

THE CONSCIENCE OF THE BAKER¹: RELIGION AND COMPELLED SPEECH

Ashutosh Bhagwat*

INTRODUCTION

Compelled speech has, in recent years, emerged as one of the most active areas of First Amendment jurisprudence. In just the October 2017 Term the Supreme Court decided two important compelled-speech cases,² and a third case in which compelled speech was at the center of the dispute, albeit the Court ducked the issue.³ The lower courts have also decided a number of important and highly controversial compelled-speech cases in the past decade.⁴ And the recent academic commentary on the subject is, to put it mildly, voluminous.⁵ Also noteworthy is the sheer range of plaintiffs in recent cases, from traditional plaintiffs such as the religious nonprofits and dissenting individuals in the Supreme Court's recent decisions, to tobacco companies and soft drink makers.⁶ Finally, it was also in a compelled-speech case that Justice Kagan, normally one of the more moderate and understated of the Justices, accused the conservative majority of “weaponizing the First Amendment . . . to intervene in

¹ “The play’s the thing [w]herein I’ll catch the conscience of the king.” WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2 (Yale Univ. Press ed. 2003).

* Martin Luther King, Jr. Professor of Law and Boochever and Bird Endowed Chair for the Study and Teaching of Freedom and Equality, University of California, Davis School of Law. BA, 1986 Yale University. JD, 1990 The University of Chicago. Contact: aabhagwat@ucdavis.edu. Thanks to Professor Tim Zick and to the staff of the *William & Mary Bill of Rights Journal* for organizing this great Symposium. Thanks also to my fellow speakers and audience members for extremely valuable comments. Finally, thanks to participants at the UC Davis School of Law “Schmooze” for their always-helpful feedback.

² *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018); *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

³ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

⁴ *See, e.g., Am. Beverage Ass’n v. City & Cty. of S.F.*, 916 F.3d 749 (9th Cir. 2019) (en banc); *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), *adhered to on reh’g*, 800 F.3d 518 (D.C. Cir. 2015); *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013) (en banc); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

⁵ *See, e.g., Vikram David Amar & Alan Brownstein, Towards a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, ILL. L. REV. (forthcoming 2019); William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171 (2018); Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277 (2014); Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015); Steven H. Shiffrin, *What Is Wrong with Compelled Speech?*, 29 J.L. & POL. 499 (2014); Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355 (2018).

⁶ *See, e.g., Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. 2361; *Am. Beverage Ass’n*, 916 F.3d 749; *R.J. Reynolds Tobacco Co.*, 696 F.3d 1205.

economic and regulatory policy.”⁷ Clearly something is afoot in the area of compelled speech.

All of this is frankly quite odd and rather baffling because the law of compelled speech has been, and continues to be, underdeveloped both doctrinally and theoretically. In 2006, before the recent explosion of compelled-speech cases, Larry Alexander made the comment that “[t]he harm in compelled speech remains elusive, at least for me.”⁸ I agree, and would argue that Alexander’s doubts are even more pertinent today. In this Article, I want to explore a modest proposal⁹: What if there *is* no harm associated with compelled speech as such, and so no general right against compelled speech exists at all? What if the Supreme Court has gotten this area of law wrong from the beginning, which is why the current doctrine is entirely unmoored? And what if we have been relying on entirely the wrong part of the Constitution to resolve compelled speech disputes by focusing on free speech principles rather than, as we should, free exercise of religion? And finally, what implications, if this is correct, would this have for cases raising issues of compelled speech? My conclusion, in brief, is that there is no general right against compelled speech, and as a consequence many, though not all, recent compelled-speech decisions are simply wrong.

Part I looks at recent compelled-speech decisions in the Supreme Court and lower courts. Part II looks at the origins of the doctrine in classic Supreme Court cases, and then looks for lessons to be drawn from those decisions. Part III looks at the relationship and differences between the Free Speech and Free Exercise Clauses of the First Amendment, focusing in particular on the concept of “freedom of conscience.” Part IV identifies that “freedom of conscience” as the key principle underlying traditional compelled-speech doctrine and elucidates the doctrinal implications of that conclusion. Finally, Part V concludes by briefly summarizing the implications of this analysis for recent compelled-speech cases, including the special problem of compelled subsidies.

I. COMPELLED SPEECH TODAY

A. *The Supreme Court*

As just noted, the Supreme Court decided two important compelled-speech cases at the end of the October 2017 Term.¹⁰ The first was *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*).¹¹ At issue in *NIFLA* was a California statute that, in relevant part, imposed disclosure requirements on so-called Crisis Pregnancy Centers—clinics, typically run by pro-life Christian groups, which offer pregnant

⁷ *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

⁸ Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 148 (2006).

⁹ Cf. JONATHAN SWIFT, A MODEST PROPOSAL FOR PREVENTING THE CHILDREN OF POOR PEOPLE FROM BEING A BURTHEN TO THEIR PARENTS OR THE COUNTRY, AND FOR MAKING THEM BENEFICIAL TO THE PUBLICK (London, Weaver Bickerton 1730).

¹⁰ See *supra* note 2 and accompanying text.

¹¹ 138 S. Ct. 2361.

women certain services, including medical services, with the aim of assisting the (typically poor) women they serve but also discouraging them from obtaining abortions.¹² The first disclosure requirement applied to licensed medical facilities who provide primarily “family planning” and “pregnancy-related services.”¹³ Such facilities were required to post, in a prominent location within the facility, a notice stating that the State of California ran programs providing free or low-cost access to family planning, prenatal care, and abortion services.¹⁴ The second requirement applied to “unlicensed” clinics that were not licensed medical facilities and did not employ a licensed medical professional.¹⁵ They were required to post a notice on site stating that the clinic was not a licensed medical facility and had no licensed medical professional on the premises, and to include a similar disclosure in all advertising materials.¹⁶

This statute was challenged by a number of organizations that ran Crisis Pregnancy Centers, and in a 5–4 decision split along traditional conservative-liberal lines, the Supreme Court invalidated both provisions.¹⁷ Regarding the licensed facilities provision, Justice Thomas’s majority opinion begins by describing the notice requirement as a “content-based regulation of [the clinics’] speech,”¹⁸ because “such notices ‘alte[r] the content of [the clinics’] speech.’”¹⁹ As such, the Court suggests the notice requirement is presumptively subject to strict scrutiny.²⁰ It is worth taking a pause here to consider how thoroughly odd this analysis is. To begin with, compelled speech *always* involves “content-based” regulation because the government, when it compels speech, compels a specific message, not just an obligation to say whatever the speaker wants.²¹ Furthermore, the majority is entirely unclear on *why* placing an obviously government-written and -mandated notice on one’s wall alters one’s own message.²² After all, the California law in no way prevented Crisis Pregnancy Centers from speaking out against abortions.²³ Admittedly, the *NIFLA* Court’s error in this regard is an old error, dating back to a 1988 decision imposing disclosure requirements on professional fundraisers;²⁴ but for reasons I will develop further in the next part, it was error nonetheless.

In any event, having feinted towards strict scrutiny by invoking content discrimination, the majority then considered the argument accepted by the Ninth Circuit that

¹² *Id.* at 2368.

¹³ *Id.* at 2368–69 (quoting CAL. HEALTH & SAFETY CODE § 123471(a) (West 2016)).

¹⁴ *Id.* at 2369.

¹⁵ *Id.* at 2369–70 (quoting CAL. HEALTH & SAFETY CODE § 123471(b)).

¹⁶ *Id.* at 2370.

¹⁷ *See id.* at 2370, 2378.

¹⁸ *Id.* at 2371 (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1998)).

¹⁹ *Id.* at 2371 (alteration in original) (quoting *Riley*, 487 U.S. at 795).

²⁰ *Id.*

²¹ *See Amar & Brownstein, supra* note 5, at 11–13.

²² *See generally Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. 2361.

²³ *See generally id.*

²⁴ *Riley*, 487 U.S. at 795.

a lower standard of scrutiny should apply because the case involved “professional speech.”²⁵ The majority expressed deep doubts about such a rule, and distinguished its earlier decisions seemingly supporting such an approach.²⁶ Regarding the first such case, *Zauderer v. Office of Disciplinary Counsel*,²⁷ the Court limited its reach to laws requiring “the disclosure of ‘purely factual and uncontroversial information about the terms under which . . . services will be available,’” and which are not “unjustified or unduly burdensome.”²⁸ Because the required notice did not relate directly to the services provided by licensed clinics but rather to state-provided services, and because abortion is “anything but an ‘uncontroversial’ topic,” the Court held that *Zauderer* did not apply to the licensed-facility notice.²⁹ Regarding another line of cases, epitomized by *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁰ the Court held that its reach was limited to rules such as informed-consent requirements which primarily target professional *conduct*, and only incidentally affect speech.³¹ Again, the Court held that because the required notice did not relate to services provided by the regulated clinics, these cases were not on point.³²

The Court ended its analysis with the conclusion that the notice requirement could not survive even the intermediate scrutiny applied by the Ninth Circuit, much less strict scrutiny.³³ The Court accepted as substantial, California’s stated interest in educating low-income women about state-provided services, but said the law nonetheless fails constitutional scrutiny for two reasons.³⁴ First, because the California law applied only to a small group of clinics, it was “underinclusive.”³⁵ And second, in any event, California could have achieved its goals in a less burdensome manner by educating the women itself through some sort of a “public information campaign.”³⁶

Finally, the Court turned to the disclosure requirements for unlicensed facilities. Here, the Court proceeded quickly. First, it stated that the notice was not justified even under the lenient standard of *Zauderer* because California had not demonstrated a *need* for such a notice.³⁷ The burden of proof on this point, the Court held, was on California, which had failed to produce evidence that women did not understand that

²⁵ *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2371–73 (quoting and reversing *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 839 (9th Cir. 2016)).

²⁶ *Id.* at 2371–74.

²⁷ 471 U.S. 626 (1985).

²⁸ *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2372 (alteration in original) (quoting *Zauderer*, 471 U.S. at 651).

²⁹ *Id.*

³⁰ 505 U.S. 833 (1992).

³¹ *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2373.

³² *Id.* at 2372–74.

³³ *Id.* at 2375.

³⁴ *Id.*

³⁵ *Id.* at 2375–76 (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 802 (2011)).

³⁶ *Id.* at 2376.

³⁷ *Id.* at 2376–77.

these clinics were unlicensed.³⁸ Second, the Court held, the notice provision was unduly burdensome because it required “a 29-word statement from the government, in as many as 13 different languages” on all advertising.³⁹ This obligation threatened to “drown[] out the facility’s speech,” and likely make it impossible to advertise in the first place.⁴⁰

The second major compelled-speech decision from 2018 was *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.⁴¹ *Janus* involved, not strictly speaking compelled speech, but rather compelled subsidization of the speech of others.⁴² The case involved a challenge to “agency fees,” which are fees that public employees represented by unions must pay to those unions, even if the employee was not a union member.⁴³ In its 1977 decision in *Abood v. Detroit Board of Education*, the Court upheld the constitutionality of such fees against a free-speech challenge, so long as the fees funded the collective bargaining activities of the union rather than its political or ideological activities.⁴⁴ In *Janus*, the same five-Justice conservative majority as in *NIFLA* (with Justice Alito now writing) overruled *Abood* and held that *any* requirement for non-members to subsidize public sector unions violated the Free Speech Clause of the First Amendment.⁴⁵

The majority’s analysis begins with some broad statements about the underlying bases for the compelled-speech doctrine.⁴⁶ It noted that the core purposes of free speech were to advance “our democratic form of government” and to “further[] the search for truth.”⁴⁷ It then asserted that “[w]henver the Federal Government or a State prevents individuals from saying what they think on important matters *or compels them to voice ideas with which they disagree*, it undermines these ends.”⁴⁸ Why that might be so with respect to compelled speech, the Court did not say, even though *all* the academic literature and cases discussing these purposes that it cited involved speech suppression rather than compulsion.⁴⁹ The Court then stated the compelled subsidization of speech raised the same concerns as compelled speech itself, and in support, it quoted Jefferson’s famous statement from his Bill for Establishing Religious Freedom that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.”⁵⁰

³⁸ *Id.* at 2377.

³⁹ *Id.* at 2378.

⁴⁰ *Id.*

⁴¹ 138 S. Ct. 2448 (2018).

⁴² *See generally id.*

⁴³ *Id.* at 2460–61.

⁴⁴ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225–26, 235–36 (1971), *overruled by Janus*, 138 S. Ct. 2448.

⁴⁵ *Janus*, 138 S. Ct. at 2486.

⁴⁶ *Id.* at 2463–64.

⁴⁷ *Id.* at 2464 (citations omitted).

⁴⁸ *Id.* (emphasis added).

⁴⁹ *See generally id.*

⁵⁰ *Id.* at 2464 (quoting Thomas Jefferson, *A Bill for Establishing Religious Freedom*, in 2 THE PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed., 1950) (emphasis and footnote omitted)).

Given these premises, the Court's conclusion that any forced subsidization of unions violates the First Amendment followed inevitably because the Court (correctly) noted that much of what unions do, including when engaging in collective bargaining, constitutes speech on matters of public concern.⁵¹ The only real barrier the majority appears to have seen to its result was stare decisis, but the majority made short work of that objection based on the alleged weakness of *Abood's* reasoning.⁵² The dissent, unsurprisingly, disagreed with all of this, including most notably the majority's assumption that forced subsidies for speech are constitutionally suspect.⁵³

Finally, we come to the Court's almost-compelled-speech decision from 2018, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*.⁵⁴ In that case, a baker named Jack Phillips (whose conscience provides the title for this Article) declined to sell a wedding cake to a same-sex couple because of his religious opposition to same-sex marriage.⁵⁵ He was found to have violated a Colorado law prohibiting discrimination on the basis of sexual orientation by places of public accommodation.⁵⁶ Phillips claimed that this application of the Colorado law violated both his free speech rights, "by compelling him to exercise his artistic talents to express a message with which he disagreed," and his right to free exercise of religion.⁵⁷ In Colorado's administrative system and courts, Phillips's free-exercise claim was rejected based on the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, which held that the Free Exercise Clause does not require religiously based exemptions from neutral and generally applicable laws (which the Colorado anti-discrimination statute surely was).⁵⁸ His compelled-speech claim was also rejected on the grounds that baking and selling a cake does not constitute speech.⁵⁹ The Court granted certiorari on both of these issues, but ultimately resolved the case on the narrow (and frankly implausible) grounds that in the course of considering Phillips's claims, the Colorado administrative authorities had expressed hostility to religion, thereby violating the Free Exercise Clause.⁶⁰ The compelled-speech and core free-exercise claims were thus left for another day.

B. Lower Courts

The federal courts of appeals have decided a number of important and controversial compelled-speech cases in recent years, which, in combination, point to a

⁵¹ *Id.* at 2473–74.

⁵² *Id.* at 2478–86.

⁵³ *Id.* at 2494–95 (Kagan, J., dissenting) (citing Brief for Eugene Volokh et al. as Amici Curiae at 4–5, *Janus*, 138 S. Ct. 2448 (No. 16-1466)).

⁵⁴ 138 S. Ct. 1719 (2018).

⁵⁵ *Id.* at 1724.

⁵⁶ *Id.* at 1725–26.

⁵⁷ *Id.* at 1726.

⁵⁸ 494 U.S. 872, 879 (1990).

⁵⁹ *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

⁶⁰ *Id.* at 1729, 1732.

startling strengthening and expansion of the compelled-speech doctrine. Because of space constraints, a full exploration of these cases is impossible, but I will provide brief summaries of some of the most important decisions.

The most recent of these is the Ninth Circuit's en banc decision in *American Beverage Association v. City and County of San Francisco*.⁶¹ At issue was a challenge to San Francisco's first-of-its-kind requirement that advertisements and billboards for "sugar-sweetened beverages" contain health warnings taking up at least 20% of the advertising space.⁶² The court applied the Supreme Court's *Zauderer* ruling, as interpreted in *NIFLA*, concluding (contrary to some other courts of appeals) that its relatively lenient standard applied to all "health and safety" warnings.⁶³ Ultimately, however, the court decided that San Francisco's 20% requirement was "unduly burdensome" under *Zauderer* and *NIFLA* because San Francisco had failed to meet its burden of proving that the 20% requirement was needed (as opposed to a smaller percentage such as 10%).⁶⁴ The 20% rule also, the court concluded, threatened to "drown[] out" or even eliminate the targeted advertising because of the burden it imposed on such advertising.⁶⁵

Another important case is the D.C. Circuit's *National Association of Manufacturers v. Securities & Exchange Commission*, decided in 2014 and 2015.⁶⁶ The National Association of Manufacturers (NAM) challenged a Securities and Exchange Commission (SEC) regulation that, in effect, required companies that used certain minerals in manufacturing to disclose, in a publicly available report to be filed with the SEC and on the company website, whether the company could affirm that the minerals were not funding conflicts or militias in the Democratic Republic of the Congo.⁶⁷ The original panel opinion, issued in 2014, held that the lenient *Zauderer* standard for factual disclosures only applied to disclosures necessary to prevent or correct deceptive speech, which this disclosure clearly did not.⁶⁸ As such, it concluded, the regulation was subject to the intermediate scrutiny standard applicable to regulations of commercial speech,⁶⁹ which the regulation could not survive because the SEC had not met its burden of proving that its goals could not be achieved using regulatory means less burdensome on speech rights.⁷⁰

Soon after the panel opinion came out, the D.C. Circuit issued an en banc opinion rejecting the narrow reading of *Zauderer* embraced by the panel.⁷¹ As a consequence,

⁶¹ 916 F.3d 749 (9th Cir. 2019) (en banc).

⁶² *Id.* at 753–54 (citing S.F., Cal., Health Code art. 42, div. 1, § 4203(a) (2015)).

⁶³ *Id.* at 755–56.

⁶⁴ *Id.* at 757.

⁶⁵ *Id.* (quoting Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2378 (2018)).

⁶⁶ 748 F.3d 359 (D.C. Cir. 2014), *adhered to on reh'g*, 800 F.3d 518 (D.C. Cir. 2015).

⁶⁷ *Id.* at 363–65.

⁶⁸ *Id.* at 370.

⁶⁹ *Id.* at 372 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 565 (1980)).

⁷⁰ *Id.* at 373.

⁷¹ Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 20 (D.C. Cir. 2014) (en banc).

the panel granted rehearing, but then reaffirmed its original result (by the same 2–1 vote) on three separate grounds. First, it held that *Zauderer* only applied to disclosures related to point-of-sale advertising, which the SEC requirement did not.⁷² In addition, the regulation failed because the SEC had not met its burden to prove that the regulation would actually benefit victims of civil violence in the Congo.⁷³ Finally, the majority held that the disclosure required was “controversial” because it forced companies to condemn themselves, and so fell outside *Zauderer*.⁷⁴ Judge Srinivasan’s sharp dissent contested all of these conclusions, including, notably, the majority’s position that the word “controversial” from *Zauderer* referred to political controversy, as opposed to controverted facts.⁷⁵

Two more examples, both from the D.C. Circuit, help to round out the picture. The first is the decision in *National Association of Manufacturers v. National Labor Relations Board*, involving a National Labor Relations Board (NLRB) rule requiring employers to post on their property and websites a notice informing employees of their rights under the National Labor Relations Act.⁷⁶ The majority interpreted a statute prohibiting the NLRB from punishing noncoercive employer speech as also incorporating the compelled-speech doctrine, despite any statutory text so indicating.⁷⁷ It then held that the posting requirement violated this doctrine because the notice would affect the employer’s own protected speech opposing unionization.⁷⁸ As with the Supreme Court later in *NIFLA*, the court failed to explain why this is so, given that the NLRB rule placed no limits on employers’ speech.⁷⁹

The final, and most eyebrow-raising case is *R.J. Reynolds Tobacco Co. v. Food & Drug Administration* from 2012.⁸⁰ This time the challenge was to a Food and Drug Administration (FDA) regulation, implementing a congressional command that required cigarette packages to include not only the familiar textual health warning, but also a “graphic warning” that highlighted the health dangers associated with smoking in an attention-catching manner.⁸¹ The court invalidated the rule.⁸² It took an extremely aggressive view of the compelled-speech doctrine, equating laws requiring disclosures with laws suppressing speech, and so presumptively subject to strict scrutiny because they are content based.⁸³ It then held that the primary exception to this principle, *Zauderer*, did not apply for two separate reasons. First, it held that *Zauderer*

⁷² See *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 523–24 (D.C. Cir. 2015) (en banc).

⁷³ *Id.* at 525–26.

⁷⁴ *Id.* at 528–30 (quoting *Am. Meat Inst.*, 760 F.3d at 27).

⁷⁵ *Id.* at 538 (Srinivasan, J., dissenting) (quoting *Am. Meat Inst.*, 760 F.3d at 27).

⁷⁶ *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947, 949 (D.C. Cir. 2013).

⁷⁷ *Id.* at 956.

⁷⁸ *Id.* at 959.

⁷⁹ *Id.*

⁸⁰ *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

⁸¹ *Id.* at 1208.

⁸² *Id.* at 1221–22.

⁸³ *Id.* at 1211; see *id.* at 1212 (discussing the relevant level of scrutiny).

was limited to disclosures needed to prevent consumer deception⁸⁴ (a position the en banc D.C. Circuit, as we have noted, rejected two years later).⁸⁵ In addition, it held that the graphic warnings, because of their emotional content, were not “purely factual and uncontroversial.”⁸⁶ Finally, the court applied the *Central Hudson* intermediate-scrutiny test applicable to commercial-speech regulations (even though that standard was developed in cases involving speech restrictions), and concluded that under that standard, the FDA had failed to meet its burden of proving that graphic warnings actually reduce smoking and so improve health.⁸⁷

Of course, not every lower court opinion in recent years has struck down disclosure requirements.⁸⁸ But a surprising number have, including in areas such as health and safety warnings where, until recently, the permissibility of regulation seemed widely accepted.⁸⁹ And crucially, in these cases the appellate courts have consistently placed fairly substantial burdens of proof on the government, on the view that such disclosure rules, even in commercial context, impose substantial burdens on free speech rights.⁹⁰ We now can turn our attention to the question of where these ideas came from.

II. ORIGINS AND LESSONS

The modern compelled-speech doctrine has its roots in a famous and repeatedly quoted decision from 1943, and then was further developed in a series of cases from the 1970s and 1980s. This part summarizes those developments and then considers some broader themes that emerge from both these early cases as well as the more recent cases summarized in Part I.

A. Origins

In 1940, in a case titled *Minersville School District v. Gobitis*, the Supreme Court, by an 8–1 vote, held that it did not violate the religious rights of two schoolchildren for a Pennsylvania school district to expel them for failing to participate in a flag salute.⁹¹ The children were members of the Jehovah’s Witnesses religious sect, which believed that participation in such a ceremony was forbidden by the Bible.⁹² In response, the West Virginia Board of Education and legislature adopted legislation and

⁸⁴ *Id.* at 1213.

⁸⁵ *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014).

⁸⁶ *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1216–17 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

⁸⁷ *Id.* at 1217–22 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980)).

⁸⁸ *See, e.g., Am. Meat Inst.*, 760 F.3d 18.

⁸⁹ *See id.* at 23–25.

⁹⁰ *See id.* at 27.

⁹¹ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 597–600 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁹² *Id.* at 591–92.

rules requiring all students in public schools to participate in a flag salute ceremony.⁹³ A group of Jehovah's Witnesses then brought suit in federal court seeking an injunction against enforcement of this requirement.⁹⁴ A three-judge district court granted the injunction on the grounds that the mandatory salute violated plaintiffs' rights of religious freedom,⁹⁵ and the Supreme Court, by a 6–3 vote, affirmed.⁹⁶ Notably, however, Justice Jackson's majority opinion in *Barnette*—which remains one of the most widely admired and cited First Amendment opinions in the history of the Court—did *not* rely on the religious freedom argument rejected in *Gobitis* but accepted by the lower court in this case.⁹⁷ To the contrary, the Court explicitly declined to adopt this reasoning on the grounds that it would deny liberty to individuals who lacked plaintiffs' religious beliefs.⁹⁸ Instead, Justice Jackson relied upon—or to be more accurate, created out of whole cloth—the concept of compelled speech with the following sentence: “To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”⁹⁹ Justice Jackson then went on, in the most famous and cited passage from the opinion, to elucidate the general principle he believed the case established:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.¹⁰⁰

⁹³ *Barnette*, 319 U.S. at 626.

⁹⁴ *Id.* at 629.

⁹⁵ *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943). This result is quite astonishing in light of *Gobitis*, but the district court concluded that because three of the Justices in the *Gobitis* majority had expressed a change of heart, the Court would no longer come out the same way. *Id.* at 253 (citing *Jones v. City of Opelika*, 316 U.S. 584 (1942)). This was, of course, correct.

⁹⁶ *Barnette*, 319 U.S. 624. Of the original eight Justices in the *Gobitis* majority, three Justices (Black, Douglas, and Murphy) changed their votes, and two had been replaced; the *Barnette* majority therefore consisted of the original *Gobitis* dissenter (Justice, now Chief Justice Stone), the three turncoats, and the two new appointees (Jackson and Rutledge), and the remaining three members of the *Gobitis* majority, including the author Justice Frankfurter, dissented in *Barnette*. Compare *id.*, with *Minersville Sch. Dist.*, 310 U.S. 586.

⁹⁷ *Barnette*, 319 U.S. at 634–35.

⁹⁸ *Id.* (“Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellee's motives for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.”).

⁹⁹ *Id.* at 634.

¹⁰⁰ *Id.* at 642.

Justice Black, joined by Justice Douglas, and Justice Murphy—i.e., the three Justices who changed their minds about *Gobitis*—filed concurring opinions.¹⁰¹ What is notable is that both of these opinions, representing the views of Justices making up half of the *Barnette* majority, relied on principles of religious liberty, not freedom of speech or compelled speech. Justice Black’s opinion explicitly described the right at issue as one “to the freedom of religion,”¹⁰² and went on to express concerns that the compulsory flag salute, “when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution.”¹⁰³ Similarly, Justice Murphy’s concurrence focused on “the right of freedom to believe, freedom to worship one’s Maker according to the dictates of one’s conscience, a right which the Constitution specifically shelters”¹⁰⁴ (though admittedly Murphy does also reference “the right to speak freely and the right to refrain from speaking at all,”¹⁰⁵ albeit confusingly in a sentence that also references religion).¹⁰⁶ Justice Frankfurter’s dissenting opinion is also entirely taken up with considering, and rejecting, a claim that religious liberty permits individuals to disobey secular laws which violate their beliefs.¹⁰⁷ When added to the three judges on the district court in *Barnette*, it becomes clear that the vast majority of the judges who ruled on the issues in *Gobitis* and *Barnette* thought them to implicate religious liberty, not compelled speech.

After *Barnette* in 1943, the Court did not consider a compelled-speech issue for several decades. Then, in 1977, came another case involving a Jehovah’s Witness: *Wooley v. Maynard*.¹⁰⁸ New Hampshire license plates displayed (and still display)¹⁰⁹ the motto “Live Free or Die,” and George Maynard objected to this motto primarily on religious grounds (he testified that “this slogan is directly at odds with my deeply held religious convictions”¹¹⁰), though he also cited political disagreement with it.¹¹¹ He therefore covered up this motto with tape, in violation of state law.¹¹² After being repeatedly fined, he brought suit to enjoin enforcement of the law.¹¹³ The Court, in

¹⁰¹ *Id.* at 643–44 (Black & Douglas, JJ., concurring); *id.* at 644–46 (Murphy, J., concurring).

¹⁰² *Id.* at 643 (Black & Douglas, JJ., concurring).

¹⁰³ *Id.* at 644.

¹⁰⁴ *Id.* at 645 (Murphy, J., concurring).

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *Id.* at 653–54 (Frankfurter, J., dissenting). He was, of course, prescient on this point. *See Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (noting that free exercise does not relieve people of having to comply with valid, generally applicable laws).

¹⁰⁸ 430 U.S. 705 (1977).

¹⁰⁹ N.H. DEP’T OF SAFETY DIV. OF MOTOR VEHICLES, *Plate Type Examples*, <https://www.nh.gov/safety/divisions/dmv/registration/plates.htm> [<https://perma.cc/GD7K-6U4M>] (last visited Dec. 4, 2019).

¹¹⁰ *Maynard*, 430 U.S. at 707 n.2.

¹¹¹ *Id.*

¹¹² *Id.* at 708 n.4.

¹¹³ *Id.* at 709.

an opinion by Chief Justice Burger, ruled in Maynard's favor.¹¹⁴ Crucially, the majority cited both the majority opinion and Justice Murphy's concurrence in *Barnette* for the proposition that "the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all."¹¹⁵ Through this often-cited quotation, compelled speech was transformed from a single case—albeit a famous one—into a doctrine. The Court then held that Maynard's claim fell within *Barnette* because here too "we are faced with a state measure which forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."¹¹⁶ Justice Rehnquist dissented on the grounds that Maynard, unlike the schoolchildren in *Barnette*, was not actually being required to *say* anything since no observer would ascribe the motto to Maynard rather than the State, and he remained free to disavow the motto through a bumper sticker.¹¹⁷

A point of clarification is required here regarding my argument that *Maynard* represents the true birth of the compelled-speech doctrine. Three years before *Maynard* the Court decided a case titled *Miami Herald Publishing Co. v. Tornillo*,¹¹⁸ and *Maynard* and subsequent cases and scholarship often cite *Tornillo* as a compelled-speech case.¹¹⁹ This, however, is highly dubious. *Tornillo* involved a Florida "right of reply" statute that required any newspaper that "assails" a candidate for political office based on their "personal character or official record" to print, free of cost, a reply by the candidate.¹²⁰ The Court invalidated this statute unanimously, and some have described this decision as relying on a right against compelled speech on the part of newspaper editors and owners.¹²¹ This, however, is an over-reading of the case. The trigger for the "right-of-reply" law was criticism of political candidates. As such, the obligation it imposed to publish a "reply" at the newspaper's own cost, and displacing the newspaper's own preferred coverage, would surely disincentivize papers from criticizing candidates—a point the majority explicitly noted.¹²² As such, the statute in its effect was no different from one imposing a small fine on any paper that criticized political candidates, a law which in no way implicates "compelled speech" and yet would surely be held unconstitutional. Certainly the *Tornillo* opinion

¹¹⁴ *Id.* at 715–17.

¹¹⁵ *Id.* at 714 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943); *Barnette*, 319 U.S. at 645 (Murphy, J., concurring)).

¹¹⁶ *Id.* at 715.

¹¹⁷ *Id.* at 721–22 (Rehnquist, J., dissenting).

¹¹⁸ 418 U.S. 241 (1974).

¹¹⁹ *Maynard*, 430 U.S. at 714 (citing *Tornillo*, 418 U.S. 241); *see, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988) (citing *Tornillo*, 418 U.S. 241); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 9 (1986) (citing *Tornillo*, 418 U.S. 241); Alexander, *supra* note 8, at 149–50; Volokh, *supra* note 5, at 359–61.

¹²⁰ *Tornillo*, 418 U.S. at 242.

¹²¹ *See, e.g.*, Shiffrin, *supra* note 5, at 501–02.

¹²² *Tornillo*, 418 U.S. at 257.

also recognizes a right of “editorial control and judgment” on the part of newspapers,¹²³ but that part of the opinion is cursory and unclear on whether it would be violated by a truly neutral right-of-access law, for example, requiring newspapers to publish randomly selected letters to the editor.¹²⁴ After *Barnette*, therefore, *Maynard* was the first Supreme Court case cleanly raising the problem of pure, compelled speech.

It was not the last. Just one month after deciding *Maynard*, the Court decided *Abood v. Detroit Board of Education*,¹²⁵ the case overruled by *Janus*.¹²⁶ The holding and fate of *Abood* have already been discussed,¹²⁷ and so will not be repeated here, but one important point should be noted. In *Abood*, the Court took a relatively undeveloped doctrine regarding a right against compelled *speech*, and expanded it to also cover compelled *subsidies* for the speech of others with no real support other than (as we shall see) entirely off-point citations to comments by James Madison and Thomas Jefferson regarding the compelled subsidization of *religious* speech.¹²⁸ Thus did the doctrine gain steam.

After 1977, the Court decided a number of compelled-speech cases, especially in the 1980s, far more than can be discussed here even briefly. One, however, is worthy of attention. In *Pacific Gas and Electric Co. v. Public Utilities Commission of California (PG&E)*, the Court considered an order by the California Public Utilities Commission (CPUC), requiring Pacific Gas and Electric Co. (PG&E), a regulated utility, to include within its billing envelope, a newsletter created by a public interest organization named TURN that opposed utility rate increases.¹²⁹ The order was triggered by a complaint filed by TURN before the CPUC challenging PG&E’s inclusion in the billing envelopes of its own newsletter containing political editorials.¹³⁰ The CPUC order, in effect, displaced PG&E’s newsletter with TURN’s four times a year.¹³¹ A four-Justice plurality opinion by Justice Powell concluded that, by forcing PG&E to disseminate views it disagreed with, the CPUC had violated the principle established in *Tornillo*.¹³² In particular, the plurality expressed concerns that the order might discourage PG&E from taking controversial positions because

¹²³ *Id.* at 258.

¹²⁴ At least one case, involving cable television, suggests that such a requirement might be upheld if sufficiently well justified. *See generally* *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (upholding “must-carry” regulations requiring cable television operators to carry, free of charge, the signals of local television broadcasting stations).

¹²⁵ 431 U.S. 209 (1977).

¹²⁶ *See* *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464, 2486 (2018).

¹²⁷ *See supra* notes 43–44 and accompanying text.

¹²⁸ *Abood*, 431 U.S. at 234 & n.31.

¹²⁹ *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 4, 6–7 (1986) (plurality opinion).

¹³⁰ *Id.* at 5–6.

¹³¹ *Id.* at 24 (Marshall, J., concurring in judgment).

¹³² *Id.* at 11–13 (opinion of Powell, J.).

that might encourage TURN to take a contrary stance.¹³³ Justice Marshall wrote an opinion concurring in the judgment (and providing the necessary fifth vote for the result) which emphasized the fact that under the CPUC Order, TURN's newsletter displaced PG&E's, which had the effect of suppressing PG&E's speech, albeit "very slight[ly]."¹³⁴ Finally, Justice Rehnquist wrote a sharp dissent, joined by Justices White and Stevens,¹³⁵ making two key points. First, he pointed out that *Tornillo* was entirely distinguishable because the obligation here, unlike the right of reply, was not triggered by PG&E's speech.¹³⁶ Rehnquist then made a more fundamental argument, which is worth quoting at length:

This Court has recognized that natural persons enjoy negative free speech rights because of their interest in self-expression; an individual's right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in freedom of conscience. . . . [Justice Rehnquist then discusses *Barnette*, *Maynard*, and *Tornillo*.]

Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an "intellect" or "mind" for freedom of conscience purposes is to confuse metaphor with reality.¹³⁷

The implications of this profoundly thoughtful and *almost*-exactly correct thought will be explored in the remainder of this Article.

B. Lessons

At first glance, the important compelled-speech cases in the Supreme Court seem a motley crew with little in common. A closer look, however, does reveal some patterns. For starters, not all compelled-speech cases are the same. Larry Alexander (writing before the recent spate of cases) categorized them in four separate lines: (1) *Barnette* and *Maynard*; (2) "compelled support" cases such as *Abood*; (3) *Tornillo* and *PG&E*, involving compelled speech which disincentivizes speech; and (4) compelled association.¹³⁸ Eugene Volokh, on the other hand, identified two categories: "speech compulsions that also restrict speech [such as *Tornillo*]" and "pure speech

¹³³ *Id.* at 14.

¹³⁴ *Id.* at 23–25 (Marshall, J., concurring in judgment).

¹³⁵ Justice Blackmun did not participate, hence only eight votes were cast. *Id.* at 2.

¹³⁶ *Id.* at 30–31 (Rehnquist, J., dissenting).

¹³⁷ *Id.* at 32–33.

¹³⁸ Alexander, *supra* note 8, at 148–50.

compulsions' . . . which unduly intrude on the compelled person's autonomy."¹³⁹ Despite small differences in nomenclature, both of their analyses point to an important conclusion, which is that most compelled-speech cases are not truly about compelled speech. In particular, "compelled support" (or as I prefer, compelled subsidy) cases involve money transfers, not compelled speech as such.¹⁴⁰ And compelled association has little or nothing to do with speech, compelled or otherwise.¹⁴¹ That presumably is why Volokh does not even include these two lines of cases in his categorization.¹⁴²

But what about the *Tornillo* line, Alexander's third category and Volokh's "speech compulsions that also restrict speech" category?¹⁴³ These cases, it becomes obvious quickly, are not about compelled speech simpliciter, they are rather about punishing or suppressing speech through the sanction of speech compulsion. As my discussion of *Tornillo* made clear, the key harm caused by Florida's right-of-reply law was to punish and disincentivize criticism of political candidates.¹⁴⁴ Similarly, in *PG&E*, Justice Marshall's key fifth vote relied explicitly on the speech-suppressing effect of the CPUC order displacing PG&E's newsletter with TURN's; and even the plurality relied heavily on the idea that including TURN's newsletter would deter PG&E from taking on controversial topics in its newsletter.¹⁴⁵ As such, they are utterly run-of-the-mill free-speech cases. Finally, Volokh makes the further point that even absent direct deterrence of this sort, when a speaker is trying to communicate a specific position, through what Volokh calls a "Coherent Speech Product," inclusion of outside material can effectively suppress that message.¹⁴⁶ This explains why the right of "editorial control and judgment" referred to by *Tornillo* has some force to it, independent of the deterrent effect of the right of reply.¹⁴⁷ Another similar case is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, in which a unanimous Court upheld the constitutional right of organizers of a St. Patrick's Day parade to exclude a group of gay, lesbian, and bisexual Irish-Americans who wished to march under its own banner, because the effect of including it would have been to alter the message that the parade organizers were seeking to send.¹⁴⁸ And in *Riley v. National Federation of the Blind of North Carolina, Inc.*, the Court struck down a law requiring professional fundraisers to disclose what percentage of contributions they collect are actually delivered to charities because the impact of the law would

¹³⁹ Volokh, *supra* note 5, at 358.

¹⁴⁰ *See generally id.*

¹⁴¹ *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 983–89 (2011) (demonstrating that historically, association and speech were distinct rights).

¹⁴² *See generally* Volokh, *supra* note 5.

¹⁴³ *Id.* at 358.

¹⁴⁴ *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974).

¹⁴⁵ *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 14, 23–25 (1986) (plurality opinion) (Marshall, J., concurring in judgment).

¹⁴⁶ Volokh, *supra* note 5, at 361–66.

¹⁴⁷ *Tornillo*, 418 U.S. at 258 (Brennan, J., concurring).

¹⁴⁸ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574–75 (1995).

be to dilute or silence the message that the fundraisers sought to convey.¹⁴⁹ As with *Tornillo*, the true harm in these cases is not the speech compulsion as such, but rather the silencing impact of the speech compulsion, which is of course the concern of most free speech cases.¹⁵⁰

The same cannot, however, be said of *Barnette* or *Maynard*, or, for that matter, *Masterpiece Cakeshop*. In no way did the obligation to participate in a flag salute deter or prevent the plaintiffs in *Barnette* from expressing their views on that subject, or any other subject.¹⁵¹ Similarly, the words on Maynard's license plate had no impact on his ability to denounce those words, even on the same car via a bumper sticker (as the dissent pointed out).¹⁵² And if Jack Phillips in *Masterpiece Cakeshop* had been obliged to design and bake a cake for a same-sex wedding, this again would have zero impact on his ability to express his religious views on the validity of such unions.

NIFLA is a bit more complicated, but at least in part shares this characteristic. In particular, it is hard to see how the notice requirement imposed on licensed Crisis Pregnancy Centers—informing patients of the available state-provided services including abortions—in any way disincentivized or impacted the anti-abortion speech of the Centers' employees. It should be noted in this regard that, with respect to licensed Centers, the Court's comment that posting the state-mandated notices "alter[ed] the content" of the facilities' speech is frankly inscrutable.¹⁵³ The notices, as discussed, had no impact whatsoever on what the Centers' employees could say on the subject of abortion or any other subject, including the content of the notice itself.¹⁵⁴ Furthermore, no observer would have attributed the message on the notice to the Centers. True, the notices did "alter" the speech visible at their premises; but that is a tautology, since *of course* compelled speech alters speech—if it didn't, you wouldn't need to compel it. The notice requirement for unlicensed facilities, however, was different. The Court struck down the requirement based on its size and burdensomeness because the result was that "the unlicensed notice drowns out the facility's own message," and in truth "effectively rules out' the possibility of having such a billboard in the first place."¹⁵⁵ This conclusion, however, makes this part of *NIFLA* fall within the *Tornillo* line of cases because it is the speech-suppressing effect of the law that makes it unconstitutional, not the speech compulsion alone.¹⁵⁶

What this shows is that most disputes that the Court, and commentators, have labeled as compelled-speech cases actually involve suppressing or altering the speech

¹⁴⁹ *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 800–01 (1988).

¹⁵⁰ *See Tornillo*, 418 U.S. at 257.

¹⁵¹ *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630, 633 (1943).

¹⁵² *See Wooley v. Maynard*, 430 U.S. 705, 720, 722 (1977) (Rehnquist, J., dissenting).

¹⁵³ *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Riley*, 487 U.S. at 795).

¹⁵⁴ *See id.* at 2368, 2370.

¹⁵⁵ *Id.* at 2378 (quoting *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 (1994)).

¹⁵⁶ *See supra* note 150 and accompanying text.

of the regulated party.¹⁵⁷ As such, these plaintiffs would have prevailed even under conventional free-speech doctrine. In many other cases, where there was no evidence of suppression or misattribution of speech or message, the Court rejected compelled-speech claims (or variants on them).¹⁵⁸ But this cannot explain why *Barnette*, *Maynard* and the licensed facilities in *NIFLA* won their cases, and why the Court expressed such sympathy towards the compelled-speech claim in *Masterpiece Cakeshop*, describing Jack Phillips’s “dilemma” as “particularly understandable.”¹⁵⁹

The commonality among these cases is, of course, obvious. In each of them, the reason why the claimants did not want to “express” the government’s message (in *Barnette* and *Masterpiece Cakeshop*) or be associated with it (in *Maynard* and *NIFLA*) was that the message violated their sincere religious beliefs.¹⁶⁰ In *Barnette*, the motivating concern was that participation in the flag salute violated the prohibition in the Ten Commandments against bowing to graven images, an obligation which the Witnesses believed was “superior to that of laws enacted by temporal government.”¹⁶¹ In *Maynard*, George Maynard described the New Hampshire motto as being “in conflict with my . . . deeply held religious convictions.”¹⁶² In *NIFLA*, the majority objected to the fact that California’s required notice (regarding the availability of state-funded abortions) concerned “the very practice that petitioners are devoted to opposing” on religious grounds,¹⁶³ and Justice Kennedy’s concurring opinion (for four Justices) in that case argued that the notice requirement mandated individuals associated with the licensed facilities “to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these.”¹⁶⁴ Finally, in *Masterpiece Cakeshop*, the Court described the root of Phillips’s objections as “his deep and sincere religious beliefs.”¹⁶⁵

The thesis of this Article is that the religious motivations of individuals who successfully bring “pure” compelled-speech cases is not only not a coincidence, it is in fact essential to the strength of their claims. Why this is so, and its implications for the law of compelled-speech, we will explore soon. But first, a temporary digression is necessary to examine some foundational questions about the rights of free speech and free exercise of religion.

¹⁵⁷ See *supra* note 150 and accompanying text.

¹⁵⁸ See, e.g., *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

¹⁵⁹ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1728 (2018).

¹⁶⁰ See *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2371; *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1723; *Wooley v. Maynard*, 430 U.S. 705, 713 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943).

¹⁶¹ *Barnette*, 319 U.S. at 329.

¹⁶² *Maynard*, 470 U.S. at 707 & n.2.

¹⁶³ *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2371.

¹⁶⁴ *Id.* at 2379 (Kennedy, J., concurring).

¹⁶⁵ *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1728.

III. FREE SPEECH, FREE EXERCISE, AND FREEDOM OF CONSCIENCE

The text of the First Amendment, in full, reads as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁶⁶

The seeming import of this text is that, aside perhaps from the Establishment Clause (which seems structural in nature), the Amendment protects a series of personal rights that are roughly parallel. In particular, the juxtaposition of “free exercise [of religion]” and “freedom of speech” strongly suggests parallel rights; and indeed, in many cases, including *Barnette*, the Court has suggested as much.¹⁶⁷ The truth, however, is quite different, as revealed by the drafting history of the Amendment. I have examined this history in greater detail elsewhere,¹⁶⁸ but will briefly summarize here.

We begin with a punctuational clue. In the text of the First Amendment, the first two provisions, dealing with religion, are separated from each other by a comma.¹⁶⁹ The same is true with the later, in the words of the Court “cognate” rights of speech, press, assembly, and petition.¹⁷⁰ These two groups of rights, however, are separated by a semicolon, suggesting a less direct relationship.¹⁷¹ And in fact, the drafting history confirms this. When on June 8, 1789, James Madison proposed the Amendments to Congress that eventually became the Bill of Rights, what became the First Amendment was listed as three separate provisions: the first protecting religious freedoms, the second protecting expressive freedoms, and the third protecting assembly and petition (i.e., political freedoms).¹⁷² The latter two provisions, containing the antecedents of the speech, press, assembly, and petition rights, were combined with each other relatively early in the drafting process, in late July.¹⁷³ The Religion Clauses, however, did not become joined to the rest of the Amendment until September 9, very late in the drafting process and without any explanation.¹⁷⁴ Indeed, in George Mason’s master draft of the Bill of Rights, which provided the template for many of the amendment proposals sent to Congress by state ratifying conventions, the

¹⁶⁶ U.S. CONST. amend. I.

¹⁶⁷ *Id.*; see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

¹⁶⁸ See Ashutosh Bhagwat, *Religious Associations: Hosanna-Tabor and the Instrumental Value of Religious Groups*, 92 WASH. U. L. REV. 73, 91–93 (2014).

¹⁶⁹ See U.S. CONST. amend. I.

¹⁷⁰ *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

¹⁷¹ See U.S. CONST. amend. I.

¹⁷² *Amendments Offered in Congress by James Madison June 8, 1789*, CONST. SOC’Y ¶¶ 6–8, http://www.constitution.org/bor/amd_jmad.htm [<https://perma.cc/ZF2C-SQWD>] [hereinafter *Amendments Offered by Madison*].

¹⁷³ THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 148 (Neil H. Cogan ed., 2d ed. 2015).

¹⁷⁴ *Id.* at 5–6.

religious liberty provisions are not even listed contiguously to the other rights.¹⁷⁵ The apparent parallelism between religion and speech rights in our First Amendment is, then, a historical accident.

Turning specifically to speech and religion, it turns out that not only do these provisions have distinct origins, they also serve starkly different purposes. There can be no serious doubt that the primary (in my view only) function of the Free Speech Clause, along with its neighbors the Press, Assembly, and Petition Clauses, is the instrumental one of advancing democratic self-governance.¹⁷⁶ No other understanding of the rights in this group other than free speech is even plausible. In particular, freedom of the press, which both Madison and Mason in their proposed amendments described as “one of the great bulwarks of liberty,”¹⁷⁷ is universally acknowledged to be important because of its role in advancing democracy and democratic accountability. Given the close grouping of freedom of speech with freedom of the press in *every* draft and proposal that led to the final First Amendment, it is reasonable to assume that these two freedoms were understood to share this common goal.¹⁷⁸ And with respect to the assembly and petition rights (as well as the right to instruct representatives, which Mason proposed but Madison omitted), there is no plausible argument that they are personal, dignitary rights as opposed to instrumental rights designed to effectuate democratic government.

Free exercise of religion, on the other hand, is completely different. Again, starting with Madison’s and Mason’s draft proposals is revealing. Madison’s original language regarding religious rights read as follows: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”¹⁷⁹ Mason’s language is even more revealing:

That Religion or the Duty which we owe to our Creator, and the manner of discharging it, can be directed only by Reason and Conviction, not by Force or violence, and therefore all men have

¹⁷⁵ *George Mason’s Master Draft of the Bill of Rights*, CONST. SOC’Y ¶¶ 15–16, 20 (Sept. 17, 1999), http://www.constitution.org/gmason/amd_gmas.htm [<https://perma.cc/DD62-VTLW>] [hereinafter *Mason’s Master Draft*]. Mason circulated those provisions during the ratification debates as proposed amendments, and were adopted almost verbatim by a number of ratifying conventions, including those of Virginia, New York, North Carolina and Rhode Island. *See generally id.*

¹⁷⁶ It is also clear to me that when Justice Holmes famously stated that he was in favor of the “free trade in ideas” and the advancement of “truth” through the competition of the market, he was referring to *political* ideas and *political* truths. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹⁷⁷ *Amendments Offered by Madison*, *supra* note 172, ¶ 7; *see also Mason’s Master Draft*, *supra* note 175, ¶ 16.

¹⁷⁸ *See, e.g., Amendments Offered by Madison*, *supra* note 172, ¶ 7; *Mason’s Master Draft*, *supra* note 175, ¶ 16.

¹⁷⁹ *Amendments Offered by Madison*, *supra* note 172, ¶ 6.

an equal, natural, and unalienable Right to the free Exercise of Religion according to the Dictates of Conscience, and that no particular religious Sect or Society of Christians ought to be favored or established by Law in preference to others.¹⁸⁰

Both proposals, in their protection of religious liberty, are focused on one basic idea: freedom of *conscience*.¹⁸¹ Indeed, Madison was so thoroughly focused on conscience that even though his proposals to Congress were heavily influenced by Mason's master draft (both directly and through the many proposals of state ratifying conventions that essentially copied Mason) he dropped the phrase "free exercise of religion" entirely from his proposed amendment, stating the principle as "equal rights of conscience."¹⁸²

Michael McConnell's careful exploration of the background and drafting history of the Religion Clauses confirms this conclusion.¹⁸³ He points out that almost every proposal or draft of a constitutional amendment to protect religious liberty either treated "rights of conscience" and "free exercise of religion" as interchangeable concepts, or treated them as a joint principle protecting exercise of religion "according to the dictates of conscience" (the only notable exception was a proposal by Fisher Ames).¹⁸⁴ This is why Madison's failure to include "free exercise of religion" in his original proposed amendment is unexceptionable—because he thought that protecting rights of conscience accomplished the same end.¹⁸⁵ That end was to protect religiously motivated conduct from government interference (McConnell, writing in response to the Court's recent decision in *Employment Division v. Smith*, emphasizes that the amendment was intended to protect conduct, not merely belief).¹⁸⁶ Finally, the drafting history makes clear, and there is broad agreement among scholars on this point, that the primary *reason* it is necessary to protect freedom of religion/conscience is the fundamental immorality of forcing individuals to choose between the dictates of secular government and their understanding of the dictates of a divine being.¹⁸⁷

¹⁸⁰ *Mason's Master Draft*, *supra* note 175, ¶ 20.

¹⁸¹ *See Amendments Offered by Madison*, *supra* note 172, ¶ 7; *Mason's Master Draft*, *supra* note 175, ¶ 20.

¹⁸² Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1481–82 (1990).

¹⁸³ *See generally id.*

¹⁸⁴ *Id.* at 1480–83.

¹⁸⁵ *See id.* at 1481.

¹⁸⁶ *Id.* at 1489–90.

¹⁸⁷ JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 52–53 (1996); Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L.J. 504, 517–23 (2003); McConnell, *supra* note 182, at 1497–98; Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 336 (2011); Steven D. Smith, *What Does Religion Have to Do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 922–23 (2005).

One further point is worth highlighting—the possible significance of the fact that the final version of the First Amendment ended up dropping any reference to “conscience” as such, and instead limits protection to “free exercise of religion.”¹⁸⁸ Michael McConnell has argued that this decision may have been motivated by a desire to limit protection to *religious* conscience-based claims, and so to exclude conscience claims rooted in more secular belief systems.¹⁸⁹ He concedes, however, that another explanation is that given the perceived equivalence of religion and conscience among the Framers, the choice had no significance.¹⁹⁰ Steven D. Smith has convincingly argued that this is, in fact, the best explanation for this drafting choice.¹⁹¹ The importance of this issue is explored briefly below, but from a purely historical/Originalist perspective it matters little because, as Micah Schwartzman points out, for the Framers a non-theistic world-view that imposes conscientious obligations similar to those of religion was simply unthinkable.¹⁹²

Some key conclusions follow from all of this. First, freedom of speech, along with its cognate First Amendment rights (press, assembly, and petition), was intended primarily and probably exclusively to advance the instrumental goals of preserving democratic self-governance.¹⁹³ They were not in any meaningful sense personal, dignitary rights.¹⁹⁴ Second, free exercise of religion is utterly different. Its drafting history reveals evidence of few, if any, instrumental goals.¹⁹⁵ Instead, the Free Exercise of Religion was universally understood as a dignitary right tied to individual conscience.¹⁹⁶ It was protected because of the dual understanding that the State had no interest in interfering with individual conscience, and because of the unfairness of forcing an individual to choose between, as Madison put it, “the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him,” and “the claims of Civil Society.”¹⁹⁷ Finally, implicit in all of this is that it would be at least as wrong for the State to compel conduct prohibited by an individual’s religion, as to forbid conduct required by it—this presumably is why Madison would have protected “homage, *and such only*, as” individuals believe required by their conscience.¹⁹⁸

¹⁸⁸ See U.S. CONST. amend. I.

¹⁸⁹ McConnell, *supra* note 182, at 1495–99; Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 12 (2000).

¹⁹⁰ McConnell, *supra* note 182, at 1488.

¹⁹¹ See Smith, *supra* note 187, at 911–12.

¹⁹² See Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1405–06, 1426 (2012).

¹⁹³ See *supra* notes 176–77 and accompanying text.

¹⁹⁴ See *supra* notes 177–78 and accompanying text.

¹⁹⁵ See *supra* notes 179–82 and accompanying text.

¹⁹⁶ See *supra* notes 180–82 and accompanying text.

¹⁹⁷ James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in THE SUPREME COURT ON CHURCH AND STATE 18–19 (Robert S. Alley ed., 1988).

¹⁹⁸ *Id.* at 18 (emphasis added).

IV. COMPELLED SPEECH AND CONSCIENCE

Much of the background and conclusions that I outlined in the previous Part are well-known and uncontroversial. Indeed, the only point that arguably is controversial is the proposition that the Free Speech Clause serves exclusively instrumental, democracy-oriented goals, rather than dignitary ones as well. That proposition, however, has been so thoroughly demonstrated elsewhere that I will proceed with it as a given.¹⁹⁹ Once these premises are accepted, however, some striking conclusions regarding the problem of compelled speech follow quite clearly.

A. Why Is Compelled Speech Constitutional?

To reach those conclusions, a preliminary question must be explored which is *why* we believe that compelled speech raises constitutional questions. In particular, is the compelled-speech doctrine best understood as advancing the instrumental, democracy-based goals of the Free Speech Clause and its neighbors, or the conscience- and dignity-based goals of the Free Exercise Clause? The answer, as it turns out, is quite clear.

The truth is that an instrumental, democracy-enhancing explanation for *pure* compelled-speech claims simply makes no sense. Certainly in cases such as *Tornillo* and *PG&E*, when a compelled-speech claim masks suppression of speech, instrumental explanations are available (indeed, overwhelmingly so in *Tornillo*, where the effect of the right-of-reply statute was to punish criticisms of politicians).²⁰⁰ But when one moves beyond this category to cases such as *Barnette* and *Maynard*, where no plausible suppression can be identified, instrumental arguments are much harder to formulate.²⁰¹

One possible democracy-based argument one might make is that compelled speech distorts public debate (which all agree is essential to democracy), because observers may misattribute the government's chosen message to compelled speakers and so exaggerate the support for that message. But given that everyone *knew* the

¹⁹⁹ See, e.g., CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121–24 (1993); Ashutosh Bhagwat, *When Speech Is Not "Speech,"* 78 OHIO ST. L.J. 839, 872–74 (2017); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–21 (1971); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 S. CT. REV. 245, 255 (1961); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 493–97 (2011). In any event, most of the practical conclusions that I reach in this part would not change significantly if one located conscience-based claims in the Free Speech rather than the Free Exercise Clause, since either way, compelled-speech claims not rooted in individual conscience must be rejected.

²⁰⁰ *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 14 (1986) (plurality opinion); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

²⁰¹ *Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943).

government was behind the required flag salute in *Barnette*, the license plate motto in *Maynard*, the notice of the availability of publicly funded medical services in *NIFLA*, and the obligation to serve gay customers in *Masterpiece Cakeshop*, this is most implausible.²⁰² Indeed, given that the challenged laws leave compelled speakers free to independently disclaim or even criticize the government's message, the risk of such confusion is negligible (and if a law forbade such disclaimers or criticism, it would cease to raise a pure compelled-speech issue but rather would cross over into speech suppression).

Second, one might be concerned that compelling people to speak the government's message might inculcate that message, and its attendant values, in the speakers themselves, and so permit the government again to shape public debate, and the very values of the citizenry, in ways that are entirely incompatible with popular sovereignty. Again, however, in pure compelled-speech cases this seems extremely unlikely. Does anyone really believe that individuals driven by their "most deeply felt beliefs"²⁰³ or asked to say something contrary "to their deepest convictions"²⁰⁴ are going to suddenly change their minds and abandon those beliefs and convictions simply because they were forced to say a few words about the flag, drive around with an unaltered license plate, post a notice, or sell a cake? The idea is frankly absurd.²⁰⁵ Furthermore, as Caroline Mala Corbin points out, the modern government-speech doctrine explicitly permits the government to persuade its citizens and, absent a misattribution problem, it is not entirely clear why compelled speech is a more problematic form of persuasion than government speech from an *instrumental* perspective.²⁰⁶

Finally, perhaps compelled speech impacts public discourse and debate because it threatens to drown out private voices. If so, that would surely be problematic for democracy. But again, in none of the actual cases is this a plausible explanation for what is happening. Remember that in all of these cases, there is, by definition, no actual suppression of or limits on private speech.²⁰⁷ So unless there is an extraordinary paucity of speech opportunities, or the compelled speech that is required is so constant and ubiquitous that it occupies most of individuals' speech opportunities, any drowning out effect would be trivial at best. As noted earlier, such an effect might explain and justify the result in *American Beverage Association*, and in the part of the Supreme Court's *NIFLA* decision which struck down the regulations on non-licensed

²⁰² For similar arguments, see Alexander, *supra* note 8, at 152–53; Shiffrin, *supra* note 5, at 505–06.

²⁰³ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018).

²⁰⁴ *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

²⁰⁵ See Shiffrin, *supra* note 5, at 505–06.

²⁰⁶ Corbin, *supra* note 5, at 1302–04.

²⁰⁷ See, e.g., *Pac. Gas & Elec. Co. v. Pub. Utils Comm'n*, 475 U.S. 1, 14 (1986) (plurality opinion); *Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 241 U.S. 241, 257 (1974); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943).

facilities.²⁰⁸ But in none of the other Supreme Court cases was the “compelled speech” at issue anywhere near burdensome enough to drown out private speech. Moreover, if such an effect did exist, then the case would cease to be one of pure compelled speech and turn into one also involving speech suppression.

In short, the idea that pure compelled-speech claims implicate concerns about undermining democratic debate is far-fetched. When one turns to dignity and conscience, however, the link is close and obvious. *Of course* the *Barnettes* objected to participation in a flag salute that, in their view, violated one of the Ten Commandments.²⁰⁹ *Of course* Maynard was offended by being forced to disseminate a government message which violated his religious beliefs.²¹⁰ *Of course* being required to advertise free abortions violated the consciences of individuals belonging to a religiously based group organized for the very purpose of preventing abortions.²¹¹ And, *of course*, an individual who opposed same-sex marriage had conscientious objections to selling a wedding cake which celebrated such a union.²¹² None of which is to say that these conscience-based objections should necessarily be upheld by the law—that turns on how we should accommodate religious, conscience-based objections to secular laws—our next topic. But that these objections sound in valid conscience-based, dignitarian concerns is obvious.

Equally obvious is the doctrinal implication of this insight. If in fact pure compelled-speech claims are fundamentally conscience-based, with few or no implications for the vitality of democracy, then they should be rooted in the constitutional provision which protects conscience rather than the provision which protects democracy. Which, for all of the reasons discussed above, means the Free Exercise Clause, *not*, as current doctrine suggests, the Free Speech Clause.²¹³ Indeed, given the uniformly religious motivations of almost all the plaintiffs in the most prominent pure compelled-speech cases,²¹⁴ this conclusion seems entirely obvious.

Why, then, has the Court treated compelled speech and compelled subsidy as Free Speech rather than Free Exercise issues? The original choice, in *Barnette* itself, appears to have been driven by Justice Jackson’s concerns that a religion-based holding would not protect secular opponents of compulsory flag salutes.²¹⁵ This objection will be explored in more detail below, but in short, it is answerable. More recently, the problem has been the Supreme Court’s holding in *Employment Division*

²⁰⁸ See *supra* Section II.B; see also *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2378; *Am. Beverage Ass’n v. City & Cty. of S.F.*, 916 F.3d 749, 757 (9th Cir. 2019).

²⁰⁹ See *Barnette*, 319 U.S. at 629.

²¹⁰ See *Maynard*, 430 U.S. at 707 n.2.

²¹¹ See *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2368–69.

²¹² See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018).

²¹³ See *supra* Part III.

²¹⁴ See *supra* notes 209–11 and accompanying text.

²¹⁵ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634–36 (1943).

v. Smith.²¹⁶ As noted earlier, the *Smith* Court in 1990 held—contrary to much existing precedent—that the Free Exercise Clause does not require the government to grant religiously motivated exemptions to generally applicable statutes.²¹⁷ Rather, according to the Court, the Free Exercise Clause was intended only to invalidate laws that singled out religious practices—an almost empty set in the modern world.²¹⁸

Clearly, under *Smith*, compelled-speech claims rooted in the Free Exercise Clause will almost always fail.²¹⁹ None of the laws at issue in these cases singled out religious practices, and it is highly unlikely that any of them were motivated by hostility to religion. Rather, all were archetypal laws of general application designed to advance secular state goals that happened to collide with specific religious beliefs.²²⁰ Indeed, recall that Justice Frankfurter’s dissent in *Barnette* itself was based on the *Smith*-like rationale that individuals have no right to disobey secular laws which violate their beliefs.²²¹ My argument that the Free Exercise Clause permits such claims is based on the assumption—explicitly advanced by the concurring opinions in *Barnette*²²²—that *Smith* is wrong and that religious exemptions to secular laws are sometimes required.²²³ There are reasons to believe that the modern Court is ready to reconsider *Smith* in light of changed circumstances and steady scholarly criticism.²²⁴ This would place the compelled-speech doctrine on firm grounds. It should be noted, however, that if that does not happen, if *Smith* is retained, that does not mean that the Court was correct to rely on the Free Speech Clause in pure compelled-speech cases. Rather, it means that the Court was wrong in most cases to sustain such claims—yet another reason why, *pace* Justice Frankfurter, *Smith* seems clearly wrong.²²⁵

This is not, of course, to say that *all* religious objections to secular laws must be sustained. Such an approach has never been seriously advocated, and would lead to chaos as well as grave social harms. Nor is it even to say that the correct test to determine when religious exemptions should be granted is the “strict scrutiny” test

²¹⁶ 494 U.S. 872 (1990).

²¹⁷ *Id.* at 878–79, 882.

²¹⁸ *See id.* at 878. For a rare example of such a law, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

²¹⁹ *See Smith*, 494 U.S. at 872, 882.

²²⁰ *See, e.g., id.* at 874; *Wooley v. Maynard*, 430 U.S. 705, 707–08, 716 (1977); *Barnette*, 319 U.S. at 626 n.2.

²²¹ *See Smith*, 494 U.S. at 878–79; *Barnette*, 319 U.S. at 653–54 (Frankfurter, J., dissenting).

²²² *See Barnette*, 319 U.S. at 643–44 (Black & Douglas, JJ., concurring); *id.* at 645–46 (Murphy, J., concurring).

²²³ The leading defense of this position was advanced in McConnell, *supra* note 182, at 1497–98.

²²⁴ *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) (“*Smith* remains controversial in many quarters.”); Linda Greenhouse, *Religious Crusaders at the Supreme Court’s Gates*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/opinion/supreme-court-religion.html> [<https://perma.cc/PPC7-8QY5>] (discussing pending appeal requesting Supreme Court to overrule *Smith*).

²²⁵ *See Smith*, 494 U.S. 872; *Barnette*, 319 U.S. 624.

rejected by *Smith* (but then reinstated by the Religious Freedom Restoration Act in certain cases).²²⁶ But it is to say that, at a minimum, when a law compelling speech (or for that matter any law regulating conduct) imposes significant conscience-based burdens, the government must be able to advance some substantial interest to justify that burden. As it turns out (and as we shall see), even this minimal principle suffices to resolve many (though not all) compelled-speech cases.

B. Who Can Make Compelled Speech Claims?

If pure compelled-speech claims are best understood to be rooted in the policies of the Free Exercise Clause, then one question that arises is who can raise such claims. At a minimum it is clear that individuals—that is to say, natural persons—with serious religious compunctions against compliance with a legal requirement can do so. The more difficult question is whether anyone else may.

Let us begin by returning to Justice Jackson's objection in *Barnette* to rooting the decision in freedom of religion.²²⁷ His concern was that such a holding would sustain only religious objections to participation in the flag salute, not secular ones.²²⁸ At first cut, his objection seems valid. Such a holding would clearly have sustained the *Barnettes'* religious objections to participation. But because the text of the First Amendment protects only religion and religious conscience (which the Framers equated with conscience generally), secular objectors would appear to have no constitutional recourse.²²⁹ As a matter of pure and narrow original understanding, this conclusion might well be correct,²³⁰ and Michael McConnell has defended precisely this position.²³¹

In fact, however, the story is unsurprisingly much more complicated and the subject of extensive academic debate.²³² Many scholars have argued that whatever the language of the First Amendment, or even its original understanding, under modern conditions, the Free Exercise Clause can and should be read to extend to conscience claims based in secular belief systems, provided that those systems are sufficiently deeply held and bound up in personal identity.²³³ Micah Schwartzman in particular makes a convincing case that it was the Framers' very inability to conceive of non-theistic belief systems (including some religions) that individuals see as imposing conscientious obligations as binding as traditional religions, that compels us to expand

²²⁶ *City of Boerne v. Flores*, 521 U.S. 507, 515–16 (1997).

²²⁷ *See Barnette*, 319 U.S. at 634–36.

²²⁸ *See id.*

²²⁹ *See id.* at 635 n.16 (“That the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable.” (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 599 (1940))).

²³⁰ *See Schwartzman*, *supra* note 192, at 1405, 1414–15.

²³¹ McConnell, *supra* note 189, at 12–14.

²³² Schwartzman, *supra* note 187, at 335 n.49 (citing sources on both sides of debate).

²³³ *See, e.g., Schwartzman*, *supra* note 187, at 1419–20; *Smith*, *supra* note 187, at 936–37.

the concept of “religious conscience” to include secular claimants.²³⁴ And indeed, Schwartzman notes that there is Supreme Court case law (albeit engaging in statutory interpretation) which supports this view.²³⁵ It is far beyond the scope of this Article to resolve this ongoing and deep debate, but for our purposes it is sufficient to note that rooting compelled-speech cases in the Free Exercise Clause does not *necessarily*, as Justice Jackson assumed, doom secular claimants.

It should be noted, however, that objections to compelled speech based on conscience, even if extended to secular, conscience-based claims, do not translate into a general right against any compelled speech with which one disagrees. Such objections must be rooted in the kinds of deeply personal, dignitary values and beliefs that are comparable to religious conscience. The alternative is not only chaos, but also results that bear no relation to the Free Exercise Clause’s goal of protecting freedom of *conscience*. The reasons should be clear: violations of conscience impose deeply felt harms to dignity and “personhood,” as Steven D. Smith puts it,²³⁶ that merely being forced to say something one disagrees with does not. One might phrase the point this way: do individuals ever voluntarily say things that they disagree with? The answer is, of course they do, including everything from white lies in social contexts to the instrumental lies told by undercover law enforcement and journalists. None of this impinges on individual conscience. Concomitantly, do individuals voluntarily engage in prayer or other religious exercise that runs contrary to their religious beliefs? Of course they do not—precisely because to do so would be inconsistent with their conscience. As Smith points out, however, in the modern world there clearly exist secular belief systems that are parallel to religious beliefs in this sense, that they implicate personhood and conscience.²³⁷ But it is equally clear that objections based on mere disagreement with a message that one is required to convey do not rise to this level.

Finally, we come to the question of claimants other than individuals—i.e., groups, nonprofit organizations, and corporations. With respect to entities such as churches or the Crisis Pregnancy Centers in the *NIFLA* case, who are formed for the very purpose of advancing their members’ religious beliefs and practices, there seems no reason not to permit them to bring claims based on those beliefs and practices.²³⁸ Similarly, if freedom-of-conscience claims are extended to secular belief systems, organizations formed to advance such systems should also be permitted to raise conscience claims on behalf of their members. The analogy here is to organizational standing,²³⁹ and seems straightforward.

²³⁴ See Schwartzman, *supra* note 187, at 1405, 1426.

²³⁵ *Id.* at 1417–18 (discussing *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965)).

²³⁶ Smith, *supra* note 187, at 935.

²³⁷ *Id.* at 936–37.

²³⁸ See *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

²³⁹ *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (“It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review.”).

The more difficult question concerns for-profit corporations and other groups whose purposes and functions are not directly related to its members'/owners' claims of conscience. Even among these, it is possible that some groups, such as the closely held, for-profit corporation in the *Hobby Lobby* litigation,²⁴⁰ are sufficiently intertwined with their members'/owners' religious or other conscientious commitments that they should be permitted to raise such claims.²⁴¹ Regardless, what is absolutely clear is that a for-profit, publicly traded corporation such as R.J. Reynolds (the plaintiff in the D.C. Circuit graphic warning litigation) has *no* plausible claim under the Free Exercise Clause, or any other conscience-based theory.²⁴² Such corporations have no common identity with its dispersed, largely anonymous, and passive owners; and fictional entities such as corporations cannot themselves possess the sort of deeply held, religious or quasi-religious commitments that are at the heart of pure compelled-speech claims. Publicly traded corporations generally, much less tobacco companies, obviously have no consciences. As then-Justice Rehnquist put it in his dissent in the *PG&E* case, "Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality."²⁴³

It should be noted that this conclusion does not mean that publicly traded corporations can bring *no* compelled-speech claims. When the impact of a law compelling speech, such as in *Tornillo*, is to suppress or disincentivize the corporation's own speech, the latter effect surely states a claim under the Free Speech Clause.²⁴⁴ In addition, such entities might be able to bring claims under a distinct right against "compelled association" that Larry Alexander identifies.²⁴⁵ But publicly traded corporations have no plausible claim to "pure" compelled-speech rights.

V. IMPLICATIONS FOR CURRENT LAW

The reformulation of the law of compelled speech that I propose here, rooting pure claims of compelled speech in the rights of conscience protected by the Free Exercise Clause rather than the instrumental rights of expression protected by the Free Speech Clause, appears to be a radical one. What is notable, however, is that when one looks at the actual law, *as developed by the Supreme Court*, the changes this

²⁴⁰ See *Burwell v. Hobby Lobby, Inc.*, 573 U.S. 682 (2014).

²⁴¹ There are, of course, also strong arguments against ever permitting a for-profit corporation enjoying the benefits of limited liability to claim unity with its owners, and so to invoke conscience claims on its owners' behalf.

²⁴² *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

²⁴³ *Pac. Gas & Elec. Co v. Pub. Utils. Comm'n*, 475 U.S. 1, 33 (1986) (plurality opinion) (Rehnquist, J., dissenting); see also Shiffrin, *supra* note 5, at 501–02.

²⁴⁴ *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

²⁴⁵ See Alexander, *supra* note 8, at 150.

rethinking would entail are actually quite limited. The key, foundational cases including *Barnette* and *Maynard*, remain clearly correctly decided because the plaintiffs had explicitly raised religious conscience claims, and the government could not articulate any plausible and significant interest that would outweigh that claim.²⁴⁶ More recently, the part of the *NIFLA* decision striking down the notice requirement for licensed clinics also falls within this category (though the question of whether the government had a significant, countervailing interest is a closer one there, given the plausible argument that poor women were unaware of the availability of government-funded health care).²⁴⁷ And *Masterpiece Cakeshop* also clearly involves a conscience-based claim—though there, the argument for a substantial, countervailing government interest is much stronger.²⁴⁸

Moving beyond these decisions, all of which involve religiously motivated claimants, many of the other key Supreme Court decisions are explicable as involving not pure compulsion, but also suppression, punishment, and/or displacement of speech. *Tornillo* clearly falls within this category,²⁴⁹ and Justice Marshall's separate opinion in *PG&E*, which provided the essential fifth vote for the result, also relied on a displacement rationale.²⁵⁰ The *Hurley* and *Riley* decisions, as noted earlier,²⁵¹ also fall within this category. And so too does the part of the *NIFLA* decision involving regulation of unlicensed facilities, which the Court specifically held was invalid because the required notice “drowns out the facility’s own message . . . [and] ‘effectively rules out’ the possibility of having [an advertisement] in the first place.”²⁵² But notably, when neither a plausible conscience claim, nor suppression of speech are present, the Court (whatever it says) has generally rejected compelled-speech claims handily.²⁵³

²⁴⁶ See *Wooley v. Maynard*, 430 U.S. 705, 707–08, 716–17 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629–31 (1943).

²⁴⁷ See *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371, 2375 (2018).

²⁴⁸ See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724–25 (2018).

²⁴⁹ See *Tornillo*, 418 U.S. at 257.

²⁵⁰ *Pac. Gas & Elec. Co v. Pub. Utils. Comm’n*, 475 U.S. 1, 23–24 (1986) (plurality opinion) (Marshall, J., concurring in judgment).

²⁵¹ See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

²⁵² *Becerra*, 138 S. Ct. at 2378 (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994)).

²⁵³ See, e.g., *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47 (2006) (rejecting claim by law schools required to host military recruiters); *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) (rejecting claim by cable operator forced to carry signal of broadcast television stations); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (rejecting claim by attorney required to disclose potential cost responsibility to clients); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (rejecting compelled-speech claim by shopping center owner required to permit solicitors onto their property).

What is equally clear, however, is that many of the recent compelled-speech cases from the courts of appeals are simply indefensible. Certainly not all of them are wrong—as noted earlier, the Ninth Circuit’s *American Beverage Association* case relied on a “drown[ing] out” rationale which is consistent with my analysis.²⁵⁴ But other important decisions, notably the D.C. Circuit’s decisions striking down the FDA’s graphic tobacco warnings²⁵⁵ and the SEC’s conflict mineral rule²⁵⁶ cannot be sustained on a suppression or “drown[ing] out” approach. Nor is there any theory under which a publicly traded corporation has an interest, rooted in *conscience*, in refusing to publicize the harm caused by its products, whether direct or indirect. Of course such compelled speech does interfere with the corporations’ primary goal, to maximize profits, but an artificial entity’s pursuit of money is in no way comparable to the religious or quasi-religious belief systems that must underlie conscience-based arguments.

A. *Compelled Subsidies*

Finally, we will close by briefly examining the problem of compelled subsidies, illustrated by the recent *Janus* decision striking down “agency fees” payable to public sector unions.²⁵⁷ The clear implication of a conscience-based approach to compelled speech, briefly, is that compelled subsidy claims are completely implausible. The reasons are simple. First, the Supreme Court has long held that there can be *no* conscience-based claim against paying taxes or other money to the government even when the money is being used to fund activities that run strongly contrary to an individual’s religious beliefs.²⁵⁸ Any other result would, of course, cripple the government’s ability to function. Nonetheless, as noted earlier, in *Janus* and *Abood*, the Court quoted Jefferson for the proposition that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.”²⁵⁹ This citation was, however, used entirely out of context because Jefferson’s statement was narrowly and clearly directed at propagation of *religious* opinions only, given that it was made in support of his Bill for Establishing Religious Freedom.²⁶⁰ And, it should be noted, even this narrow proposition was heavily contested in the Framing era and early Republic, based on the argument that

²⁵⁴ *Am. Beverage Ass’n v. City & Cty. of S.F.*, 916 F.3d 749, 757 (9th Cir. 2019) (quoting *Becerra*, 138 S. Ct. at 2378).

²⁵⁵ *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

²⁵⁶ *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359 (2014), *adhered to on reh’g*, 800 F.3d 518 (D.C. Cir. 2015).

²⁵⁷ *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018).

²⁵⁸ *United States v. Lee*, 455 U.S. 252 (1982) (rejecting claim by member of the Old Order Amish for religiously based exemption from social security taxes).

²⁵⁹ *Janus*, 138 S. Ct. at 2464 (quoting Jefferson, *supra* note 50, at 545 (emphasis and footnote omitted)); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234 n.31 (1977) (quoting 1 IRVING BRANT, *JAMES MADISON: THE NATIONALIST* 354 (1948)).

²⁶⁰ *See* BRANT, *supra* note 259, at 354.

“money isn’t conscience.”²⁶¹ Regardless, while the Supreme Court has permitted taxpayers to object *under the Establishment Clause* to expenditures which advance religion,²⁶² there is no reason to believe that this Establishment Clause principle is properly rooted in rights of conscience, as opposed to instrumental concerns.²⁶³ As such, Jefferson’s statement provides no support for a right against paying taxes which advance secular views, whether by the government directly, or by government funding of private speakers.

Modern compelled-subsidy claims must then rest on the theory that there is a meaningful, conscience-based distinction between paying money to the government to fund speech (whether governmental or private) with which one disagrees, and being forced by the government to pay money directly to private persons who disseminate the same views. This, however, as William Baude and Eugene Volokh have pointed out, is decidedly odd.²⁶⁴ Such fine gradations seem to have little relevance to the sorts of fundamental, conscience-based objections that were raised in cases such as *Barnette* and *Maynard*, and so conscience-based claims rooted in this distinction are not particularly credible.²⁶⁵ In short, there seems little basis to believe that there is a conscience-based First Amendment right against exactions of money that fund speech (or any other activity) to which the payer has conscience-based objections.²⁶⁶ The Court’s decision in *Janus* was thus simply incorrect.²⁶⁷

CONCLUSION

In recent years, the compelled-speech doctrine has come unmoored from its roots in the principles of conscience that drove the early decisions in this area. This tendency is evident in some very loose and broad language in recent Supreme Court

²⁶¹ Schwartzman, *supra* note 187, at 372–74; *see also* Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 CONST. COMMENT 365, 374–75 (2006).

²⁶² *Flast v. Cohen*, 392 U.S. 83 (1968).

²⁶³ Smith, *supra* note 261, at 369–70. Such instrumental goals would presumably circle around a desire to preempt potentially destructive contests among religious sects for control of the State and its resources.

²⁶⁴ *See* Baude & Volokh, *supra* note 5, at 184–85; *cf.* Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144, 223–25 (2016) (suggesting reasons why funneling money through the government, rather than directly to private speakers, might make a difference for First Amendment purposes, without resolving the issue).

²⁶⁵ *See* Schwartzman, *supra* note 187, at 368–69.

²⁶⁶ This does not foreclose that possibility of an instrumental right against compelled support of political parties or candidates; but as Baude and Volokh point out, such a right would have to be rooted in an instrumental prohibition on *the government* funding political parties or candidates. Baude & Volokh, *supra* note 5, at 191–94.

²⁶⁷ Indeed, as Baude and Volokh also note, the clear implication of this conclusion is that not only was *Janus* wrong, but *Abood* was wrong as well in striking down the use of agency fees to fund the political activities of unions, with the caveat noted in the previous footnote. *See id.* at 171–72.

opinions (though not, it should be noted, in the *results* in most of the Court's cases). But it has manifested itself particularly strongly and troublingly in a series of recent cases, most of which arose in the D.C. Circuit.²⁶⁸ These decisions have embraced the claim that there is some sort of strong, constitutional presumption against *anyone ever* having to speak against their will. This proposition, however, is entirely implausible, ignoring as it does the ubiquity in commercial and professional contexts of speech and disclosure requirements.²⁶⁹ The result of this entirely erroneous presumption has been a series of decisions narrowing the scope of permitted disclosure requirements, and shifting the burden of proof to the government to justify even those requirements that might be permissible, even when the context is commercial or economic regulation with no possible relationship to claims of conscience.²⁷⁰

This Article argues that while the Lochnerization²⁷¹ of the compelled speech and compelled subsidy doctrines is a relatively recent phenomenon, it has its roots in a very old mistake. That mistake was Justice Jackson's decision to root his foundational compelled-speech opinion in *Barnette* in the Free Speech Clause rather than in the Free Exercise Clause.²⁷² That decision has, over time, lead courts to forget that pure compelled-speech claims are only plausible when rooted in rights of conscience, the reason being that freedom of conscience in fact is a poor fit as an explanation for free speech rights, while it is a close fit for free exercise rights. It is time, I have argued, for us to fix that mistake. Such a fix will retain the core of the compelled-speech doctrine as it developed since 1943, while rejecting recent unjustified extensions.

²⁶⁸ See *Am. Beverage Ass'n v. City & Cty. of S.F.*, 916 F.3d 749 (9th Cir. 2019); *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), *adhered to on reh'g*, 800 F.3d 518 (D.C. Cir. 2015); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

²⁶⁹ See Shiffirin, *supra* note 5, at 504–05.

²⁷⁰ See *generally supra* Section II.B (discussing courts of appeal rulings concerning economic regulations and disclosure requirements).

²⁷¹ See Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 135–36 (2016).

²⁷² See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943).