a newspaper."[79]

The Court found two main grounds for holding the right-of-reply statute unconstitutional: first, it suppressed speech; and second, it compelled speech and therefore intruded upon editor functions.[80] The statute suppressed speech in several ways. First, newspapers have limited space and the decision of what to print always entails a decision about what not to print and vice versa.[81] Thus, when the government requires an editor to print a reply, the paper cannot print something it would prefer to have printed, which amounts to government suppression.[82] Second, additional costs of printing and composing the reply are suppressive.[83] The third type of speech suppression is somewhat distinct: a newspaper editor may choose to avoid triggering the right-of-reply statute in the first place by deciding not to criticize candidates or cover the topic at all.[84] The final type of speech suppression is particularly problematic because it is both content-based and viewpoint discrimination: a newspaper triggers the penalty of carrying another's message if it discusses a candidate or makes a politically partisan attack.[85]

The Court's second ground for why the right-of-reply statute invades the editor's function does not rely upon suppression; it is a pure compelled speech argument premised on the speaker-based rights of editors and newspapers:

---

from government regulation." *Id.* at 251.

78. *Id.* at 254.
79. *Id.* at 256.
80. *Id.* at 256-58.
81. *Id.* at 256.
82. *Id.*
83. *Id.*
84. *See id.* at 257.
85. *See id.*

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. . . . The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.[86]

The Court concluded that the government may not regulate this "crucial process." Though the Court does not use the term "freedom of mind," the deliberative process of editors deciding what to publish is similar to the freedom of mind notion relied upon in *Barnette*. The Court subsequently confirmed that *Tornillo* rests upon the speaker's "individual freedom of mind."[87]

Tornillo, however, marked a significant departure from *Barnette* that would define compelled speech cases from then on. In *Barnette*, there was only one speaker: each student forced to recite the pledge.[88] In *Tornillo*, and all subsequent cases by contrast, there are two potential speakers, and any compelled speech doctrine must implicitly adjust their interests.[89] One speaker is the candidate who wishes his reply to appear in the newspaper.[90] On the other hand, the newspaper is also the speaker; this becomes clear when we invert the situation to see that a newspaper has a free speech right to print the opinions of others against government suppression. This dual speaker problem recurs in the compelled speech cases and, as discussed below, finds its best solution through a listener-focused analysis.[91]

---

86. *Id.* at 258.

87. The Court subsequently confirmed that *Tornillo* rests upon the speaker's individual freedom of mind. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797 (1988).

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

89. *See Tornillo*, 418 U.S. at 241.

90. *See id.* at 243-44.

91. *See infra* text accompanying notes 222-232.

D. The Concept of Freedom of Mind Expands

In *Wooley v. Maynard*,[92] the Court invalidated a New Hampshire law requiring license plates to bear the motto "Live Free or Die."[93] State law made it a misdemeanor to cover the motto.[94] The Maynards, Jehovah's Witnesses, covered up the motto on moral, political, and religious grounds and brought an action for declaratory and injunctive relief.[95] The Court held that the state law unconstitutionally compelled speech because the state may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."[96]

As in *Barnette*, the Court in *Wooley* relied upon freedom of mind, at least in a general way:

> [T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."[97]

In doing so, the Court began to set the right to speak and not to speak on equal footing, an equivalence that the Court later buttresses.

The Court in *Wooley* does not define "freedom of mind."[98] It states, however, that individuals have the right "to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."[99] Upon what definition of invasion of freedom of mind does this rest? Although the Court discusses the right of individuals to

---

92. Wooley v. Maynard, 430 U.S. 705 (1977).
93. *Id.* at 707, 717.
94. *Id.* at 707-08.
95. *Id.* at 707-09.
96. *Id.* at 713.
97. *Id.* at 714 (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34, 637 (1943)).
98. *See id.* at 714-15.
99. *Id.* at 715.

hold points of view at variance with the majority, it does not appear to rely upon a definition of invasion of freedom of mind that would require a finding that the government compulsion had altered, shaped, or coerced that person's actual thoughts or beliefs. Indeed, the facts in *Wooley* would not support such a finding, since the requirement that the Maynards, Jehovah's Witnesses, display the motto "Live Free or Die" is unlikely to alter their beliefs.

Rather, the Court identified the harm wrought by the New Hampshire statute as requiring the Maynards to foster a belief they disagreed with.[100] The Court then held that this compelled fostering of beliefs invaded the Maynards' freedom of mind.[101] But the Court did not explain how the compelled fostering of belief invaded their freedom of mind when it did not alter their beliefs. There are a few possibilities. First, the compelled speech invades the Maynards' freedom of mind because it interferes with their religious beliefs. But this ground must lie, if at all, under the Free Exercise or Freedom of Religion Clauses, and cannot form the basis of a compelled speech claim under the Free Speech Clause. Second, compelling the Maynards to foster the government message could harm their reputation. Third, and related, the compulsion could harm their personality or their sense of identity by forcing them to interact with the world in a particular way through words.

There are two problems with the argument that the government compulsion in *Wooley* invaded the Maynards' freedom of mind by injuring their reputation or personality. First, it is unlikely the compulsion in *Wooley* injured the Maynards' reputation or personality because a reasonable observer would be unlikely to conclude that the Maynards necessarily believed the message. Second, it is debatable whether the Free Speech Clause ought to protect a person's reputation or personality for its own sake. On the other hand, it is well established that the Free Speech Clause protects the interests of listeners, as discussed below.[102]

As in *Tornillo*, the facts in *Wooley* present the challenge of disentangling two potential speakers—the government and the Maynards. The government is a speaker because it established "Live

100. *Id.*

101. *See id.*

102. *See infra* Parts IV-V.

Free or Die" as the state motto and mandated that it appear on license plates. On the other hand, the Maynards are also speakers. This follows because if the Maynards wished to put a bumper sticker on their car with other political messages, then that speech would be protected against government suppression.[103] Indeed, courts have held that the message motorists choose for their vanity license plates[104] or specialized license plates[105] is protected by the First Amendment.

E. Stretching Freedom of Mind to Cover Compelled Subsidy Cases

In *Abood v. Detroit Board of Education*,[106] the Court again relied heavily upon the concept of the speaker's freedom of mind and expanded its application even farther, to embrace not just speech but compelled subsidies for speech.[107] In *Abood*, state law authorized local public school teachers to unionize and permitted those unions to enter into "agency shop" arrangements.[108] These arrangements required all teachers represented by the union to pay dues or a service fee of the same amount.[109] The Detroit Board of Education had entered into such an arrangement with its union. Employees who refused to pay either dues or service fees sued, arguing that the compulsion violated the First Amendment as compelled speech and

---

103. Broadrick v. Oklahoma, 413 U.S. 601, 618 (1973) (suggesting that the First Amendment protects bumper stickers); *see also* Cunningham v. State, 400 S.E.2d 916, 920 (Ga. 1991) ("[T]he provision regulating profane words on bumper stickers reaches a substantial amount of constitutionally protected speech and unconstitutionally restricts freedom of expression . . . .").

104. Lewis v. Wilson, 253 F.3d 1077, 1081-82 (8th Cir. 2001) (holding state violated First Amendment by refusing to issue motorist vanity license plate that said "ARYAN-1"); *see also* Perry v. McDonald, 280 F.3d 159, 169-72 (2d Cir. 2001) (holding that license plates, though not public forums, receive First Amendment protection).

105. *E.g.*, Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 960 (9th Cir. 2008) (holding that the Arizona License Plate Commission violated the First Amendment by denying the Arizona Life Coalition application for a specialty license plate that would say "Choose Life").

106. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

107. *Id.* at 222, 234-36.

108. *Id.* at 211-12.

109. *Id.* at 212.

compelled association.[110] The dissenting teachers disapproved of all collective bargaining in the public sector, and therefore objected to subsidizing collective bargaining.[111] The teachers also disagreed with the political speech the union engaged in that had nothing to do with its role in collective bargaining.[112]

The Court made three main holdings: the first concerning subsidies used for collective bargaining;[113] the second addressing subsidies used for political speech unrelated to collective bargaining;[114] and the third concerning whether teachers must affirmatively inform the union of their dissent in order to get a rebate.[115] The Court first held that compelling teachers to contribute to the union's collective bargaining activity did not violate their First Amendment rights.[116] It acknowledged, however, that the compelled subsidy affected the teachers' First Amendment interests because a teacher might oppose the union message used in collective bargaining:[117]

> An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. . . . The examples could be multiplied.[118]

Nevertheless, the Court held that the case was controlled by previous precedent, *Railway Employees' Department v. Hanson*,[119] in which the Court held that such an agency shop arrangement was justified despite First Amendment concerns, because of the need to

110. *Id.* at 212-13.
111. *Id.*
112. *Id.* at 213.
113. *Id.* at 225-26.
114. *Id.* at 235-36.
115. *Id.* at 238-39.
116. *Id.* at 225-26.
117. *Id.* at 222.
118. *Id.*
119. Ry. Employees' Dep't v. Hanson, 351 U.S. 225 (1956).

avoid "free riders" who gain the benefits of union-negotiated contracts but bear none of the costs.[120]

The second holding in *Abood* relied upon the speaker's freedom of mind.[121] The Court held that the First Amendment prohibits unions from compelling subsidies from dissenting teachers to support union political speech that is not related to collective bargaining.[122] The Court reached this conclusion in two steps. First, the Court stated that under the right of freedom of association recognized in *Buckley v. Valeo*,[123] the First Amendment protects individuals who wish to pool money to spread a political message.[124] This step did not rely on the speaker's freedom of mind.[125] Since the issue in *Abood* was not a limit on the right to pool money and freely associate, but the *compulsion* to do so, the *Abood* Court had to justify why compelled association paralleled suppressed association.[126] This brought the Court to step two.

In justifying the principle that compelled association violated the First Amendment just as suppressed association did, the Court in *Abood* relied upon the teacher's "freedom of belief" and went further to express the principle that this freedom included the right to shape one's own beliefs and not to have those beliefs coerced by the State.[127] In particular, the Court reasoned, "an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State."[128] And finally, the Court in its third holding found that the

120. *Id.* at 231, 238.

121. *Abood*, 431 U.S. at 235-36.

122. *Id.*

123. Buckley v. Valeo, 424 U.S. 1, 22-29 (1976) (holding that campaign contributions to political parties enjoy at least initial coverage under the First Amendment as free association, but that those limits withstand the closest scrutiny and are constitutional).

124. *Id.* at 22.

125. *See id.*

126. *Abood*, 431 U.S. at 211.

127. *Id.* at 235-37.

128. *Id.* at 235 (citations omitted). A unanimous Court restated this point in 1986 in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). In *Chicago Teachers Union, Local No. 1*, the Court stated that the compelled speech doctrine rested on the right of the individual employee to shape his own mind and

burden rests with individual teachers to inform the union they disagree with the union's political speech and seek a rebate, rather than upon the union to determine affirmatively whether each teacher agrees to subsidize the union's political speech.[129]

F. Stretching Individual Freedom of Mind to Include Factual Disclosures

Riley v. National Federation of the Blind of N.C., Inc.[130] reveals the compelled speech doctrine completely unhinged from its justification. In *Riley*, the Court held unconstitutional a statute that required solicitors for charities to reveal at the doorstep or on the phone how much of the collected money really went to charitable purposes as opposed to overhead costs.[131] As in *Barnette* and *Wooley*, the Court in *Riley* premised the right against compelled disclosure, even of financial facts, upon the speaker's individual freedom of mind.[132]

In addition, the Court relied on the speaker's freedom of mind to conclude that the strength of the compelled speech doctrine equals that for suppression cases, meaning that "exacting scrutiny" applies to both.[133] The State had argued the Court should apply a more deferential test to compelled speech than the exacting scrutiny applied to suppression of speech cases.[134] The Court rejected that argument, however, by emphasizing the speaker's freedom of mind.[135] It stated "[t]he constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression was established in *Miami Herald Publishing Co. v. Tornillo*."[136] The Court reiterated that freedom of mind encompasses both the right to speak and the right to

---

beliefs free of government compulsion. *Id.* at 302 n.9.

129. *Abood*, 431 U.S. at 238-42. The Court later expanded on this holding in *Chicago Teachers Union, Local No. 1*, 475 U.S. at 302-06.

130. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988).

131. *Id.* at 795.

132. *Id.* at 797; *see also* Wooley v. Maynard, 430 U.S. 705, 714 (1977); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

133. *Riley*, 487 U.S. at 796-98.

134. *Id.* at 796.

135. *Id.* at 797.

136. *Id.*

not to speak[137] and concluded that the compelled speech doctrine therefore provided the same robust protection as in suppression cases—"exacting First Amendment scrutiny."[138] The Court then expressly held the compelled speech doctrine protects against the compelled disclosure of either facts or opinions.[139] Though not expressly stated, this conclusion seems also to be based upon the parity of the right to speak and the right not to speak since it followed directly upon that discussion. Thus, *Riley* expressly established the "constitutional equivalence of compelled speech and compelled silence," at least with respect to non-commercial speech.[140]

G. Individual Freedom of Mind Remains the Keystone

In *United States v. United Foods, Inc.*,[141] the Court continued to rely upon the phrase "freedom of belief" to justify the compelled speech doctrine.[142] *United Foods* was the second in a trilogy of cases addressing a particular type of compelled subsidy: a federal check-off program. In *United Foods* the Court addressed a federal statute mandating that fresh mushroom handlers pay assessments used to fund advertising for mushrooms.[143] Certain mushroom growers sued, arguing the compelled funding for advertising violated their First Amendment rights.[144] The Court agreed, concluding the mandatory assessments were unconstitutional under *Abood*.[145] Relying again on the "freedom of belief," the Court held the assessments violated the mushroom grower's First Amendment rights because it forced them to support speech to which they objected.[146]

---

137. *Id.* (quoting *Wooley*, 430 U.S. at 714).

138. *Id.* at 798.

139. *Id.* at 797-98.

140. *Id.* at 797.

141. United States v. United Foods, Inc., 533 U.S. 405 (2001).

142. *Id.* at 413 (citing Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 471 (1997); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977)).

143. Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101(a)(6) (2000); *United Foods, Inc.*, 533 U.S. at 408.

144. *United Foods, Inc.*, 533 U.S. at 409.

145. *Id.* at 410, 413.

146. *Id.* The mushroom growers disagreed with the advertisements because they failed to recognize differences in mushroom quality. *Id.* at 411.

On the other hand, the Court in *United Foods* also stated that the interests of both the audience and the speaker are relevant in compelled speech cases.[147] The United States had argued that disputes over the quality of mushrooms are not as significant as disputes over fundamental political or ideological beliefs and therefore are not entitled to protections against compelled speech.[148] In rejecting this argument, the Court noted that the "general rule is that the speaker and the audience, not the government, assess the value of the information presented."[149]

H. The Government Speech Doctrine: A Continuing Focus on the Speaker

The Court in *Johanns v. Livestock Marketing Ass'n*[150] addressed a program similar to that in *United Foods*, only this time the program concerned beef instead of mushrooms.[151] Under federal law, cattlemen were charged one dollar per head of cattle to support the Beef Council, which used the money to fund, among other things, advertisements promoting beef, such as the "Beef, It's What's for Dinner" campaign.[152] Many of the promotions stated that they were "Funded by America's Beef Producers," but did not disclose they were part of a government program.[153]

Some cattlemen and associations who raised domestic, grain-fed beef challenged the law on the ground that it compelled them to subsidize advertisements they disagreed with.[154] They disagreed with the advertisements' generic nature because it promoted a single quality of beef, although their grain-fed beef was in their view superior to the largely imported, grass-fed beef.[155] They argued the

147. *Id.* at 411.
148. *Id.*
149. *Id.*
150. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).
151. *Id.* at 554-56, 558.
152. *Id.* at 554.
153. *Id.* at 555, 564.
154. *Id.* at 555-56.
155. *Id.* at 556.

compelled exactions therefore violated their First Amendment rights under *United Foods* and *Abood*.[156]

The Court disagreed, and held the exactions and the advertisements were constitutional because the advertisements were government speech, not the speech of the plaintiffs.[157] The Court did not rely upon the speaker's freedom of mind, but as a practical matter focused on the speaker's point of view in assessing whether the speech before it was government speech;[158] and it expressly refused to consider respondents' challenge from the viewpoint of listeners. "[T]he correct focus is not on whether the ads' audience realizes the Government is speaking, but on the compelled assessment's purported interference with respondents' First Amendment rights."[159]

In determining that the subsidized beef advertisements were government speech, the Court looked entirely to the speaker's point of view by analyzing who established and controlled the message.[160] The Court found that the beef advertisements were government speech because the promotional campaigns were controlled by the federal government.[161] The Court rejected the argument that viewers were likely to attribute the advertisements to private cattlemen rather than to the government as irrelevant, at least on a facial challenge.[162]

I. The Beginning of the End of the Speaker's Freedom of Mind?

In 2006, the Court appeared to inch away from its past reliance on the speaker's freedom of mind. It likewise appeared to question implicitly the broad equivalence for compelled speech and

156. Brief for the Respondents in Opposition *passim*, *Johanns*, 544 U.S. 550 (Nos. 03-1164, 03-1165). The Respondents cattlemen also relied heavily upon *Keller v. State Bar of California*, which held government compelled bar dues used to support political speech were unconstitutional. *Id.*; Keller v. State Bar of Cal., 496 U.S. 1, 4, 13-14 (1990).

157. *Johanns*, 544 U.S. at 560-67.

158. *Id.*

159. *Id.* at 564 n.7.

160. *Id.* at 560-61.

161. *Id.* at 560. "The message set out in the beef promotions is from beginning to end the message established by the Federal Government." *Id.*

162. *Id.* at 564 n.7.

suppression of speech announced in *Riley*.[163] In *Rumsfeld v. Forum for Academic & Institutional Rights*, several law schools challenged the constitutionality of the federal requirement that the law schools provide the same access to military recruiters as they do to other recruiters, such as law firms, or else lose some federal funding.[164] The law schools objected to the military's practice of discrimination on the basis of sexual orientation, as well as to the federal requirement that law schools provide military recruiters equal access, since these aspects of the regulation compelled them to tacitly support such discrimination and to disseminate military recruiting messages.[165] The Court disagreed that the compelled speech doctrine protected against the access the legislation required law schools to provide.[166]

The Court recognized the compelled speech doctrine, but did not root the doctrine in the speaker's freedom of mind, nor did it use that phrase.[167] In reviewing the leading compelled speech cases, the Court likewise avoided the phrase "freedom of mind," and did not refer to any similar concept. Rather, it summarized those cases as merely establishing that the government may not tell individuals what to say when the speech is of a type similar to that in *Barnette* and *Wooley*.[168] Similarly, in reviewing *Tornillo* and other compelled speech cases, the Court emphasized the suppressive aspect of the government's conduct.[169]

With respect to compelled *factual* disclosures, the Court acknowledged the broad protection *Riley* afforded against compelled factual disclosures.[170] The Court noted that compelled statements of fact such as, "'The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.,'" are subject to First Amendment scrutiny

---

163. *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 64 (2006) (stating that accommodation of the military's message is not compelled speech because law schools' speech is not affected when they host recruiting receptions).

164. *Id.* at 51.

165. *See* Brief for the Respondents at 1, 5, 10-23, Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) (No. 04-1152).

166. *See Rumsfeld*, 547 U.S. at 62.

167. *Id.* at 61-63.

168. *Id.* at 62.

169. *Id.* at 63-64.

170. *Id.* at 62.

just like compelled statements of opinions.[171] But the Court then stated that "this sort of recruiting assistance . . . is a far cry from the compelled speech in *Barnette* and *Wooley*."[172] In the end the Court held the speech used by law schools to inform students of Army room assignments was not protected primarily because it was more akin to conduct incidental to the act of recruiting than protected speech.[173] By contrasting these factual disclosures with the compulsion in *Barnette* and *Wooley*, the Court implicitly undermined *Riley's* holding that *all* factual disclosures deserve the same protection as compelled beliefs. But the narrowing of *Riley* by *Rumsfeld* was really more of an implicit holding, a hint of what may be to come. In the end, the broad protection for compelled speech set forth in *Riley* remains the law, as does the justification for that broad protection—the speaker's freedom of mind.

J. Unions Spending Other People's Money

In the most recent compelled speech case, *Davenport v. Washington Educational Ass'n*,[174] decided in June 2007, the Court largely reinforced the holding in *Abood* that unions may not spend the money of nonmembers for political speech unrelated to collective bargaining.[175] The Court confronted a somewhat specific issue: whether state law may shift the burden to unions to determine whether individual nonmembers agree to subsidize the union's campaign speech, rather than require dissenting nonmembers to inform the union that they dissent and want a rebate.[176] The Court held unanimously

171. *Id.* (citing Brief for Respondents at 25, Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) (No. 04-1152)).

172. *Id.*

173. *Id.* at 64. The general reasoning that a court may exclude certain speech from First Amendment coverage by arguing that the speech is more like an act than speech has been subjected to criticism. *See generally* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005) (arguing that speech cannot be excluded from First Amendment protection simply by arguing the speech at issue is more like an act than speech).

174. Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372 (2007).

175. *Id.* at 2376-77.

176. *Id.* at 2379.

that state law could in fact create such requirements.[177] State law granted unions the right to compel the subsidies in the first place; the state could therefore take the lesser step of requiring unions to ascertain which nonmembers wish to support their political, non-collective bargaining speech.[178]

In so holding, the Court did not discuss the ultimate underpinnings of the compelled speech doctrine or freedom of mind. Rather, it focused on the notion that unions themselves cannot claim their free speech right has been burdened by the requirement they ascertain which nonmembers dissent. The money the union wishes to spend is not its to begin with; rather, that money has come into union hands only through government compulsion.[179]

K. The Current Compelled Speech Doctrine Based on the Speaker's Freedom of Mind: The Equivalence of Compelled Speech and Suppression of Speech

Many flawed principles emerge from the cases discussed above. The most important is the Court's assumption that the justification for the compelled speech doctrine rests upon the protection afforded to the speaker's freedom of mind against government invasion. A second principle with far reaching consequences is the further notion that such freedom of mind is sufficient in itself to justify a compelled speech doctrine equal in both power and ambit to the free speech principles that guard against suppression of speech. That is, they are equal in power in that the Court applies to compelled speech cases the same test as for suppression cases "exacting First Amendment scrutiny."[180] They are likewise equal in scope because the Court has established that the compelled speech doctrine applies to as wide a range of speech as that found in suppression cases, protecting against compelled disclosure of facts as much as against compelled affirmation of political viewpoints.

Nowhere in these decisions, however, does the Court explain how compelled speech invades the speaker's freedom of mind, or why the

177. *Id.*

178. *Id.*

179. *Id.* at 2380-81.

180. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 798 (1988).

compelled speech doctrine is equivalent in strength of protection and scope to suppression cases. Rather, the Court merely relies upon repetitive, formalistic language, and sleight of hand to seduce us into believing that the right not to speak must logically follow from the right to speak. Two formalisms used by the Court to equate the two rights are: (i) that the First Amendment protects both the "right to speak freely and the right to refrain from speaking at all," and that these two rights are (ii) "complementary components of the broader concept of 'individual freedom of mind.'"[181] In the Court's view, these equivalences both justify a compelled speech doctrine in the first place and further justify its equivalent power and ambit of protection. The phrases quoted above may at first sound convincing because they appear to identify a perfect symmetry between the right to speak and the right not to speak. Yet when examining the reasoning implicit in this formalism, we see that it does not withstand scrutiny.

The reasoning that equates the right not to speak with the right to speak is grounded upon the following underlying assumption: ordinary speech communicates our inner beliefs and thoughts and is therefore necessary to protect our "freedom of mind." With this assumption in mind, the implicit syllogism supporting the equivalence of the right not to speak with the right to speak proceeds as follows. Major premise: the speaker's "freedom of mind" justifies the right to speak. Minor premise: not speaking is a kind of speech. Conclusion: the speaker's freedom of mind must therefore justify the right not to speak. As explained below, however, both premises are faulty.

The major premise is faulty because speech is not necessary to protect a speaker's freedom of mind or belief. One can think or believe whatever one wants and simply not say it. Luckily, there is a difference between what we think and what we say, and we are free to think many things we cannot say, whether because of laws or social norms. As Professor Frederick Schauer noted in largely rejecting "freedom of mind" as a justification for the free speech principle, thoughts are beyond the reach of government because we can think silently.[182] Therefore, it is not the speaker's freedom of mind that justifies the right to speak in the first place, but rather, listener interests that justify the right to speak.

---

181. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

182. SCHAUER, *supra* note 30, at 53.

The minor premise—that not speaking is a kind of speech—is also faulty because "not speaking" is not a type of speech unless that very silence is itself intended to be a form of expression. But in most compelled speech cases, the speaker does not intend silence to be expressive; instead, the speaker would simply prefer not to say what is demanded. For example, in *Wooley*, the Court expressly declined to find that the Maynards' had engaged in symbolic speech by covering up the state motto with tape and, indeed, held that the complaint undermined such an assertion, because the Maynards had requested the State issue them special license plates that did not bear the motto.[183] Viewed in this light, the right not to speak is *not* analogous to the right to speak, since silence is not necessarily a type of speech.[184]

As stated by Professors Vincent Blasi and Seana Shiffrin, the right not to speak cannot logically follow from the right to speak merely because of the formalism of the language employed:

> Yet surely it is not always true that for the right to X to be meaningful one must have the option not to X. For example, the right to be free from torture retains its value even in environments in which people have no opportunity to waive the protection against torture. The right to life may have great importance even if there is no corresponding right to die.[185]

As a consequence, the parity of the right not to speak with the right to speak as announced in *Barnette*, *Wooley*, *Abood*, and *Riley* cannot be based upon the speaker's freedom of mind, or at least not upon the implicit reasoning and formalism that appears in those cases. Indeed, the ultimate failure of this seductive equivalence of the right not to speak with the right to speak has led scholars to seek more concrete harm to the speaker's freedom of mind wrought by compelled speech, and it is to those theories this article now turns.

---

183. *Wooley*, 430 U.S. at 713, 713 n.10.

184. Jones v. Collins, 132 F.3d 1048, 1054-55 (5th Cir. 1998) (holding that the First Amendment does not protect silence, absent a compulsion to speak or evidence that the person intended the silence to be expressive or symbolic).

185. Blasi & Shiffrin, *supra* note 4, at 456.

III. THE PROBLEM: A FOCUS ON THE SPEAKER'S FREEDOM OF MIND DOES NOT JUSTIFY THE COMPELLED SPEECH DOCTRINE OR EXPLAIN THE ACTUAL HOLDINGS IN THE CASE LAW

Many scholars have observed that the compelled speech doctrine is difficult to justify.[186] As noted in the introduction, Larry Alexander surveyed numerous possible justifications for the compelled speech doctrine, yet concluded that none adequately explained the holdings in the leading compelled speech cases.[187] In doing so, he focused on potential harms to speaker interests, and concluded that "[t]he harm in compelled speech remains elusive, at least for me."[188] Professor Abner Greene likewise concluded that the compelled speech doctrine, as currently configured in leading compelled speech cases, was indefensible and should be greatly narrowed.[189] He too focused largely on speaker interests.[190] Professors Blasi and Shiffrin similarly noted that "*Barnette* turns out to be surprisingly difficult to defend," and that the "right to express oneself to others" provides little justification for *Barnette* since listeners likely know the speech is compelled.[191]

What these scholars have not proposed, however, is to abandon a focus on the mind of the speaker in favor of a focus on the mind of the listener. Rather, they have continued to operate under the assumption that the relevant "mind" in "freedom of mind" is the speaker's. But this focus on the speaker's freedom of mind cannot explain most of the compelled speech cases; a focus on most speaker interests, and particularly on the concept of the speaker's freedom of mind, actually hampers any justification for the compelled speech doctrine. This article outlines some of those speaker interests below.

---

186. *See id.* at 454, 456; Greene, *supra* note 4, at 475; Shiffrin, *supra* note 4, at 853.

187. Alexander, *supra* note 4, *passim*.

188. *Id.* at 178.

189. *See* Greene, *supra* note 4, at 475.

190. *Id.* at 474-75.

191. Blasi & Shiffrin, *supra* note 4, at 454, 456; Shiffrin, *supra* note 4, at 853.

A. Emotional Outlet

The speaker has an interest in having what is commonly called an "emotional outlet."[192] This interest is embodied by the notion that speaking makes the speaker happy or brings him pleasure. Schauer rejects this notion as a fundamentally misguided free speech justification,[193] whereas Greenawalt says that the need for an emotional outlet alone cannot justify a free speech principle, though that need may provide additional support to other justifications.[194]

In any event, speaker interests in emotional venting provides little justification for a compelled speech doctrine. Compelling speech obviously does not prevent a person from venting emotionally; it also does not really force him or her to vent emotionally since the government cannot compel a person to actually feel what he or she is forced to say. Either way, to the extent compelled speech does compel some feeling or emotion, the process nevertheless seems indistinguishable from compelling a belief.

B. Refining Thoughts

A more persuasive speaker interest arises from the "personal growth, self-fulfillment, and development of the rational faculties" that result from speaking.[195] Speech is integral to self-development because it enables a person to clarify and better understand his own thoughts.[196] As noted above, Frederick Schauer rejects self-development as a sufficient justification for the Free Speech Clause, and Greenawalt likewise argues that, standing alone at least, self-development cannot justify a free speech principle.

---

192. KENT GREENAWALT, SPEECH, CRIME AND THE USES OF LANGUAGE 27-28 (1989).

193. SCHAUER, *supra* note 30, at 49.

194. GREENAWALT, *supra* note 192, at 27-28.

195. SCHAUER, *supra* note 30, at 49, 53-56; *see also* Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) (observing that "[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression"); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591-93 (1982) (arguing that self-realization, including self-fulfillment, lies at the heart of the First Amendment).

196. SCHAUER, *supra* note 30, at 55.

In some ways, this interest in refinement of one's thoughts and development of one's rational faculties is a hybrid between speaker and listener interests. After all, a speaker clarifies her thoughts by: (i) listening to those thoughts spoken aloud; and (ii) listening to the reaction of others. But the "clarification" actually occurs more in the listening than in the speaking, or at a minimum in anticipating the likely response of the listener. For example, in reading a draft, a writer, in deciding how to revise, makes the precise types of choices from the available information that listeners make. Likewise, when a speaker solicits comments from others to his speech, he again acts as a listener in deciding whether and how to fix what he said based upon those comments.

When we apply the self-fulfillment rationale to compelled speech, we find that the speaker's interest in refining her thoughts, or otherwise expanding her rational and deliberative faculties in speaking, provides little support for a doctrine against compelled speech. Compelling someone to speak has little effect on her ability to refine her thoughts. After all, such compulsion can hardly prevent a person from otherwise saying what she really believes in an effort to refine those beliefs.

In some circumstances, however, speech compulsion may actually interfere with a speaker's ability to refine her thoughts. Professors Blasi and Shiffrin argue that compelling speech may force a person to reveal her ideas before she has fully worked them out. "To have to speak prematurely may interfere with a person's deliberative process and force him to speak before his thoughts are adequately settled."[197] This argument has some merit. For example, fiction writers are warned against showing their work to readers too soon to avoid squelching the ongoing creative process. Nevertheless, as Professors Blasi and Shiffrin conclude, this type of interference does not explain cases such as *Barnette*.[198] This interference does not even remotely apply to any of the compelled speech or compelled subsidy cases considered here. Simply put, a speaker's interest in refining one's thoughts can neither justify nor clarify the compelled speech doctrine.

197. Blasi & Shiffrin, *supra* note 4, at 456.

198. *See id.*

C. Compelling Beliefs

The most direct and intuitive explanation for how the government, in compelling speech, invades the speaker's freedom of mind simply asserts that compelled speech alters or even compels the speaker's beliefs.[199] *Barnette*, as noted above, hints at this possibility—that the statute possibly requires students to "forego any contrary convictions of their own and become unwilling converts . . . ."[200] Professors Blasi and Shiffrin have argued persuasively that the forced repetition of the pledge in *Barnette* may alter the beliefs of the students by subverting the normal method of rational persuasion and may, like subliminal advertisement, inculcate the government viewpoint by stealth.[201]

Whatever persuasive appeal the argument that compelled speech actually alters or compels the beliefs of the speaker has in *Barnette*, the justification cannot explain most of the other compelled speech cases. For example, in *Wooley*, drivers forced to display "Live Free or Die" on their license plates are unlikely to begin to believe it. Indeed, the Court in *Wooley* did not contend that the invasion of the speaker's freedom of mind actually meant that the speaker's thoughts were shaped or coerced by the State.[202]

In contrast to *Wooley*, the Court in *Abood* suggested the government invades the speaker's freedom of mind by actually altering or coercing his beliefs,[203] but this simply does not make sense. Compelled subsidies do not shape or coerce the beliefs of a dissenting teacher. Rather, such a compelled subsidy is more likely to sharpen the dissenting teacher's pre-existing beliefs by opposition rather than alter them. Nothing in the compelled subsidy suggests that a union worker's beliefs would actually be brought in line through the State's purported attempts at coercion.

The use of the concept of the speaker's freedom of mind by the Court in *Riley* makes even less sense in explaining that case.

---

199. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943).

200. *Id.*

201. *See* Blasi & Shiffrin, *supra* note 4, at 461; Shiffrin, *supra* note 4, at 854-60.

202. *See* Wooley v. Maynard, 430 U.S. 705, 713-15 (1977) (focusing primarily on compelled *dissemination* of objectionable messages rather than the risk of altered beliefs).

203. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977).

Requiring a solicitor for a charity to disclose how much money goes to the charity cannot possibly alter the beliefs or otherwise invade the mind of that solicitor or the charity in any meaningful way. In contrast to *Barnette*, *Wooley*, and *Abood*, the disclosure at issue in *Riley* did not even deviate from anything the speaker believes. Indeed, the disclosure did not even touch on the speaker's beliefs at all, and it surely did not compel the solicitor to believe something contrary to his or her ideals—it merely required the disclosure of financial facts. The Court in *Riley* identified no causal or other connection between the compelled disclosure of financial facts and any invasion of the speaker's "freedom of mind."[204]

D. Government Interference with the Individual's Sincerity

Professors Blasi and Shiffrin also argue that the type of compelled pledge in *Barnette* interferes with the very process of successful communication in a democracy, namely because of the particular role sincerity plays in communication.[205] Sincerity makes much speech possible and enhances its role in "facilitating mutual understanding among citizens who appreciate each others' needs and concerns and who strive to forge political accommodations on the basis of this appreciation."[206] A compelled pledge like the one at issue in *Barnette* eviscerates the students' sincerity; this government compulsion represents an illegitimate incursion into the function of free speech as a matter of principle and as a matter of the relationship between the government and the governed. It might also undermine the effectiveness of speech as a practical matter by making people, especially children, cynical about speech as a means of communicating wants and needs. The compulsion would thus erode the civic character of students in a manner particularly contrary to the First Amendment since the speech compelled pertains to the communication of political beliefs.

This argument concerning government erosion of sincerity, like the compelled beliefs argument, has some persuasive appeal with respect to *Barnette*. But it seems to provide little support for later

204. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797-800 (1988).

205. *See* Blasi & Shiffrin, *supra* note 4, at 459; Shiffrin, *supra* note 4, at 862.

206. Blasi & Shiffrin, *supra* note 4, at 459; Shiffrin, *supra* note 4, at 862.

compelled speech cases such as *Wooley* and *Abood*, where the speaker is sufficiently detached from the message to protect her against the erosion of her character for sincerity. A teacher forced to subsidize a union message he disagrees with is unlikely to become cynical or find his character for sincerity eroded any more than someone who is simply aware of the compulsion; that is, we all become a little more cynical upon learning that the government compels dissenters to subsidize political union speech.

Rather, a focus on listener interests seems to better capture the problem identified by Professors Blasi and Shiffrin than would a focus on the speaker's freedom of mind. If government compulsion erodes the usefulness of language as a political tool for accommodating interests, this seriously undermines the interests of listeners and the public in the effectiveness of interest accommodation. Sincerity helps language work effectively and, in turn, enhances the listener's ability to properly assess and evaluate the message.

E. Compelled Consent

Putting the other compelled speech cases aside for the moment, perhaps the most attractive justification made by the Court in *Barnette* lies with its disapproval of government-compelled speech that forces students to consent to our very form of government.[207] Our constitutional democracy rests upon the premise of consent of the governed; consent by its nature is voluntary, and when the government compels that consent, it undermines its own legitimacy.[208] Of course, whether such compulsion violates the First Amendment in particular remains open to debate.

But even if the pledge compels the very consent upon which a constitutional democracy is premised as the justification for the holding in *Barnette*, the argument cannot explain the compelled speech doctrine generally. The consent argument only applies to cases involving a compelled pledge of allegiance, or perhaps promises of

---

207. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943); *see also supra* text accompanying notes 68-70 for further discussion.

208. *See Barnette*, 319 U.S. at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.").

loyalty, since only these involve compelled consent to the form of government or to a particular regime.[209] The argument would not apply to most compelled speech cases, which involve political speech unrelated to consent, commercial speech, and speech somewhere in between.[210] For example, such an argument would not justify the *Wooley* decision: the state motto "Live Free or Die" hardly compels consent to the government. And such a consent argument would provide even less justification for cases such as *Tornillo*, or *Abood*, since the government compulsion at issue in these cases did not require the speaker to consent to the government.

F. Misattribution Theory: A Sufficient But Not A Necessary Condition

Scholars, as well as the Court in some cases, have employed the notion of "misattribution" (though not necessarily by that name) in assessing whether a particular form of compelled speech violates the First Amendment.[211] They examine whether reasonable listeners would mistakenly conclude that the speaker genuinely believes the compelled ideas or beliefs solely because he has uttered them.[212] Of course, the speaker may coincidentally believe the speech compelled, but a reasonable observer would have no good reason to make such a conclusion if the observer knew the speech had been compelled.

The most clear cut explanation for why a finding of misattribution should play a role in compelled speech cases follows from the very nature of speech itself. The connection between speech and thought is obvious, and surely one purpose of speech is to express our inner beliefs. It would seem to follow that if others attribute to us beliefs we do not have, such as through misunderstanding, speech has failed to

209. *Id.*; Speiser v. Randall, 357 U.S. 513, 520-29 (1958) (holding loyalty oath invalid because it placed burden of proof on taxpayer to prove he did not advocate overthrow of the government).

210. United States v. United Foods, Inc., 533 U.S. 405, 409-11 (2001); Wooley v. Maynard, 430 U.S. 705, 714-15 (1977).

211. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 572-75, 582 (1995) (holding unconstitutional a requirement that parade organizers include gay, lesbian, and bisexual group in parade since viewers might erroneously conclude organizers held or supported the gay group's message); Greene, *supra* note 4, at 474.

212. *Hurley*, 515 U.S. at 575-76; Greene, *supra* note 4, at 474.

accomplish this fundamental purpose. If it is government compulsion that leads others to misattribute to us beliefs we do not have, speech has failed in a way that violates the First Amendment. The breakdown in this important function of speech harms the interests of both speaker and listener alike.

This logic leads to the uncontroversial conclusion that whenever government-compelled speech leads to misattribution, the government conduct has violated the First Amendment. That is, misattribution is a *sufficient* condition to a finding of unlawful compelled speech. This conclusion is amply supported by both speaker interests and listener interests. The speaker interest at issue in cases of misattribution includes harm to reputation. Whether harm to reputation is an interest protected by the Free Speech Clause in particular, as opposed to other laws, seems debatable. Misattribution also harms speakers because of the practical effects that result from listeners mistakenly concluding the speaker actually holds the beliefs. For example, if the government compels an expert to mouth a government message she disagrees with, she is harmed when listeners are persuaded by the message specifically because they believe she as an expert holds that view. She has affected the world with words in a manner contrary to her desires and beliefs. Yet this harm seems to be subsumed by and derivative of the more concrete harm to the listeners who have been misled. In any event, there can be no question that the listener interests harmed by misattribution are fully protected by the Free Speech Clause. It is therefore clear that compelled speech that leads to misattribution violates the First Amendment.

The harder question is whether misattribution should be a *necessary* condition to a finding that the government compulsion violates the First Amendment. Should we require that listeners be misled by the government compulsion before we prohibit it? If so, whenever there is no likely misattribution—whenever reasonable listeners are likely to realize the speech has been compelled and does not necessarily represent the views of the speaker—then the compulsion does not violate the First Amendment. The answer is "no": misattribution should not be a necessary condition.

There are several reasons why misattribution should not be required before a finding of unlawful compelled speech. First, such a principle does not explain the leading compelled speech cases, as

others have noted.[213] In *Barnette*, *Wooley*, and *Tornillo*, reasonable listeners and readers probably know that the government has compelled the speech at issue and that the speaker therefore does not necessarily believe the ideas expressed. Other students in *Barnette* had no good reason to conclude that their fellow students believe in the compelled pledge simply because they must recite it;[214] other motorists in *Wooley* are unlikely to conclude any particular driver endorses the state motto simply because he must display it; and readers of the *Miami Herald* in *Tornillo* are particularly unlikely to conclude that a reply by a candidate represents the views of the newspaper. In other words, there is little danger of misattribution in these three seminal compelled speech cases—with the possible exception of *Barnette*. If these cases were rightly decided, then misattribution cannot be seen as necessary to a finding of unlawful compelled speech under the Free Speech Clause.

But perhaps these cases were wrongly decided and the compelled speech doctrine should be narrowed to address only cases in which there has been misattribution.[215] Justice Rehnquist argued this in his dissent in *Wooley*: "For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently to, or actually 'asserting as true' the message."[216] Abner Greene also advocates this view—that a court should find reasonable observers ascribe the compelled belief to the speaker before it holds that the compelled speech violates the Free Speech Clause.[217] Greene's view that misattribution should be a requirement follows directly from his definition of protected "speech" under the First Amendment—that "speech" only protects speech that reveals the inner thoughts or beliefs of the speaker or speech that others reasonably understand to reveal the speaker's thoughts or beliefs.[218] Greene's view stands on shaky ground, however, because it relies too heavily on the viewpoint of the

213. *See, e.g.*, Alexander, *supra* note 4, at 152-53; Blasi & Shiffrin, *supra* note 4, at 456; Greene, *supra* note 4, at 482-85; Shiffrin, *supra* note 4, at 853.

214. But students may come to conclude the others believe the pledge without a good reason, as discussed *infra* Part V.A.4.

215. *Wooley*, 430 U.S. at 721 (Rehnquist, J., dissenting); Greene, *supra* note 4, at 482-85.

216. *Wooley*, 430 U.S. at 721 (Rehnquist, J., dissenting).

217. Greene, *supra* note 4, at 474.

218. *Id.* at 473.

speaker; focusing instead on listener interests reveals why compelled speech can in fact violate the Free Speech Clause even absent misattribution.

As just noted, Greene's argument starts with the premise that the First Amendment only protects speech that reveals the inner thoughts or beliefs of the speaker or speech that others reasonably understand to reveal the speaker's thoughts or beliefs.[219] From this premise it naturally follows that in compelled speech cases, if reasonable listeners understand the speech has been compelled, and therefore do not misattribute the beliefs uttered to the speaker, there has been no violation of the Free Speech Clause.[220] As a result, Greene concludes that *Barnette*, *Wooley*, and *Tornillo* were all wrongly decided, at least as pure compelled speech cases under the Free Speech Clause, because reasonable listeners or readers would not attribute the speech to the speakers.[221] But the problem with Greene's argument is that his definition of protected "speech" is too narrow precisely because it excludes speech which listeners understand does not reflect the views of the speaker. By keeping in mind the listener's point of view, one discovers why this definition of speech is too narrow.

The First Amendment protects more than just speech reasonably understood by others to reveal the inner beliefs of the speaker for this reason: individuals have a free speech right to quote others. The decision in *New York Times Co. v. Sullivan*[222] illustrates that the First Amendment protects a newspaper's speech even when it presents the views of another that do not necessarily represent the views of the newspaper. In that case, the *New York Times* published a paid advertisement criticizing, in detail, the behavior of the police in

---

219. *Id.*

220. *Id.* at 473-74.

221. *Id.* at 482-85. On the other hand, Greene argues *Barnette* might violate the students' Constitutional right to privacy under *Griswold v. Connecticut* and its progeny, and that *Tornillo* might violate the Free Speech Clause as a suppression case, not a pure compelled speech case. *Id.*

222. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that a State cannot, under the First and Fourteenth Amendments, award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice"—that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false).

Montgomery, Alabama.[223] It was clear the advertisement represented the views of others and not necessarily those of the *New York Times*, first because it was an advertisement and, second, because the sponsors signed their names "under a line reading 'We in the south who are struggling daily for dignity and freedom warmly endorse this appeal.'"[224] The plaintiffs sued the *New York Times* claiming the advertisement was false and that it defamed them.[225] The Court held that the advertisement was protected under the First Amendment even though some of the statements were found to be false.[226]

As relevant here, the Court in *New York Times Co. v. Sullivan* afforded protection to the *New York Times* for the advertisement[227] even though readers would not necessarily attribute the ideas expressed in the ad to the *New York Times*. The *New York Times* was the protected "speaker." The purpose of the speech was not to reveal the inner thoughts of the *New York Times*, but rather for the *New York Times* to present readers with the thoughts of others. The basis for protecting the right of the *New York Times* to publish others' views rested upon two obvious notions: first, such protection is required to protect the free speech rights of the sponsors of the ad.[228] The *New York Times* stands as the sponsors' representative. Second, even if the person published did not have any First Amendment rights, the *New York Times* would retain the independent right to publish her views.[229] Listener interests require such protection to ensure that listeners hear as many views as possible: not only the views of the *New York Times*, but also the views of anyone else the *New York Times* chooses to publish.[230] The protection of the *New York Times'* right to publish the advertisement reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[231]

---

223. *Id.* at 257-58.
224. *Id.* at 257.
225. *Id.* at 258-60.
226. *Id.* at 264, 291.
227. *Id.*
228. *Id.* at 266.
229. *Id.*
230. *Id.*
231. *Id.* at 270.

Similarly, the Court held in *Smith v. California* that the First Amendment protects the right of a bookseller to sell books, even though the bookseller did not write those books and was unaware of their contents.[232] As *Smith* affirmed, such protection is necessary to safeguard the rights of listeners.[233]

The fair use doctrine[234] provides further evidence that the First Amendment protects speech that does not represent the views of the speaker. When a book reviewer quotes passages from a book, his quotation or summary is excluded from copyright protection by the fair use doctrine, a doctrine grounded in free speech concerns. Again, the quoted words are those of the author of the book, but they are also the words of the book reviewer, since he is literally writing them.

These examples of protected speech that arise when one person discusses or reports the views of another do not represent some idiosyncratic subset of speech. It is the lifeblood and central purpose of the press—to present to listeners a wide range of views of others. Newspapers regularly present the views of others, yet the newspaper remains the "speaker" and its right to present the views of others is constitutionally protected.

Protected speech in which one person essentially quotes or summarizes another plays a particularly important role in analyzing compelled speech, because it presents the closest analogy between traditional free speech (suppression) cases and compelled speech cases. In compelled speech cases, the government compels the speaker to speak another's message; in suppression cases such as *Sullivan*, the government punishes the speaker for carrying the views of another. In both cases the speech is protected even though it does not reveal the inner thoughts of the proximate speaker. It is therefore important to see that promoting the speech of others, as in *Wooley*, still qualifies as the type of speech the First Amendment protects.

---

232. Smith v. California, 361 U.S. 147, 155 (1959) (holding unconstitutional an ordinance that imposed strict criminal liability on any bookseller who sold books containing obscene material, even if he was unaware the book contained obscene material, since the ordinance imposed too great a restriction on the bookseller's First Amendment right to sell books).

233. *Id.* at 153-54 (noting that restricting the bookseller results in restricting listeners' access to this material).

234. Copyright Act, 17 U.S.C. § 107 (2008).

The foregoing also leads to the following general conclusion alluded to earlier: compelled speech cases other than *Barnette* often involve the speech of *two* different persons or entities. The first is what this article calls the "speaker" and the other is the originator or author of the message that the speaker must, in some sense, disseminate or subsidize. In cases such as *Wooley*, the speakers are the plaintiffs and the author of the message is the government.[235] *Both* are speakers in some sense and both have some right to speak. We cannot disentangle those two claims by focusing on speaker interests because both are speakers. We can only decide which claim prevails by focusing on some neutral viewpoint—that of the listeners.

IV. THE LEADING JUSTIFICATIONS FOR TRADITIONAL FREE SPEECH PROTECTION AGAINST GOVERNMENT SUPPRESSION RELY ON LISTENER INTERESTS

It is natural, of course, to view the First Amendment as protecting the interests of the speaker in expressing himself. Professor Thomas I. Emerson listed four main justifications for freedom of speech.[236] One of these justifications was self-expression as a speaker interest: "freedom of expression is essential as a means of assuring individual self-fulfillment."[237]

In fact, the most widely employed justifications for the Free Speech Clause rely on theories that focus on *listener* rather than speaker interests.[238] Roscoe Pound wrote in *Jurisprudence* that freedom of belief and speech should be viewed from the standpoint of social interests:

> But it must be looked at in connection with a social interest in free belief and free expression of opinion as guaranteeing political efficiency and promoting general progress, economic, political, and cultural. Except as interference with free belief and free expression of opinion takes the form of interference with the physical person,

235. Wooley v. Maynard, 430 U.S. 705, 707-08 (1977).
236. EMERSON, *supra* note 26, at 6-7.
237. *Id.*
238. SCANLON, *Categories of Expression*, *supra* note 9, at 93.

> the subject is better treated from the standpoint of the social interest.[239]

Scanlon likewise notes that most traditional justifications for the Free Speech Clause gravitate toward listener interests: "theoretical defenses of freedom of expression have been concerned chiefly with the interests of audiences and, to a lesser extent, those of bystanders."[240] In Scanlon's schema, both audiences and bystanders are considered listeners, while speakers are referred to as "participants."[241]

These traditional free speech justifications focus primarily on the practical interests of listeners in discovering truth or deciding how to vote. But these justifications also focus upon listeners' autonomy in choosing how to live, to develop their characters, faculties, and especially their minds; and finally, on listeners' interests in being treated as autonomous by a government based on consent. This article reviews briefly the chief justifications for free speech to highlight the reliance on listener interests.

A. Search for Truth

The main traditional justification for the First Amendment is that free speech furthers the search for truth and therefore focuses on listener interests.[242] As Emerson writes: "An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds."[243] Listener interests that require full and open discussion lead to the conclusion that even a false opinion should be permitted to be aired, for "even if wholly false, its presentation and open discussion compel a rethinking and retesting of the accepted opinion."[244]

This view, that the search for truth justifies free speech, forms the core of John Stuart Mill's *On Liberty*.[245] In setting forth his most

239. POUND, *supra* note 10, at 63.
240. SCANLON, *Categories of Expression*, *supra* note 9, at 93.
241. *Id.* at 85-93.
242. GREENAWALT, *supra* note 192, at 16.
243. EMERSON, *supra* note 26, at 6-7.
244. *Id.* at 7.
245. GREENAWALT, *supra* note 192, at 16.

influential words, Mill also emphasized listener interests and greatly minimized speaker interests. In particular, Mill considered injury to speaker interests from suppression as akin to a mere private civil injury, much as Pound did in the quotation above:

> If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.[246]

Listener interests play a role in the search for truth in several ways. First, there is simply the individual listener, who seeks to decide for himself what is true in politics, religion, science, and how best to live. In making this decision, he should hear as many viewpoints as possible—especially those he considers false. These supposed falsehoods may turn out to be true and change his mind, turn out to be partially true and modify his beliefs, or turn out to be false and thereby strengthen his original belief.[247]

Second, there is the listener interest in developing our faculties, particularly in developing our ability to reason. Again, hearing a variety of viewpoints and ways of thinking is essential. We mature intellectually when confronted with ideas that challenge our own because we must learn to balance open-mindedness to new ideas with a critical appraisal of them. As Frederick Schauer noted: "As we are compelled to evaluate more ideas, then we have more opportunity to

---

246. JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND OTHER WRITINGS 1, 20 (Stefan Collini ed., Cambridge Univ. Press 2000) (1859).

247. *Id.*

practice the important skill of evaluating and choosing among ideas."[248]

Third, there is the marketplace of ideas.[249] Under one version of this metaphor, the marketplace, like the adversarial system or Adam Smith's invisible hand, will mix many ideas and opinions, evaluate them, and render an answer, or at least render which of the competing opinions is most true.[250] This process is justified by listener interests in receiving the truth from the process as well as the inherent function of the process as a multiparty listener. This metaphor, or at least this interpretation of the marketplace of ideas metaphor, has been subjected to scorching criticism, most notably by Alexander Meiklejohn.[251] But Meiklejohn's criticism merely argues the marketplace metaphor does not sufficiently recognize listener interests—the interests of the populace in general to receive as much information as possible to make its own decisions about what is true, rather than relying upon the market to make the decision for it.[252]

All these versions of the search for truth focus on listener interests in learning information to discover the truth, make decisions, and increase critical faculties. In addition, these rationales make clear how free speech protects the freedom of the listener's *mind*; a person who has sharpened her critical judgment has freed herself from relying on the beliefs of others. She has made herself truly autonomous when able to develop her viewpoint free of the government controlling her beliefs by limiting information and thereby preventing her from developing her critical faculties.[253]

---

248. SCHAUER, *supra* note 30, at 55.

249. United States v. Abrams, 250 U.S. 616, 630 (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

250. *See* SCHAUER, *supra* note 30, at 15-16.

251. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 70-75 (1965).

252. *Id.*

253. Immanuel Kant, *An Answer to the Question: 'What is Enlightenment?,' reprinted in* KANT: POLITICAL WRITINGS 55 (Hans Reiss ed. & H.B. Nisbet trans., 1991) (stating enlightenment requires the freedom to make the public use of one's reason to address the reading public); T.M. SCANLON, *A Theory of Freedom of Expression*, *in* THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 16 (2003) [hereinafter SCANLON, *A Theory of Freedom of Expression*].

B. Political Speech

One subset of the search for truth argument is the argument that the Free Speech Clause protects political speech in particular because listeners must be allowed to hear the information needed to debate government policy and choose candidates in elections.[254] Alexander Meiklejohn wrote that the central purpose of freedom of speech was to promote democracy, and in doing so he expressly valued listener interests above speaker interests.[255] Indeed, his comments support the view that we shift from the freedom of mind of the speaker to the "minds" of the listener:

> Now, in that method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting. . . . As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. . . . That is why freedom of discussion for those minds may not be abridged.[256]

He expands this point in a manner that supports the contention that for both individual speakers and business speakers, it is the listener interests that matter:

> And the purpose of that provision is not to protect the need of Hitler or Lenin or Engels or Marx "to express his opinions on matters vital to him if life is to be worth living." We are not defending the financial interests of a publisher, or a distributor, or even of a writer. We are saying that the citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in

254. MEIKLEJOHN, *supra* note 251, *passim*.
255. *Id.* at 25.
256. *Id.*

> favor of those institutions, everything that can be said against them.[257]

The Court has repeatedly endorsed the view that at least a primary purpose of the First Amendment is to protect political discussion. For example, in *Mills v. Alabama*,[258] the Court adverted to this purpose and in doing so implicitly relied upon listener interests: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[259]

C. Autonomy

There are two main uses of the term autonomy in the arena of free speech—speaker autonomy[260] and listener autonomy.[261] Listener autonomy plays a far greater role in justifying the First Amendment than speaker autonomy. Listener autonomy also connects more directly with any reasonable concept of freedom of mind since listener autonomy addresses thinking, whereas speaker autonomy addresses the freedom of the act of speech. Listener autonomy differs from speaker autonomy in that it refers to the autonomy to think and deliberate, to consider choices, and to evaluate information and ideas—rather than the autonomy to perform the act of speaking.[262] Listener autonomy exists independent of government restraint since we always have the freedom to think to some extent. But when the government controls what we hear, such action reduces our autonomy because it reduces our ability to form judgments independent of what the government wants us to think. As Scanlon has said, to be

---

257. *Id.* at 91.

258. Mills v. Alabama, 384 U.S. 214 (1966).

259. *Id.* at 218.

260. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573 (1995) (holding that the speaker's autonomy under the compelled speech doctrine prohibits the government from requiring a private organizer of a parade to include groups whose message the organizer disagrees with).

261. GREENAWALT, *supra* note 192, at 26-27, 32 ("This claim focuses on the autonomy of the recipient of the communication.").

262. *See id.* (citing D. RICHARDS, TOLERATION AND THE CONSTITUTION 167-69 (Oxford University Press 1986)).

autonomous, "a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action."[263]

Individual listener autonomy springs from two theories. The first is the notion that autonomy will improve the choices people make in life and in politics by giving them full information undistorted by the government. Professor Kent Greenawalt calls this the consequentalist version of autonomy and describes it thus: "By affording people an opportunity to hear and digest competing positions and to explore options in conversations with others, freedom of discussion is thought to promote independent judgment and considerate decision, what might be characterized as *autonomy*."[264] The second theory is what Greenawalt refers to as the nonconsequentalist version of autonomy—limiting the way a legitimate government can treat its people.[265] The focus is on the relationship between legitimate government and the governed. But as Greenawalt notes, this version of autonomy relates to listener interests:

> The most straightforward claim is that the government should always treat people as rational and autonomous by allowing them to have all the information and all the urging to action that might be helpful to a rational, autonomous person making a choice. This claim focuses on the autonomy of the recipient of the communication.[266]

Listener autonomy ties more closely with freedom of mind than speaker autonomy because listener autonomy refers to thinking and deliberating as a means of self-rule, whereas speaker autonomy refers to the freedom of the act of speaking. The autonomy to think is severely hampered by government suppression or compulsion of speech because in such situations the government decides what we hear. Such government control directly affects what we think, since we form our opinions largely based upon the information we learn.

---

263. SCANLON, *A Theory of Freedom of Expression*, *supra* note 253, at 6, 15.
264. GREENAWALT, *supra* note 191, at 26.
265. *Id.* at 31-32.
266. *Id.* at 32.

D. Contract Theory

Professor Greenawalt identifies two other justifications for freedom of speech that arise from two contract theories—both of which relate to listener interests.[267] First, the consent of the populace to government is invalid if that very government suppresses information relevant to that consent, such as whether the form of government or current administration is good.[268] In other words, listeners need all relevant information undistorted by government control. Second, those consenting to government would not consent to government brainwashing.[269] Though Greenawalt does not say so, one imagines the "compulsory psychological conditioning" he refers to likely includes spoken propaganda.[270]

E. The Government as Listener: The Checking Function and Other Theories

The First Amendment can also be justified by the notion that the government should listen to its citizens.[271] For example, speech functions to check abuse of government authority and improve government, because government officials will avoid corruption if they think a free press will catch and expose them.[272]

Government should also listen to its citizens simply to decide what policies to enact. Whether characterized as interest accommodation or otherwise, legislators read newspapers and take testimony to learn what problems new laws can remedy. In addition, they talk to constituents, to agency officials to determine how better to regulate, and to executives to set major policies. In this way,

---

267. *Id.* at 30-31.

268. *Id.*

269. *Id.*

270. *Id.*

271. *See* Mills v. Alabama, 384 U.S. 214, 219 (1966) (noting how freedom of press serves "as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve"); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527-28 (noting the impact of free press on American political events such as the war in Vietnam and Watergate scandal).

272. Blasi, *supra* note 271, at 527.

government officials are no different from the general populace in seeking the truth.

F. A Brief History of Listener Interests

The foregoing justifications for the Free Speech Clause and their accompanying focus on listener interests are nothing new. In *Thornhill v. Alabama*,[273] the Court pointed to listener interests as a prime justification for the First Amendment, which is required "to supply the public need for information and education with respect to the significant issues of the times."[274] In fact, as noted in *Thornhill*, the focus on listener interests goes back much further.[275] In 1774, the Continental Congress sent a letter to the Inhabitants of Quebec referring to the "'five great rights.'"[276] In discussing freedom of the press as among those rights, the letter set forth many of the justifications for free speech discussed above, including the search for truth, accommodation of interests, and the abuse checking function[277]—justifications that relate to listener interests:

> "The importance of [freedom of the press] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable [sic] and just modes of conducting affairs."[278]

The Court in *Thornhill* applied these principles of protecting listener interests to vindicate the rights of workers to picket under the First Amendment, reasoning that such protection was "essential to the

---

273. Thornhill v. Alabama, 310 U.S. 88 (1940) (holding that the First Amendment protected the right of workers to picket in part to protect the interests of the community in discussion of matters of public concern).

274. *Id.* at 102.

275. *Id.*

276. *Id.* (quoting Letter from the Continental Congress to the Inhabitants of Quebec (Oct. 26, 1774)).

277. *Id.*

278. *Id.* (quoting Letter from the Continental Congress to the Inhabitants of Quebec (Oct. 26, 1774)).

securing of an informed and educated public opinion with respect to a matter which is of public concern."[279]

G. Listener Rights Under the First Amendment

The foregoing describes listeners' interests in hearing speech as sufficiently compelling to justify a right to free speech. Traditionally, while these interests remain with the listener, the judicially enforceable free speech right belongs with the speaker.[280] This arrangement is of course convenient because the speaker's own interests are sufficient motivation to vindicate the interests of listeners, allowing the speaker to act as a centralized person and representative for listeners. But listener interests can also ripen into judicially enforceable rights of the listener under the First Amendment. More important, the Court has held many times that a First Amendment right, whether for speaker or listener, existed in that particular case either solely or primarily because of listener interests.[281]

In *Stanley v. Georgia*, the defendant was prosecuted for possessing obscene films.[282] He raised a free speech defense.[283] The Court held that the defendant's prosecution violated the First

279. *Id.* at 94, 104-05.

280. *See, e.g.*, POUND, *supra* note 10, at 63-67, 313-17 (noting free speech as an individual right of belief and opinion); SCHAUER, *supra* note 30, at 47 (noting approach to free speech based on individual right).

281. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (holding that the extension of the First Amendment to commercial speech is "justified principally by the value to consumers"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (listing cases in which listeners may enforce free speech rights); Procunier v. Martinez, 416 U.S. 396, 408-09 (1974) (noting First Amendment protects inmate correspondence to outsiders in part to vindicate interests of those receiving the letters), *overruled in part by* Thornburg v. Abbott, 490 U.S. 401, 413-14 (1989) (limiting the *Martinez* standard of review to outgoing mail in view of recipients' First Amendment rights); Stanley v. Georgia, 394 U.S. 557, 563-65 (1969) (holding First Amendment protects right of person to watch obscene films even if it does not protect the producers and distributors of the films); Lamont v. Postmaster Gen., 381 U.S. 301, 302, 305, 307 (1965) (concluding federal requirement that addressee of communist publication send postmaster a card stating he wishes to receive the publication violates addressee's First Amendment right).

282. *Stanley*, 394 U.S. at 558.

283. *Id.* at 559.

Amendment because, as a viewer, he had rights under the First Amendment, even though the producers and distributors of obscenity did not.[284] In fact, the Court in *Stanley* expressly stated that the First Amendment protects the *minds* of the listener:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[285]

Thus, in *Stanley*, the Court recognized not only listener interests, but also listener rights. It recognized that the government controls men's minds and thoughts by controlling what they hear, read, and watch.[286] As the Court went on to say, the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[287] The Court placed similar express reliance on listener interests in *Lamont v. Postmaster General*[288] and *Procunier v. Martinez*.[289] In both *Lamont* and *Procunier*, the Court held that the recipients of mail have First Amendment rights even if the senders might not.[290]

The Court in *Stanley*, *Procunier*, *Lamont*, and numerous other cases makes clear that listener interests alone can justify a free speech right for listeners, even in cases in which the speakers do not enjoy a free speech right. Although this article does not argue that listeners enjoy judicially enforceable rights in the compelled speech arena, it argues that their interest in receiving information free of government compulsion is powerful. Courts have reposed this interest in the speaker's complementary right against compelled speech.

---

284. *Id.* at 568.

285. *Id.* at 565.

286. *Id.*

287. *Id.* at 566.

288. Lamont v. Postmaster Gen., 381 U.S. 301, 305, 307 (1965).

289. Procunier v. Martinez, 416 U.S. 396, 408-09 (1974).

290. *Lamont*, 381 U.S. at 305, 307; *Id.* at 307-08 (Brennan, J., concurring); *Procunier*, 416 U.S. at 408-09.

V. THE SOLUTION: A FOCUS ON LISTENER INTERESTS JUSTIFIES THE COMPELLED SPEECH DOCTRINE

The foregoing cases and scholarship show that the justifications for free speech protection focus on protecting the mind of the listener, not the mind of the speaker. The government most readily controls our minds by controlling what we hear, not what we say. Thus, a shift from the point of view of the speaker to that of the listener in no way diminishes the notion, nor the grandeur, of protecting freedom of mind and belief; it simply adjusts our understanding of what makes our minds free by shifting the focus to a different mind—the mind of the listener. Freedom of mind and belief lies chiefly in the freedom to read whatever we want, and what others urge us to read, to listen to and consider ideas from the popular as well as the pariah.

These same principles apply to compelled speech cases; a focus on the listener point of view helps justify the compelled speech doctrine under the First Amendment. By requiring citizens to repeat the government approved message, it unfairly distorts what listeners hear in an effort to control the minds and thoughts of those listeners. New Hampshire presumably requires the motto "Live Free or Die" to be displayed on car license plates so that people will read it and be persuaded by it. After all, the motorist on whose car the motto sits usually cannot even see the motto (on her own car). In addition, the focus on listener interests also avoids the problems created by a focus on the speaker's freedom of mind, namely, that in many compelled speech cases the government-compelled speech does not actually invade the speaker's freedom of mind, by altering or coercing her beliefs.

But even if a focus on listener interests does not explain the compelled speech doctrine in every compelled speech case, it helps justify at least some of the cases and provides an additional viewpoint for analysis. Suppression and compelled speech cases have two important similarities. First, free speech protection in both areas cannot be justified by resorting to a single rationale, even a single listener rationale, but requires the combination of several distinct rationales. Second, both suppression and compelled speech cases occur in a wide variety of circumstances such that the various justifications for protection, like ingredients for a dish, must be combined in different ways to justify the protection at issue. Thus, a

focus on listener interests may play a greater or lesser explanatory role depending on the case.

A. Distortion of the Total Mix of Information

1. Misattribution

If a court has found that listeners will misattribute to the speaker beliefs that the government has compelled him or her to say, that finding is generally a sufficient condition to establish that compelled speech violates the First Amendment. After all, the most straightforward method by which the government can distort what listeners hear, other than by suppression, is with compelled speech that misleads listeners into concluding that the speaker believes the message he or she has been compelled to utter. This misattribution obviously harms speakers, but the greater First Amendment harm occurs to listeners.

Listeners are harmed by such misattribution because it compromises two important methods listeners use to decide whether to be persuaded by a message: the popularity of the message and the speaker's level of authority.[291] If the government compels speech and listeners attribute the ideas to the speaker, listeners will mistakenly believe the speech is more popular than it is. That conclusion, in turn, will make them more likely to believe the thought themselves. Popularity greatly influences whether people adopt a certain belief.[292] People cannot independently verify every fact and idea, and must often rely on the collected wisdom of others.

Similarly, when the speaker is someone in a position of authority, or an expert, listeners are often more likely to be persuaded by that person's statement than the statement of a non-expert—but only if the listeners conclude the speaker actually believes the message. Politicians are often not persuasive because we suspect they do not believe what they are saying. On the other hand, imagine an expert scientist independent from the government who is nevertheless

---

291. Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 998-99 nn.68-72 (2005) (citing social science literature that people's beliefs are shaped by whether the source of an idea is an expert or by the popularity of the view espoused).

292. *Id.*

compelled by the government to espouse the government's partisan position, and also imagine that listeners do not realize he has been compelled. In these circumstances, listeners are far more likely to be persuaded that the government's position is correct. Since the government compelled the message in this example, it violates the First Amendment because of its improper control over what listeners hear and consequently believe. The government has invaded freedom of mind—but freedom of mind of the listener. The violation has far less to do with the speaker's freedom of mind.

Thus, misattribution is a sufficient condition for a finding of unlawful compelled speech because its effect on listeners is so predictably grave. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* illustrates this straightforward and uncontroversial proposition.[293] In *Hurley*, state law prohibited discrimination on account of sexual orientation in places of public accommodation, resort, or amusement and thus required the private organizer of the annual St. Patrick's Day parade to include the Irish-American Gay, Lesbian & Bisexual Group of Boston (GLIB).[294] The organizers, the South Boston Allied War Veterans Council, challenged the requirement and argued to the Court that it was unconstitutional compelled speech.[295]

A unanimous Court agreed, stating that the state requirement that the Veterans Council include GLIB violated the Veterans Council's First Amendment right against compelled speech.[296] In doing so, the Court stated that as a general matter, speakers have the right under the First Amendment to choose the content of their own message and that selecting units for a parade amounts to speech.[297] A parade organizer may shape his message by deciding whom to include and whom to exclude.[298]

The Court further considered the impact of compelling the organizers to include GLIB: reasonable viewers of the parade may

293. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).

294. *Id.* at 561.

295. *Id.* at 562.

296. *Id.* at 566.

297. *Id.* at 570.

298. *Id.*

conclude that the Veterans Council supports the gay pride message articulated by GLIB.[299] "GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well."[300]

The Court did not identify any harm to listeners from GLIB's particular message. Nevertheless, it is clear that listeners are harmed by misattribution because they are misled. Parade listeners are likely to conclude, wrongly, that the War Veterans Council supports gay rights. Moreover, many listeners may be far more likely to support gay rights based on a false belief that a traditional and conservative group, such as the Veterans Council, supports that message. The State government will therefore have broadcast its favored anti-discrimination policy to parade listeners, through the Veterans Council, by compelling it to include GLIB in its parade.

But unlike in *Hurley*, misattribution in many other cases of government compelled speech was either unlikely or unclear.[301] But with or without misattribution, government-compelled speech distorts what we as listeners hear and what we are persuaded by, and therefore improperly interferes with the marketplace of ideas.

2. *Compelled Subsidies Artificially Amplify Union Speech, Thereby Harming Listener Interests*

There are three holdings in *Abood* that shed light on the listener point of view. First, the Court held that a union may not use dissenting workers' subsidies for speech that is not part of collective bargaining.[302] Second, the Court held that unions may use compelled subsidies for speech that is part of collective bargaining to avoid the free-rider problem of non-paying workers benefiting from union-negotiated contracts.[303] A focus on listener interests shows that for a public sector union, the free-rider problem does not justify the

299. *Id.* at 572-73.

300. *Id.* at 575.

301. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

302. *Abood*, 431 U.S. at 235-36.

303. *Id.* at 224.

incursion on free speech rights. Finally, the Court essentially held the burden lay with individual union workers to opt out and ask for a rebate, rather than with the union to ask individuals for permission to use funds for political speech.[304] A focus on listener interests would tend to undermine this last holding as well.

a. The Main Holding of Abood*: No Compelled Subsidies for Political Speech*

The Court in *Abood* held that compelled subsidies for union speech outside collective bargaining violated the First Amendment because it invaded a union worker's freedom of belief.[305] But the Court's rationale contradicts common sense: compelled subsidies are very unlikely to compel the union worker to change beliefs.

From a listener point of view, the holding in *Abood* is justified because the government compulsion amplifies the union message beyond the genuine support it enjoys, thus distorting the balance of information listeners receive. An amplified union message will get more attention and become more persuasive, especially since many listeners will not consider that some union workers were compelled to support the speech. If unions publicly and loudly oppose globalization in advertisements and in the news, the public will assume all or nearly all American workers support that position. If it were not for the constraints announced in *Abood*, such an assumption would be incorrect and the public would be misled.

But even if most listeners recognized that the union speech was not supported by all of its workers, the problem of pervasiveness would remain. The message would still enjoy the greater amplification those funds provide, and listeners might be persuaded by the message simply because they have heard it more often. The union's message has a meaning completely aside from whether listeners attribute the words to the individual teachers in *Abood*. Just as the reader of a cancer warning on a cigarette package might be persuaded to stop smoking although she knows the cigarette manufacturer might disagree with the warning, so too might a listener be persuaded by a union message notwithstanding a belief of how many teachers actually

304. *Id.* at 238.

305. *Id.* at 234-36.

support it. Thus, when the government amplifies a message beyond its genuine support, it unfairly distorts the marketplace of ideas.

The disproportionality argument for compelled speech cases is a straightforward application of the principles underlying traditional suppression cases, best exemplified in *Austin v. Michigan Chamber of Commerce*.[306] *Austin* implicitly illustrates the overall theme of this article, focusing more on listener interests than the speaker's freedom of mind. There, the Michigan Chamber of Commerce used mandatory membership dues[307] from the Chamber's general treasury to fund a newspaper ad favoring a Michigan House of Representatives candidate.[308] This speech violated Michigan law, which required independent political expenditures to be made from segregated funds solicited from certain enumerated sources, and not from the Chamber's general treasury.[309]

The Chamber of Commerce claimed that its free speech rights had been violated.[310] The Court disagreed.[311] The Court recognized that a state has a compelling interest in regulating corruption or apparent corruption from corporate political expenditures.[312] But the Court did not rely upon the danger of a "financial *quid-pro-quo*,"[313] the

306. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659-60 (1990). Others have similarly argued that a focus on public discourse and public forum provides firmer justification for compelled subsidy cases than does an exclusive focus on the harm wrought upon those compelled to contribute. *See, e.g.*, Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1109-39 (2005) (justifying First Amendment protection from compelled subsidization through potential harm to public political discourse); Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 196-200 (2002) (advocating limits on compelled speech doctrine through analysis of whose interests are actually at stake in compelled speech). But these scholars limit the application of a listener focus to compelled subsidy cases and apply a speaker focus in pure compelled speech cases such as *Barnette*, *Wooley*, and *Tornillo*. *See* Klass, *supra*, at 1115-16; Wasserman, *supra*, at 198.

307. *Austin*, 494 U.S. at 656.

308. *Id.*

309. *Id.* at 654-56.

310. *Id.* at 656.

311. *Id.* at 659-60.

312. *Id.*

313. *Id.*

traditional justification for limits on *contributions* to a candidate.[314] Rather, the Court recognized "a different type of corruption," arising when corporate messages are disproportionate to the support they actually enjoy.[315]

The Court recognized the important concept that corporations are able to amass great wealth through "special advantages—such as limited liability, perpetual life, and favorable treatment of accumulation and distribution of assets."[316] But what makes this accumulation of wealth and expenditure from the general treasury for political speech unfair is the fact that the wealth does not truly indicate the popular support for the corporation's political ideas:

> "[T]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas."[317]

The Court in *Austin* focused exclusively on the interests in the listener, the public at large, in hearing undistorted views about elections.[318] As it repeatedly clarified, the Court held the statute justified in light of

> the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas. The act does not attempt "to equalize the relative influence of speakers on elections," rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations.[319]

---

314. *Id.*

315. *Id.* at 660.

316. *Id.* at 658-59.

317. *Id.* at 659 (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 258 (1986)).

318. *See id.* at 659-60.

319. *Id.* at 660 (citations omitted).

The Court's rationale in *Austin* implicitly rests upon listener interests. First, the Court speaks of the "distorting" effects of corporate wealth and how the corporation's speech has little or no correlation to actual public support of the idea—both of which relate to listener interests. Second, the Court never mentions the rights or interests of the individual members of the Chamber of Commerce, the "speakers" analogous to the union workers in *Abood*. This stands in stark contrast to earlier campaign finance cases[320] and to Brennan's concurrence in *Austin*,[321] which do rely in part upon protecting the rights of dissenters.[322] Indeed, most of the individual members of the Chamber of Commerce were for-profit corporations that did not have speaker rights to subvert such restrictions by funneling money to a non-profit Chamber of Commerce.[323]

The application of *Austin* to *Abood* is straightforward. In *Abood*, the union received an unfair advantage in amassing money for political expenditures out of proportion to the strength of the message's genuine support because the fees were mandatory; likewise in *Austin*, the dues were mandatory and allowed the Chamber of Commerce, when using general treasury funds, to amplify its message out of proportion to its support.

The connection between *Austin* and *Abood* was not lost on the Court. For example, when the Chamber of Commerce argued that the statute was underinclusive because it did not ban similar independent expenditures of labor unions, the Court soundly rebutted the argument in part by reference to *Abood*.[324] It noted unions must allow dissenting workers to refrain from funding political speech they do not support.[325] Thus, the very problem of distortion for listeners identified in *Austin* does not occur in cases such as *Abood*, the Court said, since workers may opt out from the political speech.[326] "As a result, the funds available for a union's political activities more accurately

320. FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982); Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972).

321. *Austin*, 494 U.S. at 669 (Brennan, J., concurring).

322. *Nat'l Right to Work Comm.*, 459 U.S. at 208; *Pipefitters*, 407 U.S. at 416, 423-24; *Austin*, 494 U.S. at 672-73 (Brennan, J., concurring).

323. *Austin*, 494 U.S. at 664.

324. *Id.* at 665.

325. *Id.* at 665-66.

326. *Id.*

reflects [sic] members' support for the organization's political views than does a corporation's general treasury."[327] Thus *Austin* directly supports the proposition that *Abood* can be read as rooted in listener interests, even though *Abood* itself did not rest upon those grounds.

The principles set forth in *Austin* apply with greater force in *Abood* because of a fundamental difference: in *Austin* the government did not compel individuals to contribute to the corporations whereas in *Abood* it did. Put otherwise, *Austin* lacks the state action necessary to trigger First Amendment protection present in *Abood.* Justice Brennan recognized this connection in his concurrence in *Austin*, where he all but says that *Austin* applied to an *Abood* situation except that there is no state action:

> While the State may have no constitutional duty to protect the objecting Chamber member and corporate shareholder in the absence of state action, cf. Abood . . . , the State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber's political message.[328]

Recently, in *Davenport*, the Court recognized that *Austin* lacks the government action present in compelled subsidy cases.[329] The Court held as constitutional the requirement that a union discern first whether its workers dissent before spending their money on its political speech.[330] In so holding, the Court emphasized that in *Austin*, the government had not compelled contributions to its treasury; in *Abood* and *Davenport* the government had compelled the contributions.[331]

The foregoing shows how a focus on listener interests provides a better justification for the main holding in *Abood* than the foundation that case actually relied upon—the speaker's freedom of mind. But a focus on listener interests also helps guide us in assessing other features raised in *Abood.* The first is whether the holding in *Abood*

327. *Id.* at 666.
328. *Id.* at 675 (Brennan, J., concurring) (citation omitted).
329. Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372, 2380 (2007).
330. *Id.* at 2378-79.
331. *Id.* at 2380.

went far enough and whether it should also have applied, as the dissent argued, to *all* compelled fees.

b. The Second Holding in Abood*: Public Sector Unions Are Not Different*

The *Abood* majority also held that unions could compel subsidies to support collective bargaining to avoid the free-rider problem; those withholding funds nevertheless enjoy the benefits of the union-negotiated contract.[332] This holding flowed directly from an earlier holding in *Railway Employees' Department v. Hanson*.[333] In *Hanson*, federal law similarly authorized railroads and unions to enter into agency shop arrangements requiring all employees represented by the union to pay dues or a service fee.[334] Even though the employer in *Hanson* was private, the Court held the government authorization of the agency shop arrangement counted as state action for the purpose of free speech analysis.[335]

The Court in *Abood* acknowledged the case was different from *Hanson* in that the teachers' union in *Abood* was a public sector union. As a result, the speech the union used in *Abood* in negotiating and lobbying for a contract was arguably more political because it was directed at the government on the subject of public government policy.[336] By contrast, the speech the union used in *Hanson* during negotiations did not similarly touch on public policy.[337]

Nevertheless, the majority found the distinction insufficient; the majority largely focused on the interests of public sector workers and said they stood in a sufficiently similar position as the private sector workers in *Hanson* to justify applying the rule in *Hanson* to *Abood*.[338] Consequently, the Court in *Abood* held that the teachers had no right to withhold service fees that supported collective bargaining even though that bargaining touched on public policy.[339]

---

332. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977).
333. Ry. Employees' Dep't v. Hanson, 351 U.S. 225 (1956).
334. *Id.* at 235.
335. *Id.* at 232.
336. *Abood*, 431 U.S. at 230-31.
337. *Hanson*, 351 U.S. at 238.
338. *Abood*, 431 U.S. at 227-30.
339. *Id.* at 237.

In his concurrence to *Abood*, Justice Powell found the distinction between private and public employer crucial and argued that workers in public sector unions should not be compelled to subsidize even negotiations, since those negotiations are speech to the government.[340] "Collective bargaining in the public sector is 'political' in any meaningful sense of the word,"[341] especially since such bargaining may extend to educational philosophy:[342]

> The ultimate objective of a union in the public sector, like that of a political party, is to influence public decisionmaking in accordance with the views and perceived interests of its membership. Whether a teachers' union is concerned with salaries and fringe benefits, teacher qualifications and in-service training, pupil-teacher ratios, length of the school day, student discipline, or the content of the high school curriculum . . . .[343]

Any union worker who disagrees with the union position on these issues essentially subsidizes political speech lobbying for the government policy with which he or she disagrees.

Justice Powell focused largely on the nature of the speech itself to show that the speech is political in a public sector union, like that of a political party, whereas it is not necessarily political in a private sector union.[344] Justice Powell did not, however, adopt a listener viewpoint to clarify the harm he sought to illuminate—namely, that the difference lies not only in the topic of discussion but in the identity of the listener.[345] In some ways, a focus on listener interest allows us to say the same thing as Justice Powell, only with a different emphasis that clarifies the situation.

Therefore, a focus on listener interests shows that compelling fees to support a public sector union's collective bargaining violates the compelled speech doctrine because the listener is the government and the public receives a distorted message. A focus on listener interests distinguishes *Abood* from *Hanson* by differentiating the listeners in

340. *Id.* at 245, 257-58. (Powell, J., concurring).
341. *Id.* at 257.
342. *Id.* at 258.
343. *Id.* at 256.
344. *Id.* at 257-59.
345. *Id.*

each case. The two listeners, a private employer in *Hanson* versus the government and the public in *Abood*, have vastly different interests and functions. Indeed, the listener to the speech of a private sector union is generally a single private employer. This employer has minimal interest in receiving a message not amplified by more money. In either case, the employer must negotiate with the union if a union exists at all. Moreover, the union message will not be competing with other messages. And, in either situation, the employer recognizes that the union message represents only a certain portion of the workers' views. In the public sector, by contrast, the union message urges the government both as employer and as policymaker to adopt certain positions. The listener in *Abood* includes not only the specific state official in charge of schools, but also the entire school board, the legislature, and the voters. Listener interests that reflect this far broader range of listeners are far more harmed by an amplified union message for several reasons. That message must compete with the interests of others seeking to affect school policy. An artificially amplified union message gains an unfair advantage over others seeking to affect school policy, such as parents, teachers, students, and other taxpayers who care about school policy and funding. In addition, because the union message, in essence, becomes public speech on public policy, many listeners in the public will lack the sophistication to understand—as did the private employer—that the union speech does not represent the views of all union workers. Some voters will incorrectly assume all teachers support the union position on certain subjects.

While a focus on listener interests clarifies this issue, the majority's focus on speakers' interests and the speakers' freedom of mind obscures this problem and minimizes the difference between public and private sector union speech. According to the majority's reasoning, an individual teacher compelled to support a message she disagrees with has suffered an equal invasion of her freedom of mind and belief in either the private or public sector union context. As a result, *Hanson* controls *Abood*. By contrast, a focus on a listener point of view reveals the important practical difference between private and public sector unions based on the identity of the listener.

c. *The Third Holding in* Abood: *The Burden Rests on Workers to Opt Out*

A focus on listener interests helps illuminate the third holding in *Abood* concerning who should bear the burden of identifying dissenters for a rebate.[346] Should dissenters be required to opt out and affirmatively tell the union they want a rebate, or should the union only be permitted to spend funds of those workers who have already indicated they support the union position? The majority in *Abood* held that all the First Amendment requires is that the union permit dissenters to opt out based on the idea that "dissent is not to be presumed."[347] The union will not give a rebate to those who remain silent.[348]

The decision in *Abood* to place the burden on dissenters makes sense if one focuses on speaker interests. After all, if a union worker feels concerned about supporting views he disagrees with, he can be expected to take the trouble to opt out and seek a rebate; the Free Speech Clause should not protect those unwilling to take such minimal steps. But speaker interests do not explain the compelled subsidy doctrine in *Abood* in the first place, so speaker interests should not act as a guide to the ambit of the compelled subsidy doctrine.

Listener interests do explain the compelled subsidy doctrine in the first place, and they are therefore the appropriate interest to employ in assessing the *Abood* requirement that dissenters opt out. Indeed, when we look to listener interests, it becomes clear the opt-out requirement harms listener interests. This follows because many union workers who either disagree with the union speech or have no opinion will do nothing—they will not opt out—and listeners will be harmed because the union message will have been amplified disproportionately to the support it enjoys. For this reason, a focus on listener interests justifies placing the burden on the union so that the union is responsible for ensuring that the money it receives actually supports the position it takes. Washington State concluded the union should shoulder this

346. *Id.* at 238.

347. *Id.* at 238 (quoting Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 774 (1961)); *see also* Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372 (2007).

348. Abood v. Detroit Bd. of Educ., 431 U.S. at 238-39.

burden as a matter of policy, and the Court in *Davenport* held that this policy was constitutional.[349] The foregoing focus on listener interests suggests that the burden should lie with unions not only as a policy matter, but as a constitutional matter as well.

* * *

The distortion that occurred in *Abood* will occur whether or not listeners attribute the ideas expressed by the union to the workers compelled to support it. Naturally, if listeners attribute the message to the union workers and conclude the union speaks for all of them, the impact of the distortion will be greater. Even if listeners do not attribute the message to individual workers, their interests are harmed because the message is nevertheless improperly magnified by the compelled dues.

This latter problem is more pronounced in *Wooley* and *Barnette* because most reasonable listeners in those cases probably would not attribute the beliefs compelled to the speakers. Nevertheless, these listeners may still become persuaded by the message simply because they begin to find the message, which has been so pervasively imposed upon them, to be persuasive. Because the government has compelled the speech, it distorts the overall message and controls, to some extent, what the public believes. Naturally, if one concludes that listeners would attribute the beliefs compelled to the speakers even in cases such as *Wooley* or *Barnette*, then the harm to listeners is that much more concrete.

3. Government Distortion of the Total Mix of Information We Receive

It seems reasonable to assume that listeners would not attribute the motto, "Live Free or Die," to the Maynards. The following scenario suggested by the facts in *Wooley* illustrates why the distortion that arises from government compelled speech is nevertheless improper. Motorists drive along the highway. They have little to read. One of the few messages drivers are presented with, other than the speed limit and the occasional billboard or bumper sticker, is: "Live Free or Die." Hour after hour of driving, they read the phrase hundreds and hundreds of times: "Live Free or Die." Since drivers

349. *Davenport*, 127 S. Ct. at 2383.

tend to become hypnotized by the car in front of them and focus on the rear license plate, almost all they read are the meaningless license plate numbers and the phrase "Live Free or Die." The government has chosen a venue with few competitors and then forced each motorist to display the message. The message will have an effect upon other drivers completely irrespective of the views held by the driver of the vehicle bearing the "Live Free or Die" message.

The harm in *Wooley* thus arises from the government's barraging of motorists with the phrase "Live Free or Die"—a motto apparently aimed at indoctrinating motorists with the government's point of view. The government has made the message eminently pervasive. It is a message that will inevitably persuade some listeners regardless of whether they think the Maynards endorse it. The focus on listener interests thus reveals the harm the government wreaks by distorting the total natural mix of information the public hears—a harm that has nothing to do with the Maynards' freedom of mind.

But there is an objection to this view: isn't the government entitled to disseminate its own message? If most motorists realize that the Maynards do not believe the state motto on their license plate and understand it is really the government speaking, why should the compelled display of the motto still qualify as improper distortion—as then Justice Rehnquist argued in his dissent?[350] And didn't the Court in *Johanns* subsequently recognize a strong government speech doctrine, albeit in a compelled subsidy case?[351] The explanation is free advertising.

The government is entitled to disseminate its message like any other speaker in the marketplace, but it may not get free advertising through compulsion because that artificially amplifies the government message over other messages. In *Wooley*, the government has managed to pervasively display the message "Live Free or Die" for free. If the government had to pay motorists to display the message, the government would find itself severely curtailed in its ability to disseminate this message. In all likelihood, it would not pay to display the message on license plates at all. Requiring the government to pay for advertising is proper because it simply puts the government in the same position as any other speaker. In this way, the government, its

350. Wooley v. Maynard, 430 U.S. 705, 721 (1977) (Rehnquist, J., dissenting).

351. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 562 (2005).

opponents, and speakers on completely different subjects would all compete fairly (or more fairly) for attention in the marketplace. In other words, the First Amendment prohibits the government from securing free advertising.[352]

The foregoing discussion assumes that other motorists will conclude that the Maynards do not necessarily believe the motto "Live Free or Die" because they know it has been compelled. Is this assumption valid? If not, the harm to listener interests will be even greater. Some people might not realize that the motto has been compelled because they may believe that New Hampshire will issue a different license plate to those who request it. Others may conclude, perhaps irrationally, that anyone who disagreed with the state motto would move elsewhere. Finally, many may not consider precisely who is conveying the "Live Free or Die" message, perhaps attributing the message in part to the driver, in part to the government.

Indeed, this logic returns us to the difficulty inherent in many compelled speech cases—that there are two speakers. In *Wooley*, both the government and the Maynards claim the right to speak. A focus on the Maynards' freedom of mind provides little help in deciding whether we should consider the message to be that of the government, which authored and established the message, or that of the Maynards in being forced to display the message on their private property. Instead of focusing on one of the two speakers, it is more helpful to focus on the listener. A focus on listener interests provides precisely the neutral outside viewpoint necessary to determine who should prevail. In *Wooley*, this listener viewpoint weighs in favor of the Maynards—not to protect their freedom of mind, but to protect the listeners from distortion of what they hear, distortion wrought by the government compelling motorists to provide free advertising.

4. Group Ritual Distorts What Listeners Hear and Believe

The chief challenge in explaining *Barnette* under the Free Speech Clause arises from the difficulty in distinguishing the compelled pledge from other forms of compulsory education. That is, on the one

352. The First Amendment prohibits the government from securing free advertising through compulsion for the same reason it prohibits the government from suppressing speech: the government may not favor one message over another in a way that disturbs the natural competition in the marketplace of ideas.

hand we have the compelled pledge; on the other we have permissible lectures by teachers on the virtues of American democracy. Both shape, affect, and alter the student's mind to similar degrees concerning the similar subjects.

When we focus on listener interests, it is easier to distinguish the forced pledge from other forms of education because students rather than the teachers are forced to inculcate other students. One can imagine that students will discount platitudes about American freedom when a teacher propounds them but find themselves more persuaded when thirty fellow students repeat the message in unison. Peer pressure works—even if each individual student as a listener knows the message is compelled. It is improper because the government artificially amplifies its message and manipulates the students in a manner that unfairly distorts what the students hear.

But perhaps the students in *Barnette* concluded that their fellow students believed the pledge, even though it had been compelled. This phenomenon is illustrated in a scene from George Orwell's *1984* which depicts a pro-government ritual called the Two Minutes Hate.[353] During Two Minutes Hate, everyone is more or less compelled to throw themselves into a fury during which they manifest their hate for opponents of Big Brother (the government).[354] Winston, the main character, works in an office and assembles with the others in the Records Department for the ceremony.[355] While he privately disagrees with Big Brother, he still yells along with everyone else as the Two Minutes Hate approaches its climax.[356] He knows this ritual is essentially compelled, and yet concludes that most of the others truly believe it.[357] In short, Winston's knowledge of the compulsion does little to dissuade him from what his eyes and ears tell him: that the others hate as much as their words and gesticulations suggest.[358]

Likewise in *Barnette*—though to a lesser degree—it seems that students may well believe, perhaps without careful consideration, that the other students genuinely support the pledge. Or at least they

353. GEORGE ORWELL, 1984, at 9-17 (Signet Classic 1950) (1949).
354. *Id.*
355. *Id.* at 9-11.
356. *Id.* at 14, 17.
357. *Id.* at 14.
358. *See id.* at 11-16.

believe it enough to be swayed to join along. Day after day of hearing thirty other students recite the pledge, they may simply give in to a perceived social acceptance of its message. Of course, no individual speaker's interests will be particularly harmed because each student as listener will not attribute the beliefs expressed in the pledge to any particular classmate. Rather, a student as listener will generally attribute belief in the pledge to the rest of the class collectively. The long-term effect of hearing thirty classmates recite the pledge every day eventually begins to persuade a student to believe. This effect only becomes stronger when we consider that the student is also participating in the ritual himself. That is, the unique *combination* of reciting the pledge and hearing thirty others recite it will surely begin to persuade many students that the pledge reflects the truth about America.

Whether or not this focus on listener interests captures the entirety of the harm wrought by the compelled pledge in *Barnette*, it at least adds an additional analytical tool for assessing government conduct by using traditional First Amendment restraints on government conduct as a framework for analysis.

* * *

The main listener interest supporting the compelled speech doctrine is the interest in hearing information undistorted by government compulsion. But there is another distinct listener interest that plays an important role in government speech cases such as *Johanns*: the listener interest in government accountability.

B. Government Accountability: A Distinct Type of Listener Interest

Johanns raises the difficult question of what to do when there are two speakers, one of which is the government. The Court did not assess the problem in precisely these terms, but that assessment readily emerges from the facts. So on the one hand, those compelled to subsidize the beef ads claimed an interest in not having their dollars used to support speech they disagreed with; under cases such as *Abood*, they were "speakers." On the other hand, the government had the right to tax the public and spend that money however it pleased, consistent with the Constitution, and this included funding speech. Therefore, the government was also a "speaker." In the case of the beef advertisements at issue in *Johanns*, one could accurately say both

the government and the cattlemen were speaking. The problem, however, was that both speakers cannot be protected simultaneously because one wanted to speak and the other did not want to be forced to speak. These interests are inconsistent.

The Court in *Johanns* therefore needed to devise a test to determine whether the individual or the government was speaking at a given time. The majority focused on speaker interests in creating a test. But both the government and the cattlemen were speakers and a speaker-based test therefore fails to provide a neutral or principled perspective in determining who prevails. For this reason, a speaker-based test does not promote First Amendment values. By contrast, a focus on listener interests, particularly the listener interest in government accountability, provides precisely this neutral viewpoint grounded in First Amendment values.

The listener interest in government accountability requires an advertisement to disclose whether it is the government that is speaking, so listeners who disagree with the message can seek to change it by writing a letter to the agency in charge, voting against the administration responsible, or taking other steps. Conversely, if the public does not realize a governmental message is in fact a message of the government, it will not believe it has any power to change the advertisements or the administration if it disagrees. Thus, any case in which the government argues the speech at issue is government speech because the subsidies are really taxes, courts should find the compulsion violates the First Amendment if reasonable viewers would not realize it is the government speaking.

The beef advertisements in *Johanns* failed to disclose they were government-sponsored. To the contrary, the advertisements said they were sponsored by "America's Beef Producers."[359] Consequently, as Justice Souter pointed out in his dissent, the compelled speech violates the First Amendment.[360] It does so because of the harm to listeners who are deprived of the information needed to conclude that they can take steps to change either the message or the administration responsible for it if they disagree.[361] As Justice Souter put it, the government "must make itself politically accountable by indicating

359. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 555 (2005).

360. *Id.* at 570-71 (Souter, J., dissenting).

361. *Id.* at 571-72.

that the content actually is a government message."[362] Justice Souter wished to impose this requirement so that if the public disagrees with the message, they understand they can change it since it comes from the government: "if enough voters disagree with what government says, the next election will cancel the message."[363] This argument relies entirely on listener interests in understanding who is speaking.

By its failure to recognize listener interests, the opinion in *Johanns* furthered undesirable results outside the compelled speech arena. Recently, many organizations, such as right-to-life organizations, have sought and been denied permission for specialty license plates that would promote their pro-life views.[364] For example, in *Arizona Life Coalition Inc. v. Stanton*, the state license plate commission denied the application of a pro-life group for a specialty license plate that would read "Choose Life."[365] In this case, the Ninth Circuit properly recognized that it had to decide who was speaking, the motorist or the state.[366] In making this determination, however, it relied upon the factors previously enumerated by several Circuit Courts and supported by *Johanns*, such as who controlled the message and who owned the license plates[367]—factors that ignored the listener point of view. The Court properly concluded that the speech was that of the motorist, and that the state violated the First Amendment in denying the pro-life group's application.[368] But the point is that the Ninth Circuit never assessed a key factor: would the average motorist looking at the license plate conclude that the "Choose Life" message was the motorist speaking or the state speaking?

---

362. *Id.* at 571.

363. *Id.* at 575.

364. *See, e.g.*, Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 960 (9th Cir. 2008); *cf.* ACLU of Tenn. v. Bredesen, 441 F.3d 370 (6th Cir. 2006) (holding that Tennessee Statute allowing "Choose Life" specialty plates but not "Pro-Choice" plates was constitutional).

365. *Ariz. Life Coal. Inc.*, 515 F.3d at 961-62.

366. *Id.* at 963.

367. *Id.* at 963-64, 966-67.

368. *Id.* at 968, 973.

C. A Potential Objection: Doesn't a Focus on Listener Interests in Compelled Speech Cases Militate in Favor of More Speech?

A possible objection arises to the theory that listener interests explain the compelled speech doctrine: when the government compels speech, doesn't it provide listeners with more information from which to make informed choices? Isn't it the whole point of the First Amendment to provide listeners with as much information as possible? The answer to these objections is this: while one purpose of the First Amendment is to increase information for listeners, another purpose, also listener based, is to prohibit the government from controlling what listeners hear. Thus for many of the compelled speech cases discussed above, listener interests do militate against compelled speech because the harm to listeners wrought by the government artificially amplifying and distorting what we hear outweighs any marginal increase in the information provided to listeners by the compelled speech. This is especially true in cases such as *Barnette* and *Wooley*, in which the speech compelled is a government-favored political message.

But the problem becomes more challenging in cases of right-of-reply statutes and the fairness doctrine, which both seek to increase the diversity of views presented to listeners in a seemingly neutral fashion. Do these statutes further listener interests on balance? The answer is yes, sometimes. The Court has twice relied upon listener interests to find that more information was better, and the argument that the government may not compel speech was unavailing.[369]

Listener interests do not necessarily require more information in all situations, as the *Tornillo* case makes clear. In *Tornillo*, there are strong listener interests on *both* sides of the argument, both in favor of government-compelled right-of-reply and in opposition. The first way in which the right-of-reply statute in *Tornillo* trenched upon listener interests under the First Amendment was to suppress speech. The

369. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 653 (1985) (holding that the First Amendment does not forbid a state from requiring lawyers who chose to advertise to include certain fee information in ad); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 373-75 (1969) (holding that the federal requirement that radio stations provide airtime for the opposition is constitutional in part to vindicate interests of listeners).

Court stated that the statute suppressed speech in three ways: (i) by preventing the newspaper from printing something else that it would have preferred to have printed; (ii) by imposing what resembled a tax for attacking candidates; and (iii) by generally deterring the paper from taking on controversial topics such as criticizing candidates to avoid triggering the penalty represented by a right of reply.[370]

The contention that the right-of-reply statute suppresses speech is firmly rooted in traditional listener interests because suppression of speech, especially by content and viewpoint, deprives listeners of vital political information. As the Court in *Tornillo* said, the "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'"[371] These three modes of suppression would, by themselves, justify holding the right-of-reply statute unconstitutional because, as noted in *Buckley v. Valeo*, the state may not suppress the speech of one to enable that of another.[372]

Advocates of the statute argued that despite suppression, listeners gain a net benefit from the right of access to the press. These advocates also argued, perhaps implicitly, a distrust of government motives was not relevant because the right-of-reply statute was neutral and simply aimed to provide both sides of the story.[373] But the right-of-reply statute in *Tornillo* was not neutral; rather, it was skewed on its face to favor the government. Under the statute, three types of attack triggered a right of reply.[374] The first category to trigger a reply was an attack on the "personal character" of the candidate.[375] The second category to trigger a reply was any column that "charges [the] candidate with malfeasance or misfeasance *in office*,"[376] and the third

370. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256-57 (1974).

371. *Id.* at 257 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

372. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .").

373. Tornillo, 418 U.S. at 248-54. "[I]t is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues." *Id.* at 250.

374. *Id.* at 244 n.2.

375. *Id.*

376. *Id.* (emphasis added).

was any column that "otherwise attacks his *official record*."[377] The last two categories applied only to office holders, past and present. By limiting protection to those "in office" or for attacks of an "official record," the statute nakedly professed a preference for protecting incumbents or past office-holders. If malfeasance "in office" or attacks on a candidate's "official record" were merely types of attacks on personal character, it would have been unnecessary to enumerate those categories. Thus, this statute gave special protection to office holders or former office holders. This special protection for those holding office skews debate in favor of government, a distortion that impermissibly harms listeners.

The right-of-reply statute was skewed in another way. The *enforcement* of a right-of-reply statute may tend to entrench office holders or at least those with traditional viewpoints. First, the right-of-reply statute in *Tornillo* made a violation a misdemeanor criminal offense and therefore the *government* was the chief enforcer of the statute.[378] The opportunity for government abuse is obvious—a government administration may use its prosecutorial discretion to selectively prosecute newspapers attacking incumbents while failing to prosecute newspapers attacking challengers.

Second, judges and juries will likely favor popular positions of those already in power and disfavor unpopular positions of minority candidates in both criminal cases and civil cases brought by the candidate attacked.[379] This will occur because the statute grants judges and juries broad discretion in determining whether a particular newspaper column "assails" or "attacks." For example, if a column states a candidate "lacks judgment," does this constitute an "attack" which triggers a right-of-reply? What the judge or jury deems an attack on personal character may often depend on the popularity of the newspaper and the candidate. If the candidate espouses the same views of the judge and the community, stating that a candidate "lacks judgment" will likely be found an "attack" triggering the candidate's right to reply. On the other hand, if the candidate espouses views unpopular with the judge and community, these same words, "lacks

377. *Id.* (emphasis added).

378. *Id.* at 244.

379. The Florida Supreme Court evidently construed this criminal statute to provide for a private right for candidates to sue for damages. *See id.* at 243-44, 246.

judgment," will likely be found perfectly appropriate, not a personal "attack," thereby denying the candidate the right to reply.

This same problem arose, of course, in the war-time seditious libel cases.[380] Judges and juries were much more likely to conclude that defendants espousing views they disagreed with had the requisite criminal intent.[381] The result was viewpoint discrimination in enforcement. That danger applies to right of reply, because judges and juries must assess whether the content of speech attacks a favored candidate or simply appraises his or her record in a fair and neutral way.

The fact that the statute, on its face, provides special protection for office-holders past and present—and that enforcement could, in many cases, favor popular positions—shows that even a seemingly neutral statute can be infected with distorting effects. These two concrete examples of distortion, particularly the office-holders example, bolster the wisdom of the general rule: the government cannot be trusted to interfere with content of speech, even when it is compelled speech. The harms inflicted, of course, are inflicted upon listener interests. Therefore, even under a right-of-reply statute supposedly aimed at furthering listener interests, those same listener interests can be sufficiently harmed to render the compelled speech under the right-of-reply statute unconstitutional under the First Amendment.

Of course, one can imagine a right-of-reply statute constructed to avoid at least some of these problems. The balance of listener interests with other interests will be delicate in each case, and depend on numerous factors that can tip the scale one way or another. For example, under special circumstances the Court has held that listener interests justify government-compelled speech. In *Zauderer v. Office of Disciplinary Counsel*,[382] an Ohio regulation required that any lawyer who chooses to advertise his fees must also disclose any

---

380. The war-time suppression cases arose from World War I through the Korean War. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47, 48-53 (1919) (affirming convictions under the Espionage Act of 1917 on ground that distribution of leaflets constituted "obstruct[ion] of the recruiting or enlistment service").

381. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 176 (2004).

382. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

hidden costs.[383] The Court viewed the speech as commercial speech and noted that the principal justification for protecting commercial speech was consumer interest in getting full information[384]—pure listener interests. Based upon these interests, and the fact that commercial speech receives less protection than political speech, the Court held that the interests of a lawyer's potential clients justify requiring that lawyer to disclose hidden fees to avoid misleading the listener.[385] But this case, finding that listener interests justified government-compelled speech, is special in that it finds the speech at issue to be commercial speech. Listener interests are implicated differently when the speech is political, because government compelled political speech presents a greater danger that the government will improperly distort what listeners hear.

Similarly, the Court in *Red Lion Broadcasting Co. v. FCC*[386] addressed the section of the fairness doctrine that required broadcasters to permit a political or public figure attacked on a radio show free airtime to rebut the charges.[387] The Court relied in part on listener interests in determining that the requirement was permissible under the First Amendment because listener interests are paramount.[388] But *Red Lion* also had a special feature that formed the main basis of the holding: there were more potential broadcasters than frequencies available.[389] Thus, when the government licensed a particular broadcaster, that broadcaster did not have an indefeasible right to that frequency. Instead, the broadcaster held the right in trust, so that "the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens."[390]

Any analysis of the fairness doctrine or right-of-reply statutes in general exceeds the scope of this article. It needs to be emphasized that there are listener interests on both sides of the debate and that

383. *Id.* at 652.
384. *Id.* at 651.
385. *Id.* at 653.
386. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).
387. *Id.* at 378-79.
388. *Id.* at 281, 85-86.
389. *Id.* at 388.
390. *Id.* at 388-89.

right of access may harm listener interests when it is the government that compels the access.

* * *

The concept of the speaker's freedom of mind evolved throughout the compelled speech cases in such a way as to make the protection against compelled speech equal to that for government suppression of speech. *Riley* is the apotheosis of that evolution.

D. A Focus on Listener Interests Narrows the Holding of Riley

Riley is frequently cited for two related propositions concerning the compelled speech doctrine: first, that both the power and the ambit of the compelled speech doctrine are as great as they are in suppression cases; second, that the compelled speech doctrine protects as much against the compelled disclosure of facts as it does against the compelled affirmation of fundamental political beliefs.[391] The Court in *Hurley*, for example, asserted based on *Riley* that the compelled speech doctrine applies "equally to statements of fact the speaker would rather avoid."[392] Both propositions are false, and a focus on listener interests helps explain their deficiencies.

1. Disclosures of Facts and Beliefs

In fact, *Riley* did not hold that facts receive the same disclosure protection as opinions. Rather, it held that the government could not compel canvassers to reveal facts at the doorstep.[393] But the Court expressly said the government could compel charities to reveal facts in a more general venue, such as directly to the state, which could then publicize them to the public:

> Further North Carolina may constitutionally require fundraisers to disclose certain financial information to the State, as it has since 1981. . . . [And] as a general rule, the State may itself publish the

391. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573 (1995); Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 61 (2006).

392. *Hurley*, 515 U.S. at 573 (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797-98 (1988)).

393. *Riley*, 487 U.S. at 798-800.

> detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation.[394]

Riley does not prohibit compelled disclosure of facts generally; rather, it only prohibits compelled disclosures that are likely to suppress speech immediately as will occur on the doorstep or telephone solicitation.[395] As the Court wrote, "if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone."[396] That is, it does not matter that the government regulation compelled speech rather than impose some other kind of stricture, because either way the government regulation has the immediate effect of *suppressing* speech. *Riley* could thus have rested on the more mundane and traditional principle that government conduct that suppresses speech (even if the conduct happens to compel speech) violates the First Amendment, without relying on a separate compelled speech doctrine. *Riley* thus differs from many other compelled speech cases. The *Riley* Court identifies the main harm as suppression of other speech whereas in most other compelled speech cases the Court does not identify suppression of other speech as a harm flowing from the compelled speech.[397]

Indeed, since *Riley* it does not appear that the Court has actually protected factual disclosures against compelled disclosure absent a likely suppressive effect.[398] The Court's frequent recitation that the compelled speech doctrine protects against factual disclosure has been

---

394. *Id.* at 795, 800.

395. *Id.* at 800-01.

396. *Id.* at 800.

397. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

398. For example, the Court in *McIntyre* protected against compelled disclosure of facts by holding unconstitutional a statute that banned anonymous campaign literature. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-58 (1995). But the Court relied almost entirely upon the suppressive effect of the statute. *Id.* at 345-46, 347 (subjecting the statute to "exacting scrutiny" as it "burdens core political speech" and "involves a limitation on political expression").

largely dicta.[399] For example, in *Hurley*, the Court stated that factual disclosures are protected against compelled disclosure,[400] but the case involved speech concerning political beliefs, not factual disclosures. The Court in *Rumsfeld* appeared to inch away from providing as broad a protection for factual disclosures for compelled affirmation of fundamental political beliefs.[401]

2. Riley*'s Application of Exacting Scrutiny for Compelled Speech Cases*

The *Riley* Court also stated that compelled speech must satisfy "exacting First Amendment scrutiny" as on par with suppression cases.[402] This article does not propose an alternative test; it merely points out that the Court's justification for applying the test from suppression cases to compelled speech cases relies entirely upon the misplaced notion of the speaker's freedom of mind. Once that concept has been abandoned, as this article suggests, the Court must decide afresh, based upon listener interests, what level of protection compelled speech should enjoy. The level of protection will depend upon the type of case; but overall, it appears that a focus on listener interests will, in some cases, not require strict scrutiny, particularly pertaining to compelled disclosure of facts.

VI. CONCLUSION

In tracing the case law and the development of the compelled speech doctrine, this article shows that the Court has continued to rely upon the original underpinning of the doctrine: to protect the speaker's freedom of mind. But with each new compelled speech case, this concept of the speaker's freedom of mind provides less and less logical support for the holding. This is especially so in compelled

399. *E.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573 (1995) (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797-98 (1988)).

400. *Hurley*, 515 U.S. at 573 (citing *McIntyre*, 514 U.S. at 341-42; *Riley*, 487 U.S. at 797-98).

401. *See infra* Part II.I.

402. *Riley*, 487 U.S. at 789.

subsidy cases such as *Abood*, where the compulsion at issue has little or no chance of influencing the individual speaker's mind or beliefs. This article argues that a focus on listener interests helps explain why the Free Speech Clause provides protection against compelled speech. The listener point of view provides the most fruitful justification for compelled subsidy cases such as *Abood*, in which the government compulsion can distort and amplify union speech out of proportion to the support that speech actually enjoys.

The same focus on listener interests also provides a guide to the proper strength and ambit of the compelled speech doctrine. The Court's repeated pronouncements that the compelled speech doctrine is congruent to the Free Speech Clause in suppression cases flows from its mistaken reliance on the speaker's freedom of mind: "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[403] But compelled speech, in most cases, has little to do with the speaker's freedom of mind. Thus, the very premise for asserting that the two different rights are complementary—or rather, equal—fails. By contrast, a focus on listener interests suggests that both the strength and the ambit of the compelled speech doctrine should, in most cases, be less than for suppression cases. For example, a focus on listener interests helps to show why the compelled speech doctrine should not protect the compelled disclosure of facts to the same extent as compelled affirmation or subsidy of speech with a political viewpoint.

Finally, focusing on the listener point of view does not eliminate that grand concept of freedom of mind; it simply shifts the Court's attention to protecting the mind that really matters—the listener's. The same practical considerations that have led philosophers and scholars, from Mill to Meiklejohn, to abjure government suppression apply to compelled speech cases. In compelled speech cases, as in suppression cases, the guiding principle is the same: the government should not control what we hear and do not hear.

---

403. Wooley v. Maynard, 430 U.S. 705, 714 (1977) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).