Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism

Leora Harpaz
Western New England University School of Law, lharpaz@law.wne.edu

Follow this and additional works at: http://digitalcommons.law.wne.edu/facschol
Part of the Constitutional Law Commons

Recommended Citation
64 Tex. L. Rev. 817 (1986)
Texas Law Review

Volume 64, Number 5, February 1986

Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism

Leora Harpaz*

Table of Contents

I. Introduction ................................................................. 818
II. Judicial Recognition of the Coerced Expression Issue .................. 820
   A. The Flag Salute Cases ............................................. 820
   B. The Jehovah's Witnesses in the Supreme Court ............... 830
   C. Justice Jackson Elaborates on His Barnette Themes ......... 836
III. The Loyalty Oath Cases .................................................. 840
IV. Wooley v. Maynard ...................................................... 848
V. Abood v. Detroit Board of Education .................................. 855
VI. Prune Yard Shopping Center v. Robins ................................ 868
VII. The 1983 Supreme Court Term ......................................... 874
VIII. Pacific Gas & Electric .................................................. 891
IX. A Suggested Two-Tiered Analysis ..................................... 902
   A. The Analytic Framework .......................................... 902
      1. First-Tier Cases .............................................. 903
      2. Second-Tier Cases ............................................ 904
   B. Applying the Two-Tier Approach .................................. 904
      1. Barnette Revisited ............................................ 904
      2. The Loyalty Oath Cases .................................... 906
      4. The Difficult Cases: Roberts and Knight ..................... 910

X. Conclusion

I. Introduction

The first amendment has long protected a complex and interwoven range of individual interests. Protected freedoms often involve expressive activities—religion, speech, the press, assembly, and association. The first amendment also protects an individual’s freedom to refrain from expressive activity.

Two distinct kinds of liberty interest support the right to refrain from expressive activity. First, individuals have an interest in not being forced to reveal information about personal beliefs or associations. Such a claim may arise in a variety of contexts: a reporter may not wish to reveal the identity of news sources for fear of discouraging future revelations; a public school teacher may not wish to reveal all organizations to which that teacher has belonged for fear of community hostility or loss of employment; or a litigant may seek to prevent disclosure of trade secrets or other private information through the discovery process. As a group, these cases are rightfully viewed as “compelled disclosure” cases.

Second, individuals have an interest in not being forced to belong to any organization or to make any statements when they would rather be silent or express different views. Within this category fall the claims of schoolchildren compelled to recite the pledge of allegiance in violation of their own religious or political views, of school teachers compelled to sign an oath of loyalty to the Constitution as a condition of employment, and of nonunion employees forced to pay service fees to support union activities with which they disagree. As a group, the constitutional obligations asserted in these three situations can be described as claims based on a first amendment protection for “intellectual

10. See Knight v. Board of Regents, 269 F. Supp. 339, aff’d per curiam, 390 U.S. 36 (1968). For further discussion of Knight, see infra text accompanying notes 91-95.
individualism.\textsuperscript{12}

This Article focuses on the second group of "protected silence" interests. It traces the history and development of such claims in the jurisprudence of the first amendment through decades of sporadic Supreme Court attention. The Article explores how this distinct branch of first amendment doctrine relates to core free speech concepts and whether it is, as some have argued, a separate species appealing to a different range of interests than traditional free speech claims,\textsuperscript{13} or, instead, a part of traditional first amendment doctrine appealing to those same values.\textsuperscript{14}

The Article then discusses the development of the protection against compelled expression in Supreme Court decisions in the 1970s and early 1980s. The aim of this inquiry is to determine whether later cases, taken together with earlier decisions, present a consistent and coherent doctrinal picture. To the extent that the later cases suggest the Court has taken a new turning—either consciously or inadvertently—the values motivating this doctrinal shift in focus are identified. The Article goes on to address cases from the 1983-1985 Supreme Court Terms to evaluate whether the Court has found a methodologically consistent and doctrinally sound analysis.

Finally, the Article concludes with a suggested judicial analysis for cases of this type. The proposed approach accommodates mainstream first amendment doctrine in analyzing claims of interference with the freedom from compelled expression or association.

\textsuperscript{12} Barnette, 319 U.S. at 641. One author characterizes these rights as negative rights. See Gaebler, First Amendment Protection Against Government Compelled Expression and Association, 23 B.C.L. REV. 995, 996 (1982). This characterization is accurate only in the very limited sense that the individual subjected to government compulsion may wish to remain silent, instead of voicing the government-compelled message or disclosing information. The more typical first amendment situations are those in which the government attempts to prevent an individual who desires to engage in an affirmative act of expression from speaking or associating. In contrast, a person compelled to express an idea wishes to engage in a negative act by refusing to speak and in this narrow sense asserts a negative right. The negative rights characterization, however, is flawed for several reasons. First, the distinction between negative and affirmative rights has another meaning within the jurisprudence of the first amendment. "Negative rights" are those limitations on government power that protect individual choices to speak or not to speak. "Affirmative rights" are the governmental obligations to "promot[e] the system of freedom of expression." Emerson, The Affirmative Side of the First Amendment, 15 GA. L. REV. 795, 796 (1981). Second, the negative rights label is inaccurate because it is not always true that the individual desires not to speak. Instead, the individual is rejecting the government-compelled speech in favor of either silence or of voicing some different message. Moreover, if one chooses to remain silent, the desire not to speak may in and of itself be identified by the individual as expressing a viewpoint or attitude. For example, refusing to salute the flag is an act communicating a definite meaning. Thus, the term "intellectual individualism" has been chosen as more evocative terminology.

\textsuperscript{13} Gaebler, supra note 12, at 1004-06.

\textsuperscript{14} "Belief is not, strictly speaking, expression; yet it is so closely related that the safeguarding of the right to hold beliefs is essential in maintaining a system of freedom of expression . . . . The attempt to coerce belief is . . . one of the most destructive forms of restricting expression." Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 919 (1963).
II. Judicial Recognition of the Coerced Expression Issue

A. The Flag Salute Cases

*West Virginia State Board of Education v. Barnette* was the first Supreme Court decision establishing that the free speech guarantee also secures the right to remain silent in the face of a government effort to coerce expression. *Barnette* arose out of a challenge to a resolution adopted by the West Virginia Board of Education one month after the start of World War II. The resolution required public schools to include a mandatory flag salute and the pledge of allegiance as part of their daily educational programs; all teachers and pupils were required to participate. Any pupil refusing to take part was deemed guilty of insubordination and could be expelled from school as a consequence. In addition, after the students had been expelled, the state could bring delinquency proceedings and subject the parents to prosecution. The flag salute ceremony was therefore an instrument to coerce not only school children, but also their parents.

A suit was brought challenging the constitutionality of the Board of Education resolution six months after its enactment. The challengers, three Jehovah's Witnesses who were parents of public school students, claimed that the ceremony violated their religious principles. They argued that they could not be forced to violate those principles unless the state could show that excusing their children from participation would result in some clear and present danger to the state or nation.

The Supreme Court held in favor of the challengers. Its plurality opinion, however, explicitly did not rely on the principle of religious liberty that had been extensively briefed by the lawyer representing the Je-
Jackson's Flag Salute Legacy

hovah's Witnesses. Instead, the four Justices appealed to a broader principle. Writing for the plurality, Justice Jackson condemned, in a much-quoted passage, government prescribed orthodoxy:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodoxy 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.

Although Justice Jackson's opinion spoke in terms of high-sounding principles, the principles asserted provide little assistance in understanding the scope of the limitation on government authority announced in Barnette. Such understanding requires a more detailed examination of Justice Jackson's reasoning.

The plurality opinion began by making clear the nature of the claim presented: The Jehovah's Witnesses asked only to be exempted from the flag salute, leaving others free to participate in the ceremony; they asserted no claim of paramount right over any other individual. Nor did the Jehovah's Witnesses suggest the state could not teach patriotism. They acknowledged that the state could instruct students in the values behind the flag salute and permit voluntary participation in this patriotic ceremony. Their argument was only that the state could not compel students to participate in the salute and pledge of allegiance.

After considering the scope of the Witnesses' claim, Justice Jackson analyzed the nature of the state's requirement in light of the interfered with liberty interest. The flag salute was identified as symbolic speech communicating an "adherence to government as presently organized. It

19. 319 U.S. at 642.
20. Id. at 630.
21. See id. at 631. More recently, the Supreme Court affirmed the legitimacy of state efforts to transmit values such as patriotism in the public schools. See Board of Educ. v. Pico, 457 U.S. 853 (1982); see also Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.").

Less clear to Justice Jackson, however, was whether the Board of Education resolution only required students to go through the motions of the flag salute—without needing to become true believers—or whether they were also required to abandon any contrary beliefs and become "unwilling converts" to the state-supported ideology of patriotism. 319 U.S. at 633. In characterizing the flag salute as symbolic expression, Justice Jackson relied on Stromberg v. California, 283 U.S. 359 (1931), involving a daily flag-raising ceremony at a summer camp where a reproduction of the Soviet Flag was used. Appellant was charged with violating a provision of California law criminalizing certain displays of a red flag. The Supreme Court overturned the conviction because it found unconstitutional the aspect of the California law that permitted punishing anyone displaying the flag as a symbol of opposition to organized government. Id. at 369. The Court viewed such a display as within constitutionally protected peaceful political discussion.
requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks."  

Justice Jackson then focused on the nature of the question before the Court. The question for Justice Jackson was not whether the Constitution required an exemption from the flag salute requirement as a matter of religious liberty. Instead, his inquiry was whether the state had the power to compel participation by children who had no choice but to attend school as a result of compulsory education laws. Justice Jackson's concern was with the extent of government authority and not with the specifics of what motivated a particular child to refuse to participate in the ceremony.

For Justice Jackson, defining the limits of governmental authority involved fundamental questions about the nature of democracy, including the seeming conflict between the need for strong government and the individual freedoms guaranteed in a democratic system. Those freedoms, as he saw them, included not only the right to speak but also the right to be free of government efforts to force individuals to say what they do not believe. In exposing this conflict as more apparent than real, Justice Jackson explored the nature of our governmental system: "There is no

22. 319 U.S. at 633.
23. Justice Jackson rejected the argument that the first amendment protection available to the Jehovah's Witnesses depended on the religious character of their objections: "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." 319 U.S. at 634.
24. This view presages modern concern for the plight of a captive audience. See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 759 (1978) (Powell, J., concurring) (arguing that the FCC should be permitted to prohibit broadcasts of obscene or offensive material during hours in which unsupervised children are listening); Lehman v. City of Shaker Heights, 418 U.S. 298, 305-08 (1974) (Douglas, J., concurring) (stating that a political candidate does not have first amendment right to display advertising on city buses); Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 COLUM. L. REV. 960 (1953) (discussing the rights and remedies of those deemed "captive auditors"); Haiman, Speech v. Privacy: Is There a Right Not To Be Spoken To?, 61 NW. U.L. REV. 153 (1972) (discussing the constitutional interrelationship between speech and privacy and the asserted right to be free from unwanted communication).
25. In light of Justice Jackson's explicit refusal to limit his holding to religiously motivated actions, lower courts have readily extended Barnette to situations in which a refusal to participate in a flag salute ceremony was based on a political objection. See, e.g., Goetz v. Ansell, 477 F.2d 636, 637-39 (2d Cir. 1973) (extending Barnette to the situation in which a high school student refused to stand for Pledge of Allegiance because he believed "that there [isn't] liberty and justice for all in the United States"); Frain v. Baron, 307 F. Supp. 27, 29, 33 (E.D.N.Y. 1969) (extending Barnette to protect students who refused not only to participate in recitation of the Pledge of Allegiance but also to stand and leave the classroom during the pledge and flag salute). Teachers wishing to refrain from leading a daily flag salute ceremony because of political beliefs also have been afforded constitutional protection. See, e.g., Russo v. Central School Dist., 469 F.2d 623, 633-34 (2d Cir. 1972) ("[B]ecause the First Amendment ranks among the most important of our constitutional rights we must recognize that the precious right of free speech requires protection even when the speech is personally obnoxious."), cert. denied, 411 U.S. 932 (1973); Hanover v. Northrup, 325 F. Supp. 170, 172-73 (D. Conn. 1970) (holding that a teacher's refusal to lead the Pledge of Allegiance did not disrupt school activities, interfere with or deny the rights of other teachers or students, or cause any disciplinary problems among her students).
mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." 26 Although "[n]ational unity [is] an end which officials may foster by persuasion and example," 27 compulsion is not a permissible means for its achievement. 28

After establishing this guiding principle, Justice Jackson sought to justify his view by demonstrating that no society benefitted by efforts to compel unity and eliminate dissent. Justice Jackson invoked the lessons of history: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." 29

These tactics were not only dangerous, he reasoned, they were unnecessary. There was no need to fear that securing the "freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization." 30 Similarly, guaranteeing the right to refuse to participate posed no threat to the continued existence of our form of government: "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds." 31

As a final point in his argument, Justice Jackson pointed out that—far from imposing disastrous costs—the kind of restriction on governmental authority he was announcing would have many positive benefits: "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." 32

26. 319 U.S. at 641.
27. Id. at 640.
28. Although Justice Jackson's view was that compelled affirmation of a government-sponsored idea is an impermissible means, the Barnette opinion does not make it clear whether such means are unconstitutional in all contexts or whether the unconstitutionality arose from an inadequate relationship between ends and means specific to the facts of the case. On the one hand, the suggestion is made that the individual might be compelled to participate in the ceremony if to do otherwise would create "a clear and present danger that would justify an effort even to muzzle expression." Id. at 634. On the other hand, elsewhere the opinion states, in absolutist language, "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." Id. at 641. For a recent expression of the view that Justice Jackson's opinion in Barnette is an example of the absolutist philosophy in first amendment analysis, see Gard, The Flag Salute Cases and the First Amendment, 31 CLEV. ST. L. REV. 419, 422-24 (1982).
29. 319 U.S. at 641.
30. Id.
31. Id.
32. Id. at 641-42. In addition to Justice Jackson's opinion for the Court, Justice Black wrote a concurring opinion that relied on the claim of religious freedom advanced by the resolution's challengers. Justice Black's opinion, joined by Justice Douglas, warned of the religious prejudice hidden
Although the plurality opinion makes many resounding statements, it also leaves one important question unanswered or unclear: What is the scope of the restriction on government authority and of its mirror image, the individual's freedom to differ? Responding to those inquiries requires determining what core value is threatened by incursions on the freedom to think as one pleases. Some writers view the *Barnette* rationale as resting on a notion of individual self-realization.33 That Justice

in mandatory flag salute laws: "The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution." *Id.* at 644. Justice Murphy, joining the opinion for the Court, also wrote separately agreeing with Justices Black and Douglas that *Barnette* was principally a case about freedom of religion: "Official compulsion to affirm what is contrary to one's religious belief is the antithesis of freedom of worship." *Id.* at 646.

Only Justice Frankfurter dissented in *Barnette*. Justice Frankfurter had written the majority opinion in Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), an earlier decision upholding a similar mandatory flag salute policy. *See infra* text accompanying notes 37-44. Unlike a number of other members of the Court, Justice Frankfurter had not changed his mind about the appropriate outcome of such cases in the intervening three years. *See infra* note 52. His dissent in *Barnette* emphasized the importance of judicial restraint and respect for democratic processes. 319 U.S. at 647-52. He also reiterated, as he had expressed in *Gobitis*, that religious liberty did not grant an immunity from laws of general applicability. *Id.* at 653. The Jehovah's Witnesses were free to educate their children in private schools rather than public schools and could affirmatively express their disagreement with the flag salute ceremony. *Id.* at 657-58. They could not, however, refuse to participate in the ceremony so long as the legislature viewed such mandatory participation as a means to promote good citizenship. *Id.* at 654-55. For an interesting analysis of Justice Frankfurter's opinions in *Barnette* and *Gobitis*, see Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675 (1984).

The disagreement between Justices Frankfurter and Jackson concerning the appropriate resolution of the issues posed in *Barnette* appears to have been deep-seated. *See Gard, supra* note 28, at 421-35. Nevertheless, in a letter Justice Frankfurter wrote to President Roosevelt in 1943, he praised Justice Jackson's *Barnette* opinion: "You may find some diversion from your heavy burdens—some of which are needlessly put upon your shoulders—in Bob Jackson's opinion. It is really worth reading." ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 699 (M. Freedman ann. 1967) (reprinting letter of May 3, 1943).

33. Professor Tribe takes the view that *Barnette* is most accurately classified as a case in which the focus of concern is on preventing an invasion of the right of personhood. This right includes an individual's autonomy to define the essence of one's own personality, both the inner self and the outward manifestation of the self. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-1, at 899-900 (1978). As an underlying justification for the protection of freedom of speech, this concern is referred to as a protection for "self-realization." *Id.* § 12-1, at 579.

The need to protect "individual self-realization," as the central value behind the first amendment, is urged by Professor Redish. *See Redish, The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982). Professor Redish finds this term particularly appropriate because it incorporates the dual concerns of a person's ability to "realize[] his or her full potential," and an "individual's control of his or her own destiny through making life-affecting decisions." *Id.* at 593. *See generally* Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (the free speech clause protects individual liberty); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215-22 (1972) (the first amendment promotes personal autonomy).

The concepts of autonomy and self-realization as explanations for the underlying purposes served by the first amendment free speech guarantee have been criticized for not focusing on values that are specially furltered by the first amendment:

Each of these theories relies on the fact that expressing one's self is an important component of individual liberty, and if we do not allow channels of self-expression then we will suffer accordingly. Now this is of course true, but the question is whether communicating
Jackson's Flag Salute Legacy

Jackson was concerned primarily with the individual freedom to develop

serves any particularly special function in terms of self-expression. I can also express myself in my attire, my occupation, my sexual activity and preferences, my residence, my hobbies and other recreations, and so on. The list is virtually endless, and that is exactly the point. Communicating is obviously a form of self-expression, but it is by no means the only form of self-expression, and it is by no means the form of self-expression that is most important to everyone. Thus, the argument from self-expression leads to the conclusion that all forms of self-expression are worthy of equivalent protection. As a result, it is impossible to distinguish an argument from self-expression as an argument for freedom of speech from an argument from self-expression as an argument for liberty in general.


Justice Jackson's summation of the holding of Barnette is reflected in the following language from his opinion: "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 319 U.S. at 642 (emphasis added). Although this statement has received much praise over the years, Justice Jackson's words are not without their critics. One commentator stated, "It would be difficult to find another statement so plausible, so seductively obvious, and yet so utterly, so foolishly, so deeply mistaken." J. TUSSMAN, GOVERNMENT AND THE MIND 3 (1977). Justice Jackson's use of the phrase "sphere of intellect and spirit" has been seized upon as synonymous with "the individual's interest in selfhood," an interest which includes both "the individual's ability to define the persona he presents to the world" and "the individual's freedom of conscience." Gaebler, supra note 12, at 1004 (quoting Barnette, 319 U.S. at 642). Equating Justice Jackson's concept of the "sphere of intellect and spirit" with a protection for the concept of "selfhood" or "personhood" requires embarking on the difficult task of defining the meaning of those terms. Much academic enterprise has already been devoted to translating these concepts into their core components in an effort to make them useful in the judicial decision-making process. Much of this effort has focused on defining the scope of the individual interest in privacy that is a part of the "liberty" protected by the fifth and fourteenth amendments rather than on defining that part of the concept of personhood protected by the free speech clause. See, e.g., Craven, Personhood: The Right to be Let Alone, 1976 DUKE L.J. 699, 702 (defining personhood to include elements of individuality, autonomy, and privacy); Gerety, Redefining Privacy, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977) ("Privacy will be defined here as an autonomy or control over the intimacies of personal identity."); Henkin, Privacy and Autonomy, 74 COLUM. L. REV. 1410, 1411 (1974) (defining privacy as a zone of autonomy, presumptively free of government regulation).

The overlap between a concept of personhood that stresses autonomy, privacy, and individuality and the freedom of the mind and spirit protected by the first amendment free speech guarantee is obvious. That aspect of the first amendment encompassing freedom of mind or freedom of conscience has been described in these terms:

When we refer to freedom of conscience, we ordinarily mean some sort of private domain of the mind, some area that is under the exclusive control of the individual. This domain is off limits to the state, not only as a matter of moral right, but also as a matter of necessity. If I say that I am following my conscience, I mean that I am retreating into that portion of my personality that is an exclusive preserve against governmental interference. Similarly, references to freedom of thought mark off an area of exclusive control by the individual, an area that simultaneously sets the outer boundaries of permissible (and practical) state intrusion.

F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 68 (1982). Described in these terms the act of thinking is, according to Professor Schauer and others, a self-regarding act and not an other-regarding act, and therefore this freedom falls within the category of private activities that, according to the philosophy of John Stuart Mill, should be free of state control. See J.S. MILL, ON LIBERTY (1859). Because Mill's analysis serves as an important element in the argument for a general constitutional protection for private behavior under the "liberty" clause, the overlap is not surprising. This analysis, however, is not sufficient to explain Barnette.

The behavior at issue in Barnette took place in a public setting. The state was not attempting the impractical task of trying to influence the Jehovah's Witnesses thoughts, only their acts. Additionally, allowing the Witnesses to refuse to participate in the patriotic ceremony would have some identifiable impact (for example, to make others uncomfortable in the face of unusual behavior, to direct additional resentment or prejudice against the Witnesses, or even to cause others to question
one's own personality, however, is not the only conclusion that can be
drawn from a careful reading of the opinion. To the contrary, although
Justice Jackson's language is sometimes ambiguous, its primary focus is
not on the needs of the individual. Instead, the first amendment is
presented not as an end in itself, but as serving an instrumental purpose described in terms of benefits to the community. Focusing on the govern­
mental excesses that can grow out of compelled uniformity of view­
point, Justice Jackson suggested that core values of the first amendment include the preservation of democratic government and "rich cultural diversities" that the community may reap through its tolerance of dissent. Although this analysis protects the individual, this protection is provided explicitly because it is necessary to the effective functioning of democratic government.

The values involved in Barnette did not arise in a jurisprudential vacuum; the opinion built upon other cases that must be examined to understand the decision's background and historical context. Three years before Barnette, the Supreme Court upheld the constitutionality of a school board rule requiring a mandatory flag salute and pledge of allegiance in Minersville School District v. Gobitis. As in Barnette, the

their own participation in the flag salute) on the other participants. Although the nature of the impact is uncertain, its existence is not.

34. First amendment literature reflects an unresolvable debate over whether the first amendment is designed to further instrumental purposes or whether it is an end in itself. The chief architect of the instrumental theory is Alexander Meiklejohn, who describes the first amendment free speech guarantee as essential to successful self-government. See A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO GOVERNMENT (1948); A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965) [hereinafter cited as A. MEIKLEJOHN, POLITICAL FREEDOM]; see also Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 20 (1971) (arguing for an internally consistent free speech theory that protects only explicitly political speech); Wellington, On Freedom of Expression, 88 YALE L.J. 1105, 1106 (1979) (addressing the "role of expression in the political process" and "the proper limits of expression's immunity"). Others view the first amendment as an end in itself, promoting speaker-oriented values. See Redish, supra note 33, at 593 (asserting that the constitutional guarantee of free speech serves only one true value, individual self-realization); Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. PA. L. REV. 45, 62 (1974) ("The value of free expression, in this view, rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish."). Still other first amendment theorists refuse to identify a single value served by the first amendment or to limit it to furthering either instrumental or intrinsic values. See T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3-15 (1963) (arguing that the first amendment furthers four purposes: individual self-fulfillment, attainment of truth, participation in decision-making, and balance between stability and change); Schauer, Codifying the First Amendment: New York v. Ferber, 1982 SUP. CT. REV. 285, 313 (asserting that "the concept of freedom of speech may not have one central core").

35. See supra text accompanying note 29.

36. 319 U.S. at 642.

challengers were Jehovah's Witnesses who claimed the required flag salute and pledge were contrary to their religious beliefs. Justice Frankfurter, writing for an eight-to-one majority upholding the rule, reasoned that religious convictions did not excuse citizens from obedience to general laws. Addressing the possibility of a constitutional argument based on the free speech guarantee, Justice Frankfurter was unwilling to concede that protection for anything beyond a citizen’s dissemination of views could be found within the concept of freedom of expression. Even if the Constitution protected citizens from being required to appear supportive of government-compelled expressions that protection was not absolute. The government’s interest in promoting national unity, he suggested, was sufficient to outweigh any interference with rights of free speech.

The *Gobitis* opinion reviewed existing Supreme Court precedent. From that case law, it was clear that principles of religious freedom had not been interpreted to include the right to be exempt from generally applicable laws; religious beliefs did not grant an exemption from military service, or provide an exemption from laws banning polygamy. Earlier decisions demonstrated that the Court had traditionally drawn a line between freedom to believe and freedom to act.

The Court also relied on the few Supreme Court cases that had examined the constitutionality of compelled behavior. Although principally concerned with the obligation of military service, these cases had reiterated the principle that no special exemption from law could be based on a claim that compelled activities violate religious scruples. The state was free to require attendance at a course in military science as a condition of attending a state land-grant university, despite a student’s religious and conscientious belief that war is immoral; applicants for citizenship could be compelled to swear an oath of allegiance to support and defend the United States as the price of citizenship. In light of the

38. The Court described this as being protected “from conveying what may be deemed an implied but rejected affirmation.” 310 U.S. at 595.
39. Id.
41. Davis v. Beason, 133 U.S. 333, 342 (1890); Reynolds v. United States, 98 U.S. 145, 167 (1878) (“To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”).
42. See, e.g., Reynolds v. United States, 98 U.S. 145, 166 (1878) (“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”).
43. Hamilton v. Regents of the Univ. of Cal, 293 U.S. 245, 262 (1934).
44. United States v. Macintosh, 283 U.S. 605, 616 (1931). The Court interpreted the oath of allegiance required before admission to citizenship to include a promise to bear arms on behalf of the United States. This interpretation of the naturalization oath was overruled in *Girouard v. United States*, 328 U.S. 61, 64 (1946).
precedent, the decision in *Gobitis* to uphold the mandatory ceremony was not surprising.

The *Gobitis* decision, however, was not unanimous. Justice Stone's vigorous dissenting opinion conceded that first amendment rights are not absolute but argued that the government could interfere with these precious guarantees only to further important government ends such as the need to raise an army.\(^{45}\) Requiring the flag salute had to be placed at a different point on the spectrum of government purposes; the government's interest—promoting patriotism—was less important than raising an army, and, moreover, alternative means to achieve the asserted purpose were available.\(^{46}\)

Justice Stone also wrote at length about the individual interests at stake in *Gobitis*:

The guaranties of civil liberty are but guaranties of *freedom of the human mind and spirit* and of reasonable freedom and opportunity to express them. They presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression, and his freedom, and that of the state as well, to teach and persuade others by the communication of ideas.\(^{47}\)

Clearly, in Justice Stone's view there was an intimate connection between freedom from compelled expression and the guarantee of freedom of speech; the individual desire to exercise the right of expression must be built upon dual protections—unfettered thought and an absence of compelled expression. If government is permitted to dampen the independent spirit of the mind, it may damage irreparably the willingness of individuals to speak out on behalf of divergent views that they hold.

Justice Stone wrote that the individual interest is at its zenith if religious freedom is threatened:

The very essence of the liberty which [civil liberties] guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the

\(^{45}\) See Minersville School Dist. v. Gobitis, 310 U.S. 586, 602 (1940) (Stone, J., dissenting) ("Government has a right to survive and powers conferred upon it are not necessarily set at naught by the express prohibitions of the Bill of Rights.").

\(^{46}\) Id. at 603-04 (asserting that "there are other ways to teach loyalty and patriotism" than to compel salute of the flag).

\(^{47}\) 310 U.S. at 604 (emphasis added). Some of the themes stressed in Justice Stone's dissenting opinion are later echoed in Justice Jackson's opinion in *Barnette*. For example, in *Barnette*, Justice Jackson spoke of the "sphere of intellect and spirit." 319 U.S. 642. This phrase is reminiscent of Justice Stone's *Gobitis* reference to the need to guarantee the "freedom of the human mind and spirit."
Jackson's Flag Salute Legacy

legislative view of the desirability of such compulsion. In Justice Stone's view, the preeminence of religious freedom in the value structure of the first amendment had its roots in the history of the United States. The facts of Gobitis, involving a "small and helpless minority . . . entertaining in good faith a religious belief," conjured up for Justice Stone the image of the persecuted colonists who fled their homelands to escape condemnation for their failure to conform to the established religions.

Traceable to his vision of persecuted religious minorities, Justice Stone's view of what was at issue in Gobitis nevertheless went further. The essential difference between totalitarian systems and the democratic form of government was defined by their differing treatment of small minorities, whatever the source of the shared beliefs that united the groups' members. For Justice Stone, protecting the rights of such groups was a hallmark of a free government.

Justice Stone's vision of the issues at stake in Gobitis was not then shared by other Justices. Only three years later, however, the Court did an "about-face" in Barnette. When this new challenge came before the Court, the invidious impact of mandatory flag salute laws was evident.

48. 310 U.S. at 604 (emphasis added).
49. Id. at 606.
50. See id. at 606-07. Justice Stone emphasized the commitment to the "constitutional protection of the liberty of small minorities to the popular will." Id. at 606. Consequently, our "Constitution expresses [not only] the conviction of the people that democratic processes must be preserved at all costs," but also the necessity to preserve "freedom of mind and spirit" if a government is to adhere to "justice and moderation without which no free government can exist." Id. at 606-07.
52. The Court's rapid "about-face" on the constitutionality of the mandatory flag salute and pledge was first suggested in a dissenting opinion in Jones v. City of Opelika, 316 U.S. 584 (1942), vacated, 319 U.S. 103 (1943) (per curiam). In Jones, members of the Jehovah's Witnesses who had been convicted of selling religious books without licenses challenged the constitutionality of city ordinances requiring the purchase of a license before selling printed matter. In a five-to-four opinion, the Court upheld the constitutionality of their convictions against a first amendment challenge. The dissenting Justices wrote three separate opinions. Justices Black, Douglas, and Murphy, stated that they had come to believe that Gobitis, in which they had voted with the majority, had been wrongly decided. They saw the Witnesses as an unpopular religious minority who were in the process of having their freedom to worship as they chose squelched. They observed, "Certainly our democratic form of government, functioning under the historic Bill of Rights, has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be." Id. at 624.

In addition to this announced change in viewpoint, there had been a change in the Court's
Appellees' brief reported that many similar laws had been enacted after the *Gobitis* decision, and that enforcement of these laws had resulted in the expulsion of thousands of schoolchildren for refusal to salute the flag. In addition, widespread hostility against the Jehovah's Witnesses had produced mob violence directed at members of the sect: beatings, knifings, shootings, arson, and parading members of the religion—tied together with ropes—through the streets. The brief argued that the central catalyst for these acts of brutality was the refusal of Jehovah's Witnesses to salute the flag.

In light of the record, the *Barnette* Court could not view mandatory flag salute laws as merely foolish, unwise, or uncertain to achieve their desired end. Instead, the plurality described such laws as destructive of the fabric of society:

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies.

In order to prevent a desire for unity from deteriorating into totalitarianism, our system had to give greater weight to a respect for individualism. In the end, forced conformity was seen as exacting too high a cost by stifling the impulse to dissent and eliminating tolerance of the innovative or idiosyncratic.

### B. The Jehovah's Witnesses in the Supreme Court

In *Barnette*, Justice Jackson did not adopt the view of Justice Stone's dissenting opinion in *Gobitis*—that religious speech was elevated

---

53. Brief for Appellees at 62-63, 72, 319 U.S. at 624; see also State v. Lefebvre, 91 N.H. 382, 20 A.2d 185 (1941) (overturning lower court order declaring three children who were Jehovah's Witnesses to be delinquent based on their failure to attend school after having been suspended for refusing to salute the flag); *In re Latrecchia*, 128 N.J.L. 472, 26 A.2d 881 (1942) (reversing criminal conviction of Francesco and Raffaela Latrecchia, both Jehovah's Witnesses, who were convicted of being disorderly persons based on the expulsion of their children from school for failure to salute the flag); *In re Jones*, 175 Misc. 451, 24 N.Y.S.2d 10 (1940) (dismissing delinquency proceedings brought against nine-year-old Jehovah's Witness who had been expelled from school for refusal to salute the flag).

54. Brief for Appellees at 71-77, 319 U.S. at 624 (reporting events chronicled in Rotnem & Folsom, *Recent Limitations Upon Religious Liberty*, 36 AM. POL. SCI. REV. 1053 (1936)).

55. 319 U.S. at 641.
above other kinds of speech. Despite the record in *Barnette* of religion-based persecution of the Jehovah's Witnesses, the opinion explicitly went beyond the religious freedom argument pressed by appellees and utilized as the ground of decision by Justices Black, Douglas, and Murphy. However, the choice Justice Jackson made in *Barnette*—appealing to broader speech principles—was not unique to his opinion in that case. A substantial volume of Supreme Court decisions during the *Gobitis-Barnette* era involved the Jehovah’s Witnesses. In light of the sect’s religious tenets, the frequency of their legal battles during this period is far from surprising.56

In the years immediately preceding *Barnette*, the Witnesses were vindicated in many of their legal battles.57 In each case, the Jehovah’s Witnesses argued that an ordinance or statute unconstitutionally interfered with their religious freedom; in each case the Witnesses were victo-

56. The Witnesses believe themselves accountable only to the God Jehovah and to his laws. The source of their belief is found in various biblical passages. A major reference is to *Exodus*:

I am JEHOVAH thy God, who brought thee out of the land of Egypt, out of the house of bondage.
Thou shalt have no other gods before me.
Thou shalt not make unto thee a graven image, nor any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth:
Thou shalt not bow down thyself unto them, nor serve them; for I JEHOVAH thy God am a jealous God, visiting the iniquity of the fathers upon the children upon the third and upon the fourth generation of them that hate me.
And showing loving kindness unto thousands of them that love me and keep my commandments.

*Exodus* 20:2-6 (American Revised Edition). Jehovah is the head of a theocracy and the Witnesses, therefore, reject most civil rule. The only exceptions are the payment of taxes and laws that do not violate the Word of God. As Witnesses, their purpose is to inform all sinners that Jehovah’s Kingdom has come and it is the route to deliverance for all. For a more thorough description of the religious beliefs and practices of the Jehovah’s Witnesses, see Waite, *The Debt of Constitutional Law to Jehovah's Witnesses*, 28 MINN. L. REV. 209, 212-13 (1944). These beliefs explain both the reason why the Witnesses distribute literature explaining the Kingdom of Jehovah and why they disobey civil authority by not obtaining permits, paying license fees, or saluting the flag.

57. The first case to reach the Supreme Court during this period was *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (overturning conviction for distributing literature without permission of city manager). After a victory in *Lovell*, the Jehovah’s Witnesses successfully litigated other cases. See, *e.g.*, Schneider v. State, 308 U.S. 147 (1939) (invalidating a ban on door-to-door distribution of literature without a permit and invalidating municipal ordinances prohibiting the distribution of literature in public places); Cantwell v. Connecticut, 310 U.S. 296 (1940) (striking down a state statute prohibiting fundraising for religious causes without a prior determination by a local official that a true religion was the object of the fundraising and overturning a breach of the peace conviction resulting from defendant’s efforts to solicit sales for his religious literature); Jamison v. Texas, 318 U.S. 413 (1943) (striking down a municipal ordinance that barred the use of the streets to distribute handbills publicizing religious views); Largent v. Texas, 318 U.S. 418 (1943) (holding that city ordinance that required a permit to sell or solicit orders for books, as applied to distribution of religious materials, violated first amendment); Jones v. City of Opelika, 319 U.S. 103 (1943) (citing Murdoch v. Pennsylvania, 319 U.S. 105 (1943), to overturn on rehearing the conviction of a Jehovah’s Witness for selling religious books in violation of an ordinance requiring the payment of license taxes to sell printed materials), vacating per curiam 316 U.S. 584 (1942); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (striking down an ordinance that required colporteurs to pay a license tax before distributing religious literature); Martin v. City of Struthers, 319 U.S. 141 (1943) (invalidating city ordinance prohibiting door-to-door distribution of literature).
rious; and in each case the Court chose to ground its opinion in general free speech and press principles, rejecting the opportunity to rule solely on the religious liberty issue. 58

The Court's pattern of behavior can be explained, in part, by the controversial nature of the Jehovah's Witness religion. The Witnesses were not only a new religion, 59 but an unpopular one as well. The aggressive behavior of the sect's members in spreading their message had resulted in fairly widespread public hostility. In all the litigation involving the Witnesses, their lawyers attempted to demonstrate that their activities—such as going door-to-door, distributing leaflets, and playing recorded messages—were engaged in as a mandatory part of their service to Jehovah as required by their religion. 60 Courts could have attempted to decide which of the Witnesses' activities were part of their religious

58. In Lovell v. City of Griffin, 303 U.S. 444 (1938), because the challenged ordinance prohibited the distribution of all literature, not only religious literature, without the permission of the City Manager, the ordinance was held to be an unconstitutional prior restraint on the press. Id. at 451.

In Schneider v. State, 308 U.S. 147 (1939), Clara Schneider was convicted of door-to-door distribution of religious literature without a permit. The Supreme Court reviewed her conviction together with three other challenges to municipal ordinances regulating the distribution of printed matter. None of the other cases involved the Jehovah's Witnesses or even the distribution of religious literature; they involved absolute bans on the distribution of leaflets in public places justified by a municipal concern with littering. The Supreme Court held all four ordinances to be violative of the first amendment protection for speech and press. The Court struck down the three antilittering ordinances because the government's justification was inadequate due to the infringement of first amendment interests. Id. at 163. In light of the important speech and press interests at stake, the permit scheme that Clara Schneider violated vested too much discretion in police authorities to decide which ideas could be carried into the homes of citizens. Id. at 164.

In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court struck down a licensing scheme that required a state official to determine whether the cause for which an individual sought to solicit contributions qualified as a religious one because granting a government official the discretion to make such a judgment was an impermissible censorship of religion. Id. at 305. Although relying on the free exercise clause, the Court's reasoning was in line with its earlier decision in Lovell striking down a prior restraint scheme that gave the government censor unbridled discretion. The Court in Cantwell also overturned Jesse Cantwell's breach of the peace conviction, categorizing Cantwell's religious speech as provocative speech but finding his behavior insufficiently threatening to amount to a breach of the peace. The Court considered Cantwell's behavior analogous to someone airing unpopular political ideas. Id. at 310. Finally, in Martin v. City of Struthers, 319 U.S. 141 (1943), the Court invalidated an ordinance that banned all door-to-door distribution of literature, on the ground that it violated the guarantees of free speech and free press. Id. at 149.

59. Viewed from the perspective of the 1940s, the Jehovah's Witness religion was relatively recent in origin. The group had only adopted the name "Jehovah's Witnesses" in 1931, having been previously called "Russellites." The name refers to Charles T. Russell, who founded the religion in 1868. In 1884, the followers of Charles Russell founded the Watchtower Bible and Tract Society. Today, the Society is responsible for printing the books, pamphlets, and magazines that are distributed by adherents of the religion. Charles Russell was succeeded by Joseph F. Rutherford as the group's leader. Under Rutherford's leadership they chose to call themselves Jehovah's Witnesses. For a description of the origin, beliefs, and practices of the Jehovah's Witnesses, see L. PFEFFER, CHURCH, STATE, AND FREEDOM 533-37 (1953).

60. References to passages in the Bible and to the Biblical directives to engage in behavior of the kind described are found in all the briefs filed in the Supreme Court on behalf of the Jehovah's Witnesses. See Brief for Petitioners at 22-25, Murdock v. Pennsylvania, 319 U.S. 105 (1943); Brief for Appellant at 22-25, Largent v. Texas, 318 U.S. 418 (1943); Brief for Appellant at 19-20, Jamison v. Texas, 318 U.S. 413 (1943). Because of their lawyers' increasing familiarity with the concerns of
practices and which were simply a secular strategy chosen by the sect’s members to proselytize for their religion, a question not easily answered. Instead, by deciding cases before them on general freedom of speech and press principles, the Court could refrain from deciding the scope of the Jehovah’s Witnesses’ religious as opposed to lifestyle practices. Similarly, in *Barnette*, by regarding as irrelevant what had motivated the decision to refuse to salute the flag, the Court avoided the necessity of evaluating the bona fides of the Jehovah’s Witness claim that their refusal to salute the flag was required by their religion and protected by the free exercise clause of the Constitution.

In the period immediately before and after *Barnette*, the Court was in the throes of a struggle over the legitimacy of claims raised by the Jehovah’s Witnesses to immunity from generally applicable laws, an immunity based on an assertion of religious liberty for beliefs and practices, including door-to-door evangelical activities. In resolving these claims the members of the Court were at philosophical loggerheads as to the proper balance between freedom of religion and government regulatory

the Supreme Court, the briefs filed later in the period place less emphasis on the Bible and more emphasis on case authority. See Danzig, supra note 32, at 683 & n.22.

61. The Supreme Court addressed a similar issue in the context of the Amish religion in Wisconsin v. Yoder, 406 U.S. 205 (1972). In evaluating a religious objection to the application of Wisconsin’s compulsory education law to Amish youths above the age of fourteen, the Court had to decide if the objection was based on a religious belief. The Court described the task before it and the justifications for its undertaking:

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion clauses, the claims must be rooted in religious belief. Although a determination of what is a “religious” belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.

*Id.* at 215-16 (footnote omitted). Because the Court found the Amish claims to be based on their religious beliefs, the State had to demonstrate a sufficiently strong justification for its infringement of religious freedom. The Court held that Wisconsin had failed to show that its “strong interest in compulsory education would be adversely affected by granting an exception to the Amish.” *Id.* at 236.

62. The controversial nature of the Jehovah’s Witnesses and the Court’s cautious handling of their legal battles is illustrated by examining three cases: *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); and *Prince v. Massachusetts*, 321 U.S. 158 (1944). In the chronology of the flag salute cases, *Murdock* and *Douglas* were decided shortly before *Barnette*, and *Prince* was decided a little over six months after *Barnette*.

In *Murdock*, the Jehovah’s Witnesses challenged municipal ordinances that imposed a flat license tax on persons wishing to solicit for the sale of merchandise or literature. 319 U.S. at 106. Convicted of selling religious literature without paying the tax, the Witnesses challenged their convictions as violative of the speech, press, and religion clauses of the first amendment. *Douglas* was a companion case to *Murdock*, also involving a licensing scheme, but it was dismissed on jurisdictional grounds. 319 U.S. at 163. In *Prince*, the Court had before it an appeal from a conviction for violating the Massachusetts child labor laws. Sarah Prince had been convicted for permitting her nine-year-old ward to offer for sale copies of two religious publications, *Watchtower* and *Consolation*, in violation of Massachusetts law. Mrs. Prince argued that her conviction violated her right to religious freedom as protected by the first amendment. *Prince v. Massachusetts*, 321 U.S. at 158

833
control. Justice Jackson defined the scope of religious freedom narrowly, and he believed the Constitution’s separate recognition of protection for religious liberty was designed to give religious liberty no more constitutional protection than freedom of speech, but, instead, only an equal amount of protection. Justice Jackson strongly opposed other Justices’ willingness to deprive municipalities of the authority to protect their citizenry and preserve the peace.

63. The various opinions in Murdock, Douglas, and Prince are telling examples of the deep division on the Court about the constitutional status of the Jehovah’s Witnesses and their religious practices.

Justice Douglas’ majority opinion in Murdock, overturning the ordinances, supported the evangelical activities of the Jehovah’s Witnesses and described their door-to-door distribution of religious literature in positive terms:

It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.

319 U.S. at 109. In contrast, Justice Reed’s dissent expressed the view that the sale of religious tracts was not a religious practice to be protected under the religious freedom clause of the first amendment: “The rites which are protected by the First Amendment are in essence spiritual—prayer, mass, sermons, sacrament—not sales of religious goods.” Id. at 132. Although recognizing that the purpose of these evangelical activities was to spread a religious message, Justice Reed could not see this behavior as amounting to a religious rite.

An even more negative view of the Witnesses’ proselytizing activities was expressed by Justice Jackson. See Douglas, 319 U.S. at 167-74. Describing at length the sometimes intrusive and irritating behavior of members of the Jehovah’s Witnesses, Justice Jackson argued that the presence of such behavior created a need for municipal governments to be able to protect their residents from such abusive actions. Foreshadowing his reasoning in Barnette, Justice Jackson revealed his anger at the notion that the religiously motivated practices of the Witnesses deserved greater immunity from government regulation than behavior that promoted political, economic, or scientific ideas: “When limits are reached which such communications must observe, can one go further under the cloak of religious evangelism? Does what is obscene, or commercial, or abusive, or inciting become less so if employed to promote a religious ideology?” Id. at 179. Justice Jackson’s response was clearly “no.”

Justice Jackson disagreed with Justice Douglas on the analogy to be drawn between religious ceremonies and the distribution of literature:

I cannot accept the holding in the Murdock case that the behavior revealed here “occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.” To put them on the same constitutional plane seems to me to have a dangerous tendency towards discrediting religious freedom.

Id. at 180 (quoting Murdock, 319 U.S. at 109).

64. Justice Jackson grounded his theory of why the Constitution separately mentions freedom of religion in “the history of religious persecution”:

It was often claimed that one was an heretic and guilty of blasphemy because he failed to conform in mere belief or in support of prevailing institutions and theology. It was to assure religious teaching as much freedom as secular discussion, rather than to assure it greater license, that led to its separate statement.

319 U.S. at 179.

65. Justice Jackson’s concern that the Court, when it zealously protected minority rights, was necessarily undercutting the rights of the majority, is evident elsewhere in his writing:

But we must bear in mind that in the protection of individual or minority rights, we are often impinging on the principle of majority rule. Judicial opinions rarely face this dilemma. Let us take, for example, a community engaged largely in steel work, many of whose inhabitants are employed on night shifts and get their rest by day. Acting through regularly chosen representatives, the municipality duly enacts a regulation that precludes doorbell ringing in the distribution of literature or goods. A religious faction insists upon ringing doorbells to summon the occupant to the door to receive religious tracts that attack
Jackson's Flag Salute Legacy

The ringing endorsement of the principle of tolerance for the unusual or unorthodox that Justice Jackson sounds in *Barnette* must be contrasted with his earlier comments about the need to make sure that a religious minority does not become a tyrannical force going beyond the limits of a free society. Justice Jackson's narrow view of religious freedom provides at least a possible answer to the question of why his opinion in *Barnette* relies on broad free speech principles and does not restrict itself to religious liberty concerns.

Justice Jackson's view was that the line drawn should be between activities that affect only members of a religious group and activities that adversely influence the interests of members of the public. This view was not shared by all the members of the Court. Some would give broader deference than others to claims of religious freedom. In Justice Jack-

his religion and seek to convert him to the faith of the caller. If the Court holds that the right of free speech includes the right to enter upon private property and summon the owner to the door, it necessarily holds that a majority of a community are without the right to protect their hours of rest against such religiously inspired aggression.

In case after case in which so-called civil rights are involved, the question simmers down to one of the extent to which majority rule will be set aside.

R. Jackson, *The Supreme Court in the American System of Government* 76-77 (1955) (published posthumously from the drafts written by Justice Jackson in preparation for his anticipated delivery of the Godkin Lectures at Harvard University) (the facts described in this passage are taken from Martin v. City of Struthers, 319 U.S. 141, 144 (1943), in which the Court struck down a municipal ordinance of the kind described over the dissent of Justice Jackson).

66. *See, e.g.*, Douglas v. City of Jeannette, 319 U.S. 157, 179 (1943) (Jackson, J., dissenting) (“Civil government can not let any group ride rough-shod over others simply because their 'consciences' tell them to do so.”).

67. The battle over the Jehovah's Witnesses' place in the constitutional pecking order still raged after *Barnette*, as made clear by the Court's opinion six months later in Prince v. Massachusetts, 321 U.S. 158 (1944). Justice Rutledge, writing for the Court, made it clear that freedom of religion has no greater constitutional protection than the other freedoms described in the first amendment. Justice Rutledge went on to uphold the state's ability to protect children from the dangers of youthful employment, even if the child labor at issue involved selling religious tracts. An important government objective was appropriately served by the challenged Massachusetts legislation.

Justice Murphy, in dissent, disagreed about the extent to which religion should play a role in the case and its outcome. He viewed the case as one raising a religious liberty claim in which the state had failed to demonstrate an interest sufficiently important to justify infringement on that "vital freedom," *id.* at 174-75, and criticized the majority decision as perpetuating religious suppression:

No chapter in human history has been so largely written in terms of persecution and intolerance as one dealing with religious freedom. . . . And the Jehovah's Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. *Id.* at 175-76.

Justice Jackson also wrote separately in *Prince*, pointing out that the members of the Court had a fundamental disagreement as to the proper constitutional analysis to apply to complaints of interference with religious liberty. *Id.* at 177. He could agree neither with the views of Justice Rutledge writing for the Court nor with the dissent of Justice Murphy.

It is interesting to note by way of comparison that the dispute over the relationship between freedom of speech and freedom of religion reflected in the Court's decisions during the *Barnette* era has resurfaced in recent Supreme Court opinions. Compare Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981) (majority opinion) (religious worship as well as other religious speech is entitled to the protection of the free speech guarantee of the first amendment), *with id.* at 284-86 (White, J., dissenting) (although religious worship uses speech, it cannot be treated as simply a form of protected
son's *Barnette* opinion, as in several other cases during this period, no preferred position was offered to religious liberty. Instead, freedom of conscience\(^{68}\) and freedom of mind were equal in the eyes of the first amendment. The importance of these freedoms was reflected in the Court's willingness to protect the rights of small minorities who held unpopular views. So long as unpopular minorities chose to express their views in ways that did not seriously interfere with the rights of the other members of the community, their right to express dissident views would be assured. This protection was required by the ideal of democratic tolerance; a principle that dictated a concern for securing the kind of society in which freedom to differ was guaranteed both for its own sake and for the benefit of the culturally diverse and innovative society that was the Constitution's vision of America.

### C. Justice Jackson Elaborates on His Barnette Themes

To whatever extent the meaning of the *Barnette* opinion may have remained obscure even to the careful reader, Justice Jackson clarified and expanded upon his views expressed there seven years later in *American Communications Association v. Douds*.\(^{69}\) Although the issue in *Douds* was not the same kind of compelled expression as had been presented by the pledge in *Barnette*, Justice Jackson's opinion nevertheless explored the same first amendment themes that he had written about in *Barnette*.

With only six Justices participating in *Douds*, the Supreme Court upheld, by an equally divided vote, the constitutionality of section 9(h) of the Taft-Hartley Act,\(^{70}\) otherwise known as the non-Communist affidavit provision. Under that provision, each union officer was required to file an affidavit stating that the officer was not a member of the Communist Party or any similar organization and did not believe in "the overthrow expression under the free speech guarantee; separate treatment is required to avoid undermining the religion clauses of the first amendment).


\(^{69}\) 339 U.S. 382 (1950).

Jackson’s Flag Salute Legacy

of the United States government by force or by any illegal or unconstitutional methods.”

Many benefits of the National Labor Relations Act were withheld from any union whose officers failed to submit such affidavits to the National Labor Relations Board.

Although the required filing of this affidavit, under penalty of loss of benefits, was a form of compelled expression, it belongs within that category of compelled expression known as “compelled disclosure.” It forced all union officials to disclose information about their political affiliations and beliefs, but did not affirmatively ask them to swear allegiance to a particular political philosophy, as had the pledge of allegiance in Barnette.

The union challenging the provision argued that it interfered with the union’s ability to select its officers and infringed on those officers’ freedom of choice in their political views and associations. In response, Chief Justice Vinson found that the infringement of first amendment rights was minimal and that the government interest in ensuring labor peace was important enough to justify that minimal interference.

Justice Jackson’s separate opinion agreed with that part of Justice Vinson’s opinion that upheld section 9(h) insofar as it required disclosure of Communist Party membership or affiliation; he disagreed, however, with the constitutionality of the affidavit that section 9(h) required union

71. Douds, 339 U.S. at 386 (quoting from § 9(h) of the National Labor Relations Act, Act of June 23, 1947, ch. 120, § 101, 61 Stat. 136, 143 (repealed 1959)). That section, in its entirety, provided as follows:

No investigation shall be made by the [National Labor Relations] Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

72. See supra text accompanying notes 6-8.

73. The Chief Justice, joined by Justices Reed and Burton, distinguished the case before him from the situation in Barnette. In Barnette, according to Chief Justice Vinson, “the sole interest of the State was in securing uniformity of belief by compelling utterance of a prescribed pledge.” 339 U.S. at 404 n.19. In Douds, however, the government’s interest was not seen as aimed at suppressing political ideas, id. at 402; instead, the government was interested in preventing Communists from infiltrating labor unions and encouraging obstructive strikes that would serve revolutionary political ideas, rather than legitimate union objectives. Id. at 388-89. A second factor Chief Justice Vinson saw as distinguishing Douds was the fact that in Barnette refusal to salute the flag resulted in punishment, id. at 404 n.19, but the non-Communist affidavit provision did not impose any similar punishment for its violation. Individuals were free to retain their associations and beliefs, subject only to the possible loss of their positions as union officials. Id. at 404. Thus, the adverse impact on the individual was much less serious.

837
officers to sign: "that he does not believe in . . . the overthrow of the United States Government by force or by any illegal or unconstitutional methods." In the course of his opinion, Justice Jackson wrote at length about the value of "intellectual individualism" that was so central to his opinion in *Barnette*:

Progress generally begins in skepticism about accepted truths. Intellectual freedom means the right to re-examine much that has been long taken for granted. A free man must be a reasoning man, and he must dare to doubt what a legislative or electoral majority may most passionately assert. The danger that citizens will think wrongly is serious, but less dangerous than atrophy from not thinking at all. Our Constitution relies on our electorate's complete ideological freedom to nourish independent and responsible intelligence and preserve our democracy from that submissiveness, timidity and herd-mindedness of the masses which would foster a tyranny of mediocrity. The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. . . .

The idea that a Constitution should protect individual non-conformity is essentially American and is the last thing in the world that Communists will tolerate. . . . If any single characteristic distinguishes our democracy from Communism it is our recognition of the individual as a personality rather than as a soulless part in the jigsaw puzzle that is the collectivist state.

In this eloquent statement, Justice Jackson reaffirmed the position he announced in *Barnette*. In doing so he further clarified what underlay the constitutional protection against compelled conformity that he valued so highly.

In his *Douds* opinion, Justice Jackson established once again his belief that the first amendment provides individuals with an immunity that shields the "realm of opinion and ideas, beliefs and doubts, heresy and orthodoxy, political, religious or scientific." This immunity is designed

74. *Id.* at 435 (quoting National Labor Relations Act, § 9(h), Act of June 23, 1947, ch. 120, § 101, 61 Stat. 136, 143 (repealed 1959)).
76. *Douds*, 339 U.S. at 442-43. Justice Jackson's view of the characteristics of our democratic system was supported by one other member of the Court. Although writing separately, Justice Frankfurter's opinion reflects a similar belief:

The cardinal article of faith of our civilization is the inviolate character of the individual. A man can be regarded as an individual and not as a function of the state only if he is protected to the largest possible extent in his thoughts and in his beliefs as the citadel of his person.

*Id.* at 421. The agreement of Justices Jackson and Frankfurter on this point is somewhat ironic in light of their sharp differences over the proper outcome in *Barnette*. For a description of Justice Frankfurter's dissenting opinion in *Barnette*, see *supra* note 32.
77. 339 U.S. at 443.
Jackson's Flag Salute Legacy

to assure a free-thinking electorate that can preserve our democratic system and cause it to prosper.\textsuperscript{78} Our system's superiority over totalitarian regimes was seen as arising out of its willingness to tolerate nonconformity. An individual's ability to develop into his own person is protected in order to preserve democratic principles of tolerance and to enhance our country's greatness by assuring its receptiveness to innovative ideas. In this aspect of Justice Jackson's first amendment philosophy, individuality is seen not primarily as an end in itself, but as a means to a larger social end. The individual may receive the immediate benefits of policies designed to preserve a strong democratic system, but the motivating factor for protecting independence of mind is a concern for our system of government. Justice Jackson thus appears to align himself with those who view the first amendment freedoms as serving principally instrumental functions and not as ends in themselves.\textsuperscript{79}

Justice Jackson's views, however, did not begin and end with concern for the effective functioning of democratic government. In \textit{Douds}, he argued that the willingness to allow each person to develop an individual identity, free of government constraint, is what distinguishes democracy from totalitarian government.\textsuperscript{80} In this part of his first amendment

\textsuperscript{78} The similarities between Justice Jackson's views and the theories of Alexander Meiklejohn as to the values furthered by the first amendment are obvious:

\textit{We Americans, in choosing our form of government, have made, at this point, a momentous decision. We have decided to be self-governed. We have measured the dangers and the values of the suppression of the freedom of public inquiry and debate. And, on the basis of that measurement, having regard for the public safety, we have decided that the destruction of freedom is always unwise, that freedom is always expedient. The conviction recorded by that decision is not a sentimental vagary about the "natural rights" of individuals. It is a reasoned and sober judgment as to the best available method of guarding the public safety. We, the People, as we plan for the general welfare, do not choose to be "protected" from the "search for truth." On the contrary, we have adopted it as our "way of life," our method of doing the work of governing for which, as citizens, we are responsible. Shall we, then, as practitioners of freedom, listen to ideas which, being opposed to our own, might destroy confidence in our form of government? Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! Our action must be guided, not by their principles, but by ours. We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government.}

\textit{A. MEIKLEJOHN, POLITICAL FREEDOM, supra note 34, at 57. Despite the similarities of their views, Meiklejohn's writings are referred to only twice in the opinions of Justice Jackson. See Dennis v. United States, 341 U.S. 494, 567 n.9 (1951) (Jackson, J., concurring); Kunz v. New York, 340 U.S. 290, 300 n.3 (1951) (Jackson, J., dissenting). Both references express Justice Jackson's disagreement with Meiklejohn's absolutist philosophy of first amendment protection for speech that is necessary to the process of self-government.}

\textsuperscript{79} The battle over instrumental or speaker-benefit values in first amendment jurisprudence is still a very lively one. \textit{See supra} note 34.

\textsuperscript{80} Professor Freund described the centerpiece of Justice Jackson's constitutional philosophy in the following terms:

\textit{What must be cherished and secured above all—what the Constitution means to be secured—is human personality. Its cultivation is both a civic necessity and a spiritual duty.}
theory, Justice Jackson recognized the identity-reinforcing aspect of the first amendment.\textsuperscript{81} Thus, Justice Jackson's first amendment philosophy surfaces as a multilayered one.\textsuperscript{82} Although primarily concerned with the need for an effective democratic government, his philosophy also recognized the independent value of intellectual individualism.

III. The Loyalty Oath Cases

In the years following \textit{Barnette}, quotations from Justice Jackson's \textit{Barnette} plurality opinion began to appear regularly in the Court's writings.\textsuperscript{83} For a number of years, however, no new controversy raising the precise issue of a compelled affirmation reached the Court. The next
such occasion came when the Court began to consider the issue of the constitutionality of affirmative loyalty oaths, those that required the oath taker to pledge support for the state or federal government, or both. Such affirmative loyalty oaths presented a somewhat different constitutional problem than did the negative oath epitomized in *Douds*.

As early as 1866, long before the non-Communist affidavits at issue in *Douds*, loyalty oaths and the various constitutional issues associated with such oaths had reached the Supreme Court. Over the years, the Supreme Court employed an ever-growing collection of constitutional doctrines to test the constitutionality of such oaths, often declaring the oaths unconstitutional. The central focus of the Court's attention, however, had been on negative oaths, like that in *Douds*, requiring individuals such as applicants for public employment to swear that they did not belong to any groups that advocated the overthrow of the United States government and that they never themselves had been disloyal to the government. Such oaths sought both to force disclosure of past beliefs and associations and to condition government employment on the absence of such beliefs and affiliations. In this sense, to the extent that these loyalty oaths related at all to the problem of compelled speech, they raised the problem of compelled disclosure rather than compelled expression. Although many of the oaths also required an affirmative declaration of support for the United States Constitution, the Court often did not rule specifically on the constitutionality of this aspect of the oaths.

84. See, e.g., *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866) (holding an 1865 federal law requiring attorneys practicing in the federal courts to swear they had never been disloyal to the United States unconstitutional as both a bill of attainder and as an ex post facto law); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (holding that provisions of 1865 Missouri Constitution requiring all ministers and teachers to swear they had never been disloyal to the state or to the United States violated constitutional prohibitions on bills of attainder and ex post facto laws).

85. For an excellent survey of the varying methods of analysis employed to dispose of the loyalty oath cases, see Note, *Loyalty Oaths Are Not Dead—At Last Report One Was Alive in New York*, 77 YALE L.J. 739 (1968).


88. To the extent that these negative oath cases are viewed as government attempts to affix a condition of noninvolvement in subversive political activities to the opportunity for government employment, they can be classified as cases involving unconstitutional conditions. See, e.g., *Wieman v. Updegraff*, 344 U.S. 183 (1952) (Oklahoma statute requiring prospective state employees to make a "loyalty oath" that they were not members of a Communist or subversive organization for the preceding five years violates the due process clause of the fourteenth amendment). On the subject of unconstitutional conditions, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

89. E.g., *Wieman v. Updegraff*, 344 U.S. at 184 n.1 (Court did not rule on constitutionality of challenged support oath—"I will support and defend the Constitution"); *Ex parte* Garland, 71 U.S.
On the rare occasion when it did, the Court found the oath unconstitutional on vagueness grounds.\(^\text{90}\)

The first attack on the merits of a so-called affirmative oath that reached the United States Supreme Court was *Knight v. Board of Regents*.\(^\text{91}\) Faculty members at a private university challenged a New York State law requiring all state teachers to execute a loyalty oath. The oath provision required teachers to swear or affirm that they supported the United States Constitution and the Constitution of the State of New York and would faithfully discharge their duties. In challenging the oath requirement, the teachers relied upon *Barnette*.

A three-judge federal court rejected the *Barnette* analogy on several grounds. First, the court interpreted *Barnette* as resting on religious freedom grounds despite Justice Jackson's specific disclaimer of such a ground of decision.\(^\text{92}\) Second, the court was of the opinion that the penalties attached to refusal to take the oath were not as serious as in *Barnette*. And third, the court interpreted "the statute to impose no restrictions upon political or philosophical expressions by teachers in the State of New York."\(^\text{93}\)

The last argument, although somewhat vague, suggests that an oath requirement violates the first amendment only if it restricts the rights of teachers to engage in protected expression. This view is consistent with the concept that freedom from compelled expression is merely a derivative of the guarantee of free speech and that protected rights are violated only when a required expression is likely to discourage speech and not merely because the compelled expression is an insult to an individual's political conscience. Because the court viewed the teacher's execution of the oath as a pro forma activity, unlikely to have any long-term impact on an individual teacher's willingness to engage in political dialogue, the oath did not rise to the level of a constitutional concern.

In addition to these factors, the court also believed the government had an adequate justification for imposing the oath. The oath was viewed as the equal of the allegiance every citizen owed the government

\(^\text{90}\) Baggett v. Bullitt, 377 U.S. 360, 371 (1964) (holding that oath requiring a promise to "promote respect for the flag and the institutions of the United States and the State of Washington" was too vague because the range of acts consistent and inconsistent with the promise is very broad and "institutions" is not defined).


\(^\text{92}\) 269 F. Supp. at 341.

\(^\text{93}\) Id.
Jackson's Flag Salute Legacy

at common law. Further, the state's interest in employing the best teachers justified the entire oath, including the requirement of subscribing to their dedication to their profession. An appeal to the Supreme Court by the teachers resulted only in a summary affirmance of the three-judge district court opinion. The Court, therefore, offered no clue as to whether the lower court's interpretation of Barnette was an accurate one.

Loyalty oaths do not reach the Court against the same constitutional background as the pledge in Barnette, because these affirmative oath cases are complicated by three specific constitutional references to oaths. These constitutional provisions requiring oath taking have made it easy for members of the Court to look favorably on the requirement of an affirmative loyalty oath even as against a first amendment challenge. As Chief Justice Vinson's opinion in Douds stated: "Obviously, the Framers of the Constitution thought that the exaction of an affirmation

95. On several occasions after Knight, the Supreme Court was again asked to rule on the constitutionality of affirmative loyalty oaths. Just as in Knight, the Court in Hosack v. Smiley, 276 F. Supp. 876 (D. Colo. 1967), aff'd per curiam, 390 U.S. 744 (1968), and Ohlson v. Phillips, 304 F. Supp. 1152 (D. Colo. 1969), aff'd per curiam, 397 U.S. 317 (1970), responded by summarily affirming three-judge district court decisions upholding oaths almost identical to the one challenged in Knight.

Both Hosack and Ohlson involved a Colorado loyalty oath required of teachers, the original version of which had been struck down as unconstitutionally vague and overbroad. Gallagher v. Smiley, 270 F. Supp. 86, 87 (D. Colo. 1967). The oath provided: "I solemnly swear or affirm that I will support the Constitution of the State of Colorado and of the United States of America and the laws of the State of Colorado and of the United States." Hosack, 276 F. Supp. at 878. The district court found the oath to be a straightforward statement of support for our government and not violative of the first amendment. Id. at 878-79.

The oath was subsequently revised to read: "I solemnly (swear) (affirm) that I will uphold the constitution of the United States and the constitution of the State of Colorado, and I will faithfully perform the duties of the position upon which I am about to enter." Ohlson, 304 F. Supp. at 1153 (quoting from Colo. Rev. Stat. §§ 123-17-6 to 123-17-8, as amended). The oath was upheld, having been unsuccessfully attacked on equal protection, vagueness, overbreadth, procedural due process, contract clause, ex post facto, and bill of attainder grounds.

96. The Constitution sets out the oath required of all Presidents of the United States upon assuming office: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1, cl. 7. Moreover, the Constitution provides that all members of Congress, all state legislators, and all executive and judicial officers of the states and United States "shall be bound by Oath or Affirmation to support this Constitution." Id. at art. VI, cl. 3. In addition to these two references to constitutionally required loyalty oaths, there is one restriction on the requirement of oath taking: "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Id.

The Supreme Court has found it unnecessary to decide whether the prohibition on religious test oaths contained in Article VI applies to the states as well as to the federal government. In Torcaso v. Watkins, 367 U.S. 488 (1961), appellant was denied a commission as a notary public because he refused to declare his belief in the existence of God. He challenged his disqualification on the ground that it violated article VI, and the first and fourteenth amendments. Because the Supreme Court held that the religious test requirement unconstitutionally invaded Torcaso's "freedom of belief and religion," id. at 496, the Court found it unnecessary to decide whether the article VI prohibition applied to the states. Id. at 498 n.1.
of minimal loyalty to the Government was worth the price of whatever deprivation of individual freedom of conscience was involved." Thus, in any situation viewed as analogous to the oath taking required by the Constitution, no constitutional problem has been thought to exist.

Two issues, however, have remained: first, how far oath taking can be required beyond the list of public officials included in the Constitution; and second, to what extent the language of an oath can go beyond the support for the Constitution described in the Constitution itself. The implication of Knight is that such oaths can be required of teachers, a group responsible for imparting moral values, and that the state can require both a promise of support and a promise of best professional efforts.

The issues raised in Knight came before the Supreme Court again in 1972 with Cole v. Richardson. In Richardson, the Court addressed the affirmative oath question in a full opinion in upholding a loyalty oath

98. The conclusions that teachers play a special role in imparting values and that the state is therefore justified in holding them to higher standards than other public employees are reinforced by a 1979 Supreme Court decision, Ambach v. Norwick, 441 U.S. 68 (1979), that upheld a state requirement that public school teachers be United States citizens or persons manifesting an intention to become citizens. The Court stated:

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. ... Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values.

Id. at 78-79.
99. 405 U.S. 676 (1972). Only seven members of the Court participated in Richardson. Justices Powell and Rehnquist took no part in the consideration of the case. The Court's decision had been foreshadowed by its 1971 decision in Connell v. Higginbotham, 403 U.S. 207 (1971) (per curiam). In Connell, a Florida teacher who had been dismissed for refusing to sign a loyalty oath challenged her dismissal. In a brief per curiam opinion, the Court upheld only the support portion of the Florida oath which included both a promise of support for the state and federal constitutions and a statement that the oath taker did "not believe in the overthrow of the Government." Id. at 208. The support part of the oath was upheld on the authority of Knight, Hosack, and Ohlson. Justice Marshall, joined by Justices Douglas, Brennan, and Stewart, concurred in the part of the opinion finding the support oath constitutional. In contrast to the support oath, the section of the oath that included a statement of belief was struck down. It violated the dismissed teacher's due process right to a hearing prior to dismissal for failing to subscribe to the oath. Id. at 208-09. Under the Florida procedure, the failure to sign the oath operated as an irrebuttable presumption of belief in the overthrow of the government. Justice Marshall disagreed with this aspect of the per curiam opinion. Citing Barnette, Justice Marshall asserted that the belief section of the oath was violative of the first amendment. Id. at 209-10. Justice Stewart would have first given the Florida courts the opportunity to narrowly construe the belief section of the oath to avoid its constitutional infirmity. Id. at 210; cf. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 161-63 (1971) (holding that a state rule that a lawyer may not be admitted to practice unless the lawyer believes "in the form of the Government of the United States and [is] loyal to [such] Government" is permissible because state authorities interpret this rule "extremely narrow[ly] and [are] fully cognizant of protected constitutional freedoms").
required of most Massachusetts public employees. The text of the oath read as follows:

I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method.

In Richardson, the Court for the first time clearly distinguished between the permissible sort of support oath at issue and oaths that conditioned employment on the relinquishment of rights to political beliefs and associations secured by the first amendment. So long as an oath requiring support is not vague in its meaning and does not ask an individual to attest to an absence of certain past or present political beliefs and associations, the oath can look to the constitutional provisions providing for oaths of office as the basis of its validity. Further, it is not necessary for an oath to employ language identical to that contained in the Constitution. Thus, the Richardson majority viewed the requirement that one "uphold and defend" the Constitution as indistinguishable from the "preserve, protect and defend" language in article II, section 1, clause 8 and the oath "to support this Constitution" in article VI, clause 3.

More controversy surrounded the second part of the oath which required government employees to affirm that they would "oppose the overthrow of the government . . . by force, violence or by any illegal or unconstitutional method." Chief Justice Burger's opinion, joined by Justices White, Blackmun, and Stewart, interpreted this language as not expanding on the support obligations contained in the first part of the oath. Instead, the second part of the oath was seen as merely clarifying "the application of the first clause to a particular issue," specifically the commitment made by persons in positions of public trust "to live by

100. The controversy before the Supreme Court in Richardson had been before the Court on another occasion. In Cole v. Richardson, 397 U.S. 238 (1970), the Court had vacated the judgment of the court below and remanded to the district court to determine whether the controversy had become moot as a result of the elimination of the job previously held by Mrs. Richardson at Boston State Hospital. The district court, on remand, held that the case was not moot because the Boston State Hospital stood ready to rehire Mrs. Richardson once the oath controversy was resolved. The district court therefore reinstated its earlier judgment invalidating the oath and Cole, superintendent of the hospital, again appealed.

101. Id. at 677-78 (quoting MASS. GEN. LAWS ANN. ch. 264, § 14 (West 1970)).

102. Id. at 680-82.

103. Id. at 682.

104. Id. at 683.

105. Id. (quoting MASS. GEN. LAWS ANN. ch. 264, § 14 (West 1970)).

106. Id. at 684.
the constitutional processes of our system." 107 The oath was read as imposing no obligation to take specific action in defense of the government and as depriving no oath taker of any constitutional right. Because there was no first amendment right to overthrow the government by force or other unconstitutional method, "no constitutional right is infringed by an oath to abide by the constitutional system in the future." 108

Although Chief Justice Burger's opinion did not address the issue of the relationship between the oath in Richardson and the pledge in Barnette, a concurring opinion by Justices Stewart and White implicitly considered that question and concluded that the oath did not "impinge on conscience or belief." 109 That casual rejection of the Barnette analogy was disputed by the two dissenting opinions, one by Justice Douglas and the other by Justice Marshall joined by Justice Brennan. Justice Douglas, citing Barnette, expressed a general opposition to loyalty oaths, characterizing them as "tools of tyranny" aimed at "coercing and controlling the minds of men" and therefore "odious to a free people." 110 Justice Marshall wrote at greater length about the evils of such oaths and the relationship between a constitutionally patterned support oath and expanded loyalty oaths.

Unlike Justice Burger, Justice Marshall was not willing to consider the kind of oath at issue in Richardson as "no more than an amenity." 111

107. Id. This aspect of Chief Justice Burger's opinion is consistent with the view expressed by Justice Stewart in Connell v. Higginbotham, 403 U.S. 207, 210 (1971) (Stewart, J., concurring in part and dissenting in part). See supra note 99. The oath at issue in Connell required the taker to swear she did "not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence." 403 U.S. at 209. In Justice Stewart's view, "[i]f the clause embraces the teacher's philosophical or political beliefs" it is constitutionally invalid, id. at 210, however, if "the clause does no more than test whether the first clause of the oath can be taken 'without mental reservation or purpose of evasion' it is constitutionally valid." Id.

108. 405 U.S. at 686. Chief Justice Burger also rejected a vagueness challenge as well as a claim that the state employees who refused to take the oath were entitled to a hearing prior to being discharged from their employment.

109. Id. at 687 (Stewart, J., concurring) (quoting Cole v. Richardson, 397 U.S. 238, 241 (1970) (Harlan, J., concurring)).

110. Id. at 688 (Douglas, J., dissenting) (quoting Wieman v. Updegraff, 344 U.S. 183, 193 (1952) (Black, J., concurring)). In Wieman, the Court reviewed the constitutionality of an Oklahoma loyalty oath required of all state employees. Failure to subscribe to the oath resulted in loss of employment. Although the oath contained a variety of sections, including one requiring the employee to "support and defend the Constitution," 344 U.S. at 184 n.1, the Court's review was limited to the part requiring employees to swear that they were not and had not been members of subversive or Communist-front organizations. The Court viewed the exclusion of persons from public employment on the basis of innocent membership—the provision was not limited to knowing membership—in a subversive organization to be an arbitrary exercise of government authority in violation of the due process clause. 344 U.S. at 191. The Court, therefore, viewed the oath as an unconstitutional condition on government employment. See supra note 88.

111. 344 U.S. at 685. The language used by the Chief Justice is a quotation from Justice Harlan's concurring opinion in the Court's earlier encounter with the Massachusetts oath. Richardson, 397 U.S. at 240 (Harlan, J., concurring). See supra note 100.
Jackson’s Flag Salute Legacy

Instead, Justice Marshall drew a careful line between support oaths required of government employees “as an expression of ‘minimal loyalty to the Government,’”112 and more comprehensive oaths. Minimal oaths, although they intruded on the freedom to think and express ideas, were tolerated as an expression of the idea that public employees would abide by the law in the performance of their duties. More extensive oaths were highly suspect and justified only in an emergency.

Justice Marshall argued that the government had only limited power “to force its citizens to perform symbolic gestures of loyalty,”113 and that these limits existed because of the oath’s potential as “an instrument of thought control and a means of enforcing complete political conformity.”114 Justice Marshall ended his opinion with a quotation from Justice Black’s concurrence in Speiser v. Randall:115

Loyalty oaths . . . tend to stifle all forms of unorthodox or unpopular thinking or expression—the kind of thought and expression which has played such a vital and beneficial role in the history of this Nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be.116

This view of the societal cost exacted by loyalty oaths parallels Justice Jackson’s warning about the detrimental effect of forced patriotic expressions in Barnette.

Although the Richardson dissenters did not discuss at length the relationship between the unconstitutional pledge in Barnette and the oath at issue in Richardson, the source of their concern is clear. The dangers of forced expression are seen in terms of costs to society. In the end, suppression of unorthodox thinking would be destructive to our nation; new ideas and nonconforming individuals need to be allowed to develop unchecked for the betterment of all. An atmosphere of tolerance for thought and speech is an essential aspect of a self-governing free society. Although this theme is apparent in Justice Jackson’s opinion in Barnette,

112. 405 U.S. at 696 (quoting American Communications Ass’n v. Douds, 339 U.S. 382, 415 (1950)).
113. Id. at 697. Justice Marshall followed this comment with a citation to Barnette.
114. 405 U.S. at 698 (quoting Asper, The Long and Unhappy History of Loyalty Testing in Maryland, 13 AM. J. LEGAL Hist. 97, 108 (1969)).
115. 357 U.S. 513 (1958). In Speiser, a California law requiring the signing of an oath to obtain a property tax exemption, which the California Constitution granted to veterans, was challenged. The oath provided as follows: “I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities.” Id. at 515. The Supreme Court characterized this scheme as a penalty imposed on the exercise of free speech rights and held that it violated the due process clause by unfairly placing the burden of proof on applicants for the exemption to show that they had not engaged in criminal advocacy. Id. at 528-29.
116. 405 U.S. at 698 (quoting Speiser, 357 U.S. at 532).
the additional message communicated by Justice Jackson’s opinion in *Douds* was that forced conformity must be avoided not only for the benefit of the community but also for the sake of the affected individual. Thus, while Justice Jackson saw the first amendment as condemning government-compelled affirmations of belief for two complementary reasons, the *Richardson* dissenters focused on only one concern, the good of the nation.

Any comparison of *Barnette* and the oath cases is of course complicated by the constitutional approval of support oaths for government officials. Whenever the issue of the effect of dictating expressions of loyalty is raised in these cases, however, the focus of the Court’s discussion is the same—the tendency of such oaths to stifle unpopular thoughts and ideas. Justices who find such oaths constitutionally inoffensive view the impact on the individuals forced to take such oaths as a trivial and at most momentary annoyance. In contrast, Justices who fear such oaths argue that they portend an ominous direction, one choking the desire to think new thoughts and express new ideas.

Thus far in the compelled expression cases, the beginnings of an analytic framework can be deciphered. There is an initial focus on the tendency of the compulsion to stifle intellectual individualism. Only if such a tendency is found does the Court go on to consider the governmental purpose behind the compulsion. If the purpose is to force loyalty, it is suspect. If the purpose is one of promoting some other legitimate government interest, a closer case is presented.

IV. *Wooley v. Maynard*

No expansion of the *Barnette* doctrine occurred through the loyalty oath cases of the late sixties and early seventies. The case remained sui generis, and its central issue did not arise again in any completely analogous situation until 1977, when the Supreme Court decided *Wooley v.*

117. One case in the period after *Richardson*, although distinguishable, deserves mention. Miami Herald Publishing Co. v. Torrillo, 418 U.S. 241 (1974), involved a challenge to Florida’s right of reply statute granting candidates for public office a right to reply to negative comments about the candidate’s qualifications appearing in a newspaper. The paper was required to print the reply in the same type and just as conspicuously as the original critical commentary. The Miami Herald argued that the statute was an impermissible regulation of newspaper content. The statute’s defenders replied that the statute’s guarantee of a right of access was consistent with first amendment principles. Although much of the opinion is addressed to the arguments made by access advocates that the monopoly position of many newspapers has a negative effect on the marketplace of ideas, the Court did describe the statute as a “compulsion exerted by government on a newspaper to print that which it would not otherwise print.” *Id.* at 256. The Court expressed the fear that the law would cause newspapers to refrain from publishing critical comments about candidates to avoid the reply requirement. Although the Court did not discuss the relationship between *Torrillo* and *Barnette*, it is clear that one exists. Unlike *Barnette*, however, the compulsion is triggered by a particu-
Maynard. In Wooley, the Court directly confronted the Barnette precedent in a fact pattern parallel even to the extent that the appellees were Jehovah’s Witnesses raising a claim of religious liberty under the Constitution.

Jehovah’s Witnesses George and Maxine Maynard challenged New Hampshire’s requirement that all license plates for noncommercial vehicles bear the state motto “Live Free or Die” as offensive to their religious beliefs. The Maynards also disagreed with the motto as a statement of political conviction, believing instead that “life is more precious than freedom.” The Maynards covered the state motto with tape. Mr. Maynard was found guilty on three separate occasions of violating the New Hampshire misdemeanor law against obscuring any part of a license plate. The Supreme Court viewed the case as raising “the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.”

At the outset of his opinion for the Court, Chief Justice Burger addressed the relationship between the first amendment right to refrain from speaking and the free speech guarantee. The two rights were seen as complementary; both were necessary to assure that public debate remained vigorous. This proposition was followed by a discussion of Barnette. Barnette was viewed as involving a more drastic infringement of rights than the more passive behavior at issue in Wooley, but both cases were found to involve state invasions of “the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” The thread common to the two cases was that both concerned “a state measure which forces an individual action on the part of the press and can be avoided by refraining from publishing critical comments. This chilling effect on the willingness of the paper to print critical commentary clearly contributed to the law’s invalidity. Professor Tribe has described Tornillo as a situation involving compelled speech that “comes too close to the power to censor speech.” L. Tribe, supra note 33, § 12-22, at 697.

120. 430 U.S. at 707 n.2 (quoting the Affidavit of George Maynard).
122. 430 U.S. at 712. In contrast, the district court viewed the case as raising a claim based on symbolic expression. 406 F. Supp. 1381, 1386-87 (D.N.H. 1976). The court saw Mr. Maynard’s behavior in covering the motto as symbolic expression because it was done to symbolize his objection to the motto and was likely to be understood in those terms. Id. at 1387. The district court held that the state lacked an adequate justification for interfering with free speech rights. Id. at 1388. The Supreme Court found it unnecessary to rule on this issue. 430 U.S. at 713.
ual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."

The Court then asked whether the state had a constitutionally sufficient justification for its actions. Two interests had been advanced by the state. First, the state claimed the law assisted in ready identification of passenger vehicles because the motto was said to aid police in determining whether a vehicle was carrying proper plates. Although the Court accepted the importance of this state concern, it found that there were less drastic means available to achieve this purpose.

Second, the state asserted that the license plate "promotes appreciation of history, individualism and state pride." The Court's reaction to this purported justification is of greater interest. Labelling the interest as "not ideologically neutral," the Court indicated this legitimate interest could be pursued in a variety of ways. Disseminating the state's chosen ideology by forcing individuals to become "an instrument for fostering public adherence," however, was not a legitimate choice among available means.

Wooley offers a basis for determining what elements are now viewed as essential to the claim of freedom from coerced expression raised in both Barnette and Wooley. In the two cases, there is a distinction based on what is being coerced. The coerced speech in Barnette was pure speech in the form of the pledge of allegiance or, at the least, symbolic expression in the form of a salute: students were compelled to recite the pledge and salute the flag. In both written and recited loyalty oath cases, moreover, there was also a forced act connoting approval of the words of the pledge or oath: the oath takers had to recite in words or affix their signatures to a written declaration. This was not the case in Wooley. A license plate attached to a person's automobile is not the same kind of coerced affirmation—the Maynards were forced to display the state's message, not to identify it as their own. As the Court so graphically put it, appellee's car was used as "a 'mobile billboard' for the State's ideological message."

This distinction between advertising the state's message and asserting it as one's own, however, was not viewed as critical. The Maynards'

124. Id. at 715.
125. Id. at 716.
126. Id. at 717.
127. Id. at 715.
128. Justice Jackson stressed a similar point in Barnette. In Justice Jackson's view, promoting patriotism, although a legitimate state interest, could not be furthered by coercing the recitation of the pledge. 319 U.S. at 640-41.
129. 430 U.S. at 715.
Jackson's Flag Salute Legacy

objections were based on a serious religious and political disagreement with the content of the message and a profound objection to displaying it, a resentment not lessened by the fact that they were not forced to recite the message by words or affirm it by deeds. In light of the depth of their objection, the distinction between affirmative and passive acts was not seen by the Court as a central issue.

The Court, however, viewed as important two factual similarities between the cases. The first was the repetitious character of the forced expression: in *Barnette*, the pledge was recited each school day; in *Wooley*, the message was displayed each time the Maynards drove their car, part of their daily routine. Although the Court did not say so explicitly, there is a distinction between a daily activity and an oath recited on a single occasion, as in *Richardson*, or signing an oath form only once. This distinction does have significance in light of the first amendment values protected by the *Barnette* decision. *Barnette* addresses the chilling of individuality and the diminishing of the desire to engage in original thought; in that respect, a single act of compelled expression can be more easily shrugged off and is less likely to have a dampening effect upon the human spirit. In contrast, a repeated act is more likely, in a manner akin to brainwashing, to suppress individual initiative and to bring individual thought into line with the state's chosen ideology.

A second similarity between the cases is that in both *Barnette* and *Wooley* the state's purpose was to promote a chosen ideology. Deliberate state encouragement of a particular viewpoint is not analogous to the fact that another statute—with a nonideological purpose—may support some ideology as an incidental outgrowth. To distinguish other cases, the *Wooley* Court contrasted the license plate with the use of a state seal to

130. A similar distinction, based on the government's purpose, between a statute prompted by a desire to suppress expression and one causing such a result only as an incidental outgrowth of some other governmental purpose has been viewed as critical in a number of Supreme Court decisions beginning with United States v. O'Brien, 391 U.S. 367 (1968). In that case, the Court upheld a conviction for burning a draft card and found a symbolic speech defense insufficient grounds for overturning the conviction. The Court viewed the question of whether "the governmental interest is unrelated to the suppression of free expression," id. at 377, as critical to its analysis. The government's interest was identified as a concern for the efficiency of the Selective Service System rather than a desire to prevent draft card burning, id. at 382; therefore, the criterion was satisfied. The *O'Brien* test is explored thoroughly in Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). More recently, the Court has shown a renewed interest in the distinction between statutes justified by a government interest in suppressing expression and those justified by legitimate government interests "unrelated to the suppression of ideas." See City Council v. Taxpayers for Vincent, 466 U.S. 789, 804-05 (1984) (quoting United States v. O'Brien, 391 U.S. at 377); see also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) ("[D]ifferential treatment . . . suggests that the goal of regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.").

851
authenticate documents. A seal, although it may contain a state motto, is not stamped onto documents for the purpose of disseminating the message contained in the motto; instead, the purpose is the ideologically neutral one of authentication, and the dissemination of any ideological message is only an incidental by-product. State efforts that infringe on individual interests and purposefully disseminate favored ideologies, however, must be viewed less benignly by the Court. Because such efforts can be seen as a form of reverse viewpoint discrimination, they must be analyzed with greater attention to the relationship between ends and means. From the tone of Wooley and Barnette, whether the use of coerced expression is ever an appropriate means to disseminate a state-supported idea is unclear. Although the government may be free to

131. 430 U.S. at 715 n.11.

132. In the typical case of government viewpoint-discrimination, government efforts are directed at censoring speech that promotes a disfavored idea. Access to a public forum may be permitted for some speech, but not for speech the government views as dangerous or evil. See, e.g., Widmar v. Vincent, 454 U.S. 263, 281 (1981) (Stevens, J., concurring) (stating that a university cannot discriminate against religious speech when school facilities are available to discuss anticlerical ideas); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (holding that the musical “Hair” could not be arbitrarily excluded from a municipal theater on the basis of its objectionable content). In some of the content discrimination cases, however, the government has chosen to grant access to speech within a particular subject-matter category and to deny it for others. Government efforts to grant a preferred status to certain private speakers and deprive others of a method of communication have often failed. See, e.g., Carey v. Brown, 447 U.S. 455, 459-63 (1980) (concluding that a state cannot discriminate between ideas expressed by labor picketers over those communicated by nonlabor picketers); Police Dep’t v. Mosley, 408 U.S. 92, 95-96 (1972) (holding that to permit labor picketing and not other forms of picketing is impermissible content discrimination). But cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (holding that because of its special nonforum status, school mail system could be made available to union that served as exclusive bargaining representative and not to the rival union). In a situation like Wooley or Barnette, the government forces an individual to disseminate a government-favored viewpoint. Such efforts can be considered a form of forbidden reverse viewpoint discrimination designed to promote, not censor, a particular idea, and can be viewed as analytically different from government promotion of a favored idea by government speech. See infra note 134. The difference lies in the fact that in cases in which the government coerces individuals to assist in a government publicity campaign it is infringing directly on the constitutional rights of such persons. The government, therefore, bears a heavy burden of justification to legitimate its actions.

Barnette involved a far more offensive version of government use of the citizenry to spread a government-supported message than did Wooley. In Barnette, the government's tactics obscured the source of the message. Although the government provided the occasion for the expression of patriotic sentiments by mandating the flag salute, the participants appeared to genuinely support those sentiments. By contrast, in Wooley the license plate bearing the state motto was supplied by the state and nothing about its appearance on the vehicle suggested that the driver shared the view expressed in the motto. Thus, the degree of complicity and duplicity in the government's scheme was far less than in Barnette.

133. See Wooley, 430 U.S. at 717 (“[W]here the State's interest is to disseminate an ideology, . . . such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.”); Barnette, 319 U.S. at 642 (“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.”); see also supra note 28 (discussing the extent to which Justice Jackson's opinion in Barnette may reveal an absolute prohibition of coerced expression of government supported ideas).
promote some ideas at the expense of others,\textsuperscript{134} it may not be able to use the device of forced affirmation or support as a legitimate means to that end. Such means may be per se illegitimate or may be inappropriate because of the existence of less restrictive alternatives.

As the \textit{Wooley} majority read \textit{Barnette},\textsuperscript{135} the critical element was the individual's animus at being forced to participate in the dissemination of a state-sponsored message. The \textit{form} of individual participation is not critical: being forced to express support for that message and being forced to disseminate it are both equally condemned. What does seem to matter is the \textit{quantity} of forced participation. A key factor appears to be whether the state-composed message involves the individual only once or as an ongoing demand.\textsuperscript{136}

These factors must be examined to judge their consistency with the focus of the Court's concern in \textit{Barnette}. The \textit{Barnette} Court was principally concerned with forced conformity because of the cost it exacted from the individual and from a society that depends on individual participation in its government processes. To the extent that the state habitually requires an act affirming belief in a particular idea, that fear is well founded. The process of creating a universal voice sounding a single note

\textsuperscript{134} Government efforts to promote particular ideas must be considered in the context of the subject of government speech. Questions have been raised as to whether constitutional limits should be placed on the government's ability to promote favored ideas by participating as a speaker in the marketplace of ideas. Scholarly commentary considering this question includes M. Yudof, \textit{When Government Speaks: Politics, Law, and Government Expression in America} (1983); Kamenshine, \textit{The First Amendment's Implied Establishment Clause}, 67 Calif. L. Rev. 1104 (1979); Schauer, \textit{Is Government Speech a Problem?}, 35 Stan. L. Rev. 373 (1983); Shiffrin, \textit{Government Speech}, 27 UCLA L. Rev. 565 (1980).

\textsuperscript{135} Justice Rehnquist's dissenting opinion disagreed with the majority's view that \textit{Wooley} was closely analogous to \textit{Barnette}. Distinguishing \textit{Barnette}, Justice Rehnquist noted that the State of New Hampshire had not compelled the Maynards to speak or engage in any act that was akin to speech in its communicative effect. Justice Rehnquist argued that the \textit{Barnette} principle depended on the coercion of an affirmative belief. He argued, "[T]he State must place the citizen in the position of either apparently or actually 'asserting as true' the message." 430 U.S. at 721. The Maynards were not placed in any such position because placing the license plate on their car did not imply that they endorsed the state motto or agreed with the sentiment it expressed. \textit{Id.} at 721-22. Justice Rehnquist's view on this point is supported by Hoskin v. State, 112 N.H. 332, 336, 295 A.2d 454, 457 (1972), an earlier decision by the New Hampshire Supreme Court considering several constitutional challenges raised by two persons who had been convicted of obliterating the state motto appearing on their automobile license plates. The court rejected all the claims raised by the defendants, including their claim of deprivation of first amendment rights. \textit{Id.}

Justice Rehnquist also stated there was nothing to prevent the Maynards from disclaiming the idea communicated by the state motto through a bumper sticker placed alongside their license plate. 430 U.S. at 722. Justice Rehnquist apparently did not consider the dilemma his solution would create: the Maynards would be able to counter state-coerced expression only by disclosing their conflicting beliefs. Indirectly, then, the competing message remedy would involve compelled disclosure. \textit{See infra} notes 196, 199-201 and accompanying text.

\textsuperscript{136} In both \textit{Barnette} and \textit{Wooley}, the challengers could point to daily repetitions of the offensive message and the fact that the message reached a wide audience and had a visible presence in the marketplace of ideas at least in part because of compelled expression. \textit{See supra} text preceding note 130.
may be effective—the individual is impressed with the cost of nonconformity, including the cost of being the lone dissenting voice, and the price of nonconformity may seem too high for an individual to express a dissenting opinion. Forced repetition of an idea may also make that idea seem more acceptable as each repeated act of affirmation makes the state-sponsored idea seem less and less objectionable.

Being forced to advertise the state's message, in contrast, may be more easily shrugged off. Once attached to the car, the license plate can be largely ignored by a driver not forced to perform any act of obeisance to it. The state's message may be an irritant to individuals and they may deeply resent the state's imposing on them the task of aiding in its dissemination campaign, but an individual is not forced to choose between the act of reciting the motto and imprisonment.

To the extent that Wooley is a response to first amendment concerns articulated in Barnette, it is not a response to the fear that forced conformity poses a threat to our democratic system by weakening the incentive to introduce new, nonconforming ideas. Instead, its appeal is to the vindication of individual personality. The Maynards felt their personal integrity was violated by having to display the state motto; its presence was an insult to deeply held religious, moral, and political beliefs. Any association between them and the motto on their license plate deeply affected their sense of personal well-being, because it affronted both their inner selves and the selves they wished to present to the world. Although the state's message did not create any pressure to conform,
displaying that message made them feel like traitors to their belief system. In all these ways it infringed upon their freedom from compelled association with an idea with which they disagreed. To the extent that the first amendment as reflected in Barnette speaks to such an interest, Wooley is consistent with it. The major thrust of Barnette, however, was more concerned with the instrumental values served by the free speech guarantee and less with its identity-reinforcing side. To that extent, the values at stake in Wooley were different ones.

Thus, the Wooley Court's concerns appear to be two-fold. First, the Court limited the tools available to government for the dissemination of government-favored ideas. The government may advertise, promote, and fund certain ideas, but cannot force unwilling citizens to participate in its advertising campaign. This theme was, of course, apparent in Barnette as well; Justice Jackson's opinion recognized the need to check the power of government so as to curb excesses that could lead us down the road to a totalitarian state. Second, Wooley limited infringement on the freedom of individuals to associate only with ideas of their own choosing. In this aspect of the opinion, the Wooley Court went a step beyond Justice Jackson's primary concern in Barnette, supplementing a concern for individual freedom of mind as a precondition for democracy with the concept of protecting individual personality as an end in itself.

V. Abood v. Detroit Board of Education

The Court's next confrontation with the Barnette principle came in a distinctly different context. Only one month after Wooley, the Court decided Abood v. Detroit Board of Education, a challenge to an aspect of Michigan law authorizing union representation for public sector employees. Michigan permitted "agency-shop arrangements"—agreements between a union and employer whereby nonunion employees represented by the union were required to pay a service fee to the union. The service fee equalled what union members paid as union dues.

In Abood, an agency-shop arrangement was part of the collective bargaining agreement between the Detroit Federation of Teachers and the Detroit Board of Education. Two nonunion teachers filed lawsuits charging that the service fee arrangement violated the constitutional

their home, but instead wanted to be free of government intrusion in the public activity of driving their car.

139. See 319 U.S. at 642.
140. Id. at 640-41.
142. The distinctions between agency-shop and union-shop arrangements are discussed infra note 151.
rights of teachers "who object to public sector unions as such or to various union activities financed by the compulsory service fees."\footnote{431 U.S. at 211. The two lawsuits, both filed in state court, were identical except for the fact that one, Warzak v. Board of Educ., 73 LAB. REL. REP. (BNA) 2237 (Jan. 19, 1970), was a class action and the other, filed by D. Louis Abood and other named teachers, was not. The two cases were consolidated in the trial court.}

The Court viewed the case as presenting three not altogether separable issues. One issue was the constitutionality of the agency shop, which forced nonunion employees to support the union despite the decision of those employees not to join the union. The challengers claimed this requirement violated their rights to freedom of association not in the traditional sense of interfering with a desired association but in the sense of compelling an undesired association.\footnote{Abood, 431 U.S. at 213.} In this respect, \textit{Abood} was far from the first time the Court had been confronted with such a claim.\footnote{For a discussion of these earlier precedents, see infra text accompanying notes 150-58.}

The second and third issues in \textit{Abood} concerned the service fee requirement and the purposes for which the service fee money was spent. Some of the funds supported the union's collective bargaining activities, and the challengers objected to being forced to finance such activities against their will. In addition, the challengers alleged that service fee money was also used to promote political views, to support political candidates, and to advance other ideological activities.\footnote{431 U.S. at 232.} The challengers claimed that they did not approve of these political activities and would not willingly support them.

Both challenges to the use of service fee money raised a free speech issue. In effect, nonunion employees were compelled to support activities, ideas, and causes against their will. The form of that support was financial, rather than a verbal commitment as in \textit{Barnette} or providing advertising space as in \textit{Wooley}. The question before the Court was the extent to which the right to freedom of expression as defined in \textit{Barnette} and \textit{Wooley} was implicated by forced financing.

All three issues in \textit{Abood} required reference to first amendment constraints on government-compelled sponsorship of ideas. Although the connection between a compelled affirmation such as a pledge of allegiance and compelled funding is obvious, a somewhat more complex relationship exists between compelled affirmation and compelled association. The roots of that relationship are found in the intertwining of the freedom of association and the freedom of expression.

The Supreme Court has long recognized that, although freedom of association is not named in the first amendment, it is a correlative right
inextricably linked to the specifically enumerated first amendment freedoms.\textsuperscript{147} Freedom of association must be protected to enable persons with shared beliefs to join together, free from government interference, to work toward a more general acceptance of their ideas. Collective activity, in many cases, may be the most effective method for spreading new ideas. Protecting only the right of individuals to engage in activities fostered by the first amendment—and not the right to associate with others to engage in those activities—would greatly weaken the ability of diverse and divergent viewpoints to be heard in the marketplace of ideas. For these reasons, the Supreme Court has protected freedom of association in a variety of contexts.\textsuperscript{148}

The argument of the nonunion teachers in \textit{Abood} was that just as there is a freedom to associate to pursue activities protected by the first amendment, there is also a freedom not to associate. If one is forced to associate with a group against one's will, the impact on the individual is akin to the impact produced by the forced pledge in \textit{Barnette}. In an agency-shop situation, through the mechanism of selecting an exclusive bargaining representative, nonunion employees are compelled to lend their apparent support to and be represented by a group whose philosophy is at odds with the individual employee's own values. Moreover, by requiring nonunion employees to pay a service fee, those employees are forced to help finance the union's collective bargaining activities. The forced funding therefore operates as an additional form of compelled association, tying the nominally nonunion employees into an even closer involuntary relationship with the union.\textsuperscript{149}

Responding to the arguments advanced by the nonunion teachers,

\textsuperscript{147} NAACP v. Alabama \textit{ex rel.} Patterson, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech."); see also Emerson, \textit{Freedom of Association and Freedom of Expression}, 74 \textsc{Yale} L.J. 1 (1964) (discussing the difficulties with an independent constitutional doctrine of "freedom of association"); Fellman, \textit{Constitutional Rights of Association}, 1961 \textsc{Sup. Ct. Rev.} 74 (analyzing freedom of association in the context of decisions of the 1960 Supreme Court Term); Raggi, \textit{An Independent Right to Freedom of Association}, 12 \textsc{Harv. C.R.-C.L. L. Rev.} 1 (1977) (considering the potential of an independent constitutional doctrine of freedom of association).

\textsuperscript{148} The Court has struck down efforts to penalize individuals for membership in a disfavored group, Elfbrandt v. Russell, 384 U.S. 11 (1966); Schwar v. Board of Bar Examiners, 353 U.S. 232 (1957), and has prevented compelled disclosure of the names of association members when that disclosure was likely to deter membership in the group, Bates v. City of Little Rock, 361 U.S. 516 (1960). The classic rationale for prohibiting compelled disclosure of association membership lists was first set out in NAACP v. Alabama \textit{ex rel.} Patterson, 357 U.S. 449 (1958). In \textit{Patterson}, the Court observed, "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." \textit{Id.} at 462.

\textsuperscript{149} \textit{Abood}, 431 U.S. at 222 ("To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so as he sees fit.").
the Court linked two aspects of the Michigan agency-shop arrangement. Compelling nonunion teachers to accept the union as their only collective bargaining agent and requiring them to pay a service charge as their fair share of the cost of collective bargaining activities were viewed by the Court as raising a single constitutional issue. The challenge to the use of service fees for non-collective-bargaining, ideological activities engaged in by the union was treated as a separate constitutional issue.

In disposing of the first issue, that of the constitutionality of the exclusive representation aspect of the agency shop and the required fee for collective bargaining activities, the Court was able to point to prior decisions approving of similar arrangements. As early as 1956, in Railway Employees Department v. Hanson, the Supreme Court upheld the union-shop provision of the Railway Labor Act against a challenge from nonunion railroad employees. The Hanson claimants alleged that their freedom of thought and association protected by the first amendment was violated by compelled association with a group whose political and ideological views they did not share. The Hanson Court responded by pointing to the absence of any evidence in the record to show that compelled membership would "forc[e] ideological conformity and lead to an impairment of free speech rights. In the absence of such evidence, the facial validity of the union—shop provision was upheld.

Five years after Hanson, the Court once again had an opportunity to rule on the compelled-association question in Lathrop v. Donahue, a

151. 45 U.S.C. § 152 (1952). The union-shop arrangement in Hanson differed somewhat from the agency-shop provision in Abood. Under a union-shop agreement, all employees are required to become members of the union as a condition of employment, and as union members, they must pay all union dues and fees. In contrast, under an agency-shop arrangement, employees need not become formal members of the union. Instead, they may opt to pay an agency fee to the union, the amount of which is equivalent to union dues. In the Supreme Court's view, the union-shop arrangement permitted under the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1982), and the Railway Labor Act, Act of Jan. 10, 1951, ch. 1220, § 152, Eleventh, 64 Stat. 1238, 1238-39 (codified at 45 U.S.C. § 152, Eleventh (1982)), is the "practical equivalent" of the agency shop, Abood, 431 U.S. at 217 n.10 (quoting NLRB v. General Motors Corp., 373 U.S. 734, 743 (1963)), because membership in the union cannot be conditioned on anything other than the payment of dues and fees. NLRB v. General Motors Corp., 373 U.S. at 742 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17, 40-42 (1954). Thus, union membership amounts to nothing more than the payment of a sum of money, the very thing required under the agency-shop arrangement. The Supreme Court has never fully resolved the question of whether this "technical distinction" may have constitutional significance in some contexts. General Motors, 373 U.S. at 744,
152. 351 U.S. at 236.
153. Id. at 238.
154. 367 U.S. 820 (1961). International Ass'n of Machinists v. Street, 367 U.S. 740 (1961), decided the same day as Lathrop, provided the Court with a similar opportunity. In Street, the Court considered a further challenge to the Railway Labor Act's union-shop provisions. 45 U.S.C. § 152 (1952). Unlike the challengers in Hanson, the appellees in Street argued that a significant part of the union dues was used by the union to contribute to political campaigns and promote political causes with which they disagreed and that this use violated first amendment rights. The Supreme
Jackson's Flag Salute Legacy

challenge to Wisconsin's integrated bar system. Under Wisconsin law, an attorney had to be a dues-paying member of the State Bar of Wisconsin to practice law. Membership dues funded various activities including investigating complaints of lawyer misconduct, promoting continuing legal education to increase lawyer competency, creating study groups to evaluate the state's judicial system and the quality of legal education, and engaging in legislative and political lobbying activities. The Wisconsin system was challenged by an attorney who argued that he was being compelled to support an organization that engaged in political and propaganda activities that he opposed in violation of his right to freedom of association. The compelled support was in the form of fifteen dollars in annual dues.

In evaluating the appellant's constitutional objection, the Court looked first at the purposes the state intended to further through its integrated bar system—promoting "high standards of practice and the economical and speedy enforcement of legal rights." The Court held that, in order to improve the quality of legal services, the state was permitted to require that the costs of this effort be borne by the state's lawyers and that the state's means were sufficiently tailored to the achievement of the desired ends.

In light of the Hanson and Lathrop holdings, the Abood Court could

Court found it unnecessary to reach the constitutional question. As a matter of statutory construction, the Court ruled that the Act did not vest the union with absolute discretion in the use of an employee's dues. Under the Act, unions were not free to use compelled membership fees to promote political activities opposed by the employee contributing that money. Professor Wellington has described the Supreme Court's decision in Street as "a slick but shallow performance in the delicate art of avoiding constitutional questions through statutory interpretation." Wellington, Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues, 1961 Sup. Ct. Rev. 49, 73.

156. Id. at 833 (quoting In re Integration of the Bar, 273 Wis. 281, 283, 77 N.W.2d 602, 603 (1956)).
157. Id. at 843. The Court's conclusion that the burden imposed on the state's lawyers was reasonable in light of the state's purposes was supported by reference to its earlier decision in Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956). As in Hanson, the Court found no interference with freedom of association "in light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues." 367 U.S. at 843.
158. 367 U.S. at 843. The issue of whether appellant's money could be used, over his objection, to further the political agenda of the State Bar was reached on the merits by only five members of the Court and those members were divided three-to-two. Justice Harlan, in a concurring opinion joined by Justice Frankfurter, concluded that all political uses of the dues money were permissible. In Justice Harlan's view this result was justified for a number of reasons. First, in opting for an integrated bar, Wisconsin was not guilty of any improper "'establishment' of political beliefs" because the political positions likely to be taken by the Integrated Bar were far from predictable. Id. at 853. Second, requiring financial support for views one disagrees with is not likely to have a "substantial limiting effect on one's right to speak and be heard" expressing a differing opinion. Id. at 856. Finally, Justice Harlan distinguished Barnette because the contribution of money was a much less "concrete and intimate" expression of belief in a cause than is recitation of the pledge of allegiance, id. at 858, and because the government's purpose was not to promote a particular viewpoint. Id. at
easily approve the legitimacy of the agency shop itself\(^{159}\) and the requirement that nonunion employees support the union's collective bargaining activities.\(^{160}\) The problem presented by the use of dues money for other purposes was more troublesome. All past efforts to present this issue to the Court had failed.\(^{161}\) This time, however, the Court found the issue

858-59. Justice Whittaker, concurring separately, also appeared willing to uphold all uses of the fee against a constitutional challenge. \textit{Id.} at 865.

In contrast, in separate dissenting opinions, Justices Black and Douglas viewed the exaction of money to support candidates and causes one finds objectionable a clear violation of the first amendment. Justice Black believed the interference with an individual lawyer's ability to think and speak freely outweighed the state's interest. \textit{Id.} at 874. Justice Douglas carefully distinguished the Integrated Bar from the labor union. Although freedom of association might need to be compromised in the interest of labor peace, forced association of members of a profession was not necessary to further any equally compelling purpose. Thus, Justice Douglas viewed the upholding of the union shop in \textit{Hanson} as providing no basis for upholding the Integrated Bar arrangement. \textit{Id.} at 884.

159. The Court described the benefits of a system of exclusive representation:

The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

431 U.S. at 220-21. In addition, the Court focused on the necessity of such a system for public-sector employees such as teachers:

The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid. \textit{Id.} at 224. This conclusion was reached in large part on the authority of Railway Employees' Dep't. v. Hanson, 351 U.S. 225 (1956), and International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). The appellants in \textit{Abood} attempted to distinguish those cases on the ground that they involved private-sector employees, unlike the public school teachers in \textit{Abood}, but the Court found that distinction unpersuasive. 431 U.S. at 229. The Court recognized that significant differences exist between public-sector and private-sector collective bargaining, but did not believe those differences granted public employees greater first amendment rights than their private sector counterparts. \textit{Id.} at 232.

160. The Court noted that, under the exclusive representation system, the union is charged with the duty of representing all employees, including nonmembers: it must negotiate and administer a collective bargaining agreement and handle grievances raised by employees, all of which involve the expenditure of time and money. The agency fee fairly allocates costs of the union's work to those who benefit from it. The only alternative would be for nonunion employees to be "free riders," noncontributing members who would enjoy the same benefits as those that paid dues. 431 U.S. at 222. The need to prevent free riders is not the only explanation that has been offered for why a system of compulsory membership or compulsory dues is necessary. It has also been argued that compulsory unionism is essential in order to create large, national labor unions. See M. Olson, \textit{The Logic of Collective Action} 87 (rev. ed. 1971).

Although the agency-shop arrangement necessarily interfered with the right of nonunion employees to associate, the Court concluded that such an interference was justified by the important benefits to the structure of labor relations in the public sector produced by the arrangement. \textit{See supra} note 159.

161. The issue of the constitutionality of the use of money from mandatory fees for political causes over the objections of some contributors had been raised previously. \textit{See Lathrop v. Donahue}, 367 U.S. 820 (1961); \textit{International Ass'n of Machinists v. Street}, 367 U.S. 740 (1961); \textit{Railway Employees' Dep't. v. Hanson}, 351 U.S. 225 (1956). In both \textit{Hanson} and \textit{Street}, the issue had not been viewed as ripe for decision. In \textit{Lathrop}, the issue had been addressed by five members of the Court but no majority had agreed on a resolution. \textit{See supra} note 158.
ripe for decision.

As a starting point in its analysis, the Court confronted the relationship between free speech and making financial contributions to support chosen views. In *Buckley v. Valeo* the Court had recognized that contributions in support of political candidates were expressions of views by the contributors. As expressions of political opinions, these activities merited first amendment protection. The *Abood* Court reasoned that, because contributing money for the dissemination of a political idea promoted speech, requiring a contribution used to promote an idea opposed by the contributor was compelled support for an idea.

This connection between the compelled service fee and compelled expression clearly implicated the teaching of *Barnette* and led the Court to conclude that a nonunion teacher could not be required to contribute funds to support "an ideological cause he may oppose as a condition of holding a job as a public school teacher." Although the union could

---


163. The Court in *Buckley* recognized that contributions to political candidates were a symbolic statement of support, but upheld the constitutionality of ceilings on contributions imposed by the Federal Election Act of 1971, as amended in 1974. See Federal Election Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (amended 1974) (codified as amended at 2 U.S.C. §§ 431-56 (1982 & Supp. III 1985)). This result was justified because "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." 424 U.S. at 21. The Court's willingness to equate speech and the expenditure of money as a statement of support for a candidate has been criticized. See *Wright, Politics and the Constitution: Is Money Speech?, 85 Yale L.J. 1001 (1976).*

164. 431 U.S. at 234-35.

165. *Id.* at 235. The Court's conclusion in *Abood* that compelled funding of political causes is constitutionally impermissible has spawned a series of lawsuits challenging other forms of compelled fee arrangements. Mandatory student fees exacted by state colleges and universities are a primary focus of this litigation. In *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983), university students who disagreed with views expressed in the student newspaper challenged the use of mandatory student fee money to fund the paper. Despite the students' reliance on *Abood*, the court rejected their claim based on a balancing of interests. In weighing the competing claims, the court viewed the students' interests as minimal. By contrast, the university's interest in funding the newspaper was important because the newspaper played a vital role in accomplishing the educational mission of the university by providing a forum for the expression of students' ideas.

In *Gaida v. Blaustein*, 772 F.2d 1061 (3d Cir. 1985), the court offered a different analysis. Students successfully challenged the exaction of a mandatory refundable fee to support the operation of the New Jersey Public Interest Research Group (PIRG), an independent political organization. Their argument, based on *Abood*, was that they could not be compelled, as a condition of attending the university, to contribute to a political cause with which they disagreed. *Id.* at 1063. The university argued that PIRG had made a contribution to the education of the students and that the educational value of the organization justified university funding through a student fee. *Id.* at 1067. In its opinion striking down the mandatory fee, the court found the university had failed to demonstrate any compelling state interest to justify its funding arrangement. *Id.* at 1068. The court was careful to distinguish cases involving objections to expenditures to support campus organizations that were funded by a general activities fee. *Id.* at 1064. The critical factor in *Gaida* was that PIRG was an outside political organization operating independently of the university. On the difficulties of drawing an analogy between union agency fees and mandatory student fees, see Comment, "Fee Speech": First Amendment Limitations on Student Fee Expenditures, 20 Cal. W.L. Rev. 279, 292-95 (1984); Note, The Constitutionality of Student Fees for Political Student Groups in the Campus Public Forum: *Gaida v. Blaustein* and the Right to Associate, 15 Rutgers L.J. 135, 164-67 (1983).
spend funds on political activities not related to its collective bargaining obligations, employees objecting to the advancing of those political ideas could not be forced to contribute money toward their advancement. Realizing that drawing a line between the union's collective bargaining activities and other political activities would be difficult, the Court nevertheless left that issue to a later day.\textsuperscript{166}

The Court's separate treatment of union activities related to collective bargaining and other ideological activities was severely criticized in Justice Powell's concurring opinion.\textsuperscript{167} Justice Powell concluded that compelled union dues for public employees infringed first amendment interests no matter what use of the funds was made by the union.\textsuperscript{168} "The ultimate objective of a union in the public sector," Justice Powell noted, "like that of a political party, is to influence public decisionmaking in accordance with the views and perceived interests of its membership."\textsuperscript{169} For Justice Powell, compelling ideologically opposed teachers "to affiliate with the union by contributing to it infringes their First Amendment rights to the same degree as compelling them to contribute to a political party."\textsuperscript{170} This was just as true of compelled support for

\textsuperscript{166}. \textit{Abood}, 431 U.S. at 236. Also left for another day was the final resolution of the remedial issue. The Court had no doubts about the goal to be achieved in designing a remedy: "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." \textit{Id.} at 237. However, the Court postponed consideration of the achievement of that goal by court decree until the parties had exhausted an internal union remedy permitting an employee to protest the use of fee money for political causes at the beginning of each school year and to receive a refund of that part of the employee's service fee used for the protested purpose. \textit{Id.} at 240 n.41. The constitutional sufficiency of this union procedure was not ripe for review. \textit{Id.} at 242 n.45.

\textsuperscript{167}. Justice Powell's first disagreement with the majority reasoning stemmed from the opinion's off-handed conclusion that clear precedent existed for upholding the agency-shop arrangement as applied to public-sector employees. As Justice Powell read the case law, the Court had found only that statutory authorization of union-shop agreements voluntarily entered into by private employers did not violate the first amendment. \textit{Id.} at 250. That case law did not comment on the very different status of public employees and whether government employees could be compelled by their government employer to pay union dues as a condition of employment. In Justice Powell's view, "the government may authorize private parties to enter into voluntary agreements whose terms it could not adopt as its own." \textit{Id.}

\textsuperscript{168}. \textit{Id.} at 255.
\textsuperscript{169}. \textit{Id.} at 256.
\textsuperscript{170}. \textit{Id.} at 257. Justice Powell's views found support in the Court's decision of only one year earlier in \textit{Elrod v. Burns}, 427 U.S. 347 (1976), a case involving a challenge to patronage dismissals by the Sheriff's Office in Cook County, Illinois. A Republican sheriff was replaced by Richard Elrod, a Democrat. Upon assuming his new position, Mr. Elrod followed the accepted practice of requiring all non-civil-service employees who were not members of his party to either affiliate with that political party, gain the support of the party, or be dismissed from their jobs, to be replaced by party members. A number of employees who either had lost or were in danger of losing their jobs filed a lawsuit claiming a violation of their first amendment rights to freedom of belief and association.

The Supreme Court agreed with their claim. Justice Brennan's plurality opinion identified the patronage practices as forcing employees to switch their political allegiances under threat of losing
collective bargaining activities as for political activities, because "[c]ollective bargaining in the public sector is 'political.'"171

In Justice Powell’s view, all compelled financing of union activities seriously infringed the free speech and association rights of dissenting teachers; therefore strict scrutiny of the government purpose was necessary. Under that scrutiny, the government’s case was devoid of the necessary justification. Two state purposes had been asserted: first, that exclusive union representation was necessary to prevent the confusion and conflict that would flow from authorizing more than one union to represent members of a single group of employees and negotiate with their employer on their behalf; and second, related to the first, that under an exclusive representation system it was necessary to prevent “free riders” from benefitting from union representation.172

Justice Powell remained unconvinced by these explanations and concluded that the government had failed to meet its burden of proof. The restrictive effects of the arrangement—preventing minority employees from being represented by their own union and from negotiating directly with their employer—had not been proven necessary to promote important government interests.173 Similarly, on the record before the Court, he found the government had not demonstrated that the payment of fees by dissenting employees was needed to serve the interest of labor peace and to avoid the free rider effect.174

their jobs. Such coerced association and belief implicated the teachings of Barnette and, therefore, violated the first amendment. Moreover, the first amendment did not permit requiring political allegiance as a condition of public employment unless the government could show it was utilizing the least restrictive means to achieve a vital end. Id. at 363. That standard was not satisfied by the government except as to those employees who held policy-making positions. Id. at 372-73. Interestingly, Justice Powell relied on Elrod in his opinion in Abood but had dissented in Elrod. His Elrod dissent had questioned whether any first amendment right was implicated by the patronage system challenged in that case. Id. at 380. In addition, to the extent that first amendment rights were infringed, Justice Powell viewed the infringement as minor and outweighed by the benefits of the system. Id. at 382.

Four years after its decision in Elrod, the Court in Branti v. Finkel, 445 U.S. 507 (1980), considered an additional challenge to patronage dismissals. This time the Court made clear that the discharged employees need not show that they had “been coerced into changing, either actually or ostensibly, their political allegiance.” Id. at 517. Because Elrod had been decided on the ground that party affiliation was an unconstitutional condition, all the employees needed to demonstrate was that their discharge had resulted from their failure to be affiliated with the appropriate political party. Once such a showing was made, it was up to the government employer to “demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.” Id. at 518.

171. 431 U.S. at 257.
172. Id. at 260.
173. Id. at 262.
174. Id. at 262-63. In addition to the inadequacy of the government’s justification for the intrusion on first amendment interests, Justice Powell objected to the procedural burdens imposed on a nonunion employee who disagreed with some union uses of fee money. Such employees were required to announce their opposition to certain union activities on ideological grounds. In addition,
Although the majority and Justice Powell differed in their reasoning, both opinions embodied a common assumption in that they relied on the aptness of the analogy between the compelled financial support in *Abood* and the compelled affirmation in *Barnette*. It was assumed that because there was a free speech right to contribute, there correlativelty had to be a right not to contribute. Although this causal assumption was made, neither opinion explored whether a parallel really existed between nonunion teachers forced to pay union dues and Jehovah’s Witnesses forced to salute the flag.

Analyzing this proposition requires returning to the *Barnette* decision and to the dual values protected by preventing governmental imposition of ideas: the long-term benefits society receives from innovative thinkers in its midst, and the individual’s right to be one’s own person. In exploring the impact on these objectives of requiring payment of union dues by nonmembers, separate attention should be given to the two aspects of the problem viewed as constitutionally distinct by the *Abood* majority opinion: first, forced support for collective bargaining activities; and second, payment for union political activities. An initial question is the impact that the agency-shop arrangement has on personal autonomy.

The agency shop interferes with individual freedom to choose the kind of person one wishes to be to the extent that the individual objects to being forced to become a union supporter or a person represented by a union. If the individual’s true self is antiunion—based on a belief in speaking for oneself and not as part of a group or through a representative—that self is compromised by the agency-shop arrangement. The effect is at least as intrusive as the state motto embossed on their license plate was for the Jehovah’s Witnesses in *Wooley*. In fact, to the extent that the protection extended to individuals also includes a right to control how they will appear to the world, the impact of the agency shop is even more destructive of individual rights: there is a greater likelihood that every worker in an agency shop will be considered a union supporter than that someone will be viewed as a believer in a state motto because it appears on their license plate.

This same individual resentment at forced association will be experienced by an employee whether the compelled act is contributing to the employees were then put to the task of instituting a proceeding to establish what percentage of the union’s budget had been allocated to non-collective-bargaining activities that were offensive to the political views of the employee. Only after such a proceeding would these employees be entitled to a rebate of the share of their dues that had been expended for such purposes. In Justice Powell’s view, this procedure reversed the first amendment norm by shifting the burden of proof from the government to dissenting employees. *Id.* at 254-55. The majority viewed the adequacy of the rebate procedure as not ripe for decision. *See supra* note 166.
union collective bargaining activities or financing union-supported political causes. If the union endorses Candidate $X$ or lobbies for the passage of Bill $Y$, dissenting employees will feel that their ability to control both who they are and the image they present to the world has been compromised by forced contributions to union support of these causes. Interestingly, there seems to be no difference in the degree of offensiveness to the individual between being compelled to support union political and nonpolitical activities. How offended an employee will be may reflect how opposed the individual employee is to the union itself rather than to any particular cause it supports; some may more deeply resent the use of service fees for union labor representational activities, while others may be more annoyed at supporting some union-approved political causes, and still others may resent them both equally.

Thus, if one takes the view that *Barnette* recognizes the integrity of individual identity as a facet of first amendment protection, the service fee requirement in all of its aspects raises a valid claim of first amendment interference. It may be, as the *Abood* majority argued, that the government has a sufficiently compelling justification for forced funding of collective bargaining activities, but that it cannot justify required funding of political and ideological causes. Both situations, however, give rise to the same claim of infringement of a protected interest.

Analyzing the infringement of the individual's willingness to be associated with dissident ideas—the societal concern at the heart of Justice Jackson's *Barnette* opinion—is somewhat more complex. From the perspective of this instrumental value, the situation of the nonunion employee in *Abood* is very unlike that of the Jehovah's Witnesses in *Barnette* or *Wooley*. Under the agency-shop arrangement, the nonunion employee is not forced to take a pledge of allegiance to union ideals or to belong to the union in any technical sense. The dissident employee is not even forced to advertise the union's message and never wears the "union label." The employee's forced association is less personal and direct—it consists of paying a fee to the union knowing that the union will use the money to support its activities. Although that may make an individual react with resentment, the compelled association is no more active than

175. 431 U.S. at 222.
176. A similar conclusion has been expressed elsewhere in more extreme terms: "Can there be any doubt that the state's requirement that dissenting public employees contribute monies to an organization engaged in objectionable political or ideological activities violates the First Amendment, even if the compelled contribution is limited to the organization's collective bargaining expenses?" Pulliam, *Legal Aspects of Exclusive Representation: Ruminations on the Private-Public Sector Analogy*, 5 J. LAB. RES. 351, 367 (1984).
177. *See supra* note 151.
that.\textsuperscript{178}

Despite this obvious difference in the degree of the activities compelled in \textit{Abood} and \textit{Barnette}, the critical question is whether a nonunion employee will be less willing or likely to assert antiunion positions after being compelled to pay union dues and to accept representation by the union in collective bargaining.\textsuperscript{179} Because an agency shop forces the nonunion employee into dependency on the union, this forced association may well reduce the employee’s zest for antiunion activities. Cooptation\textsuperscript{180} is possible, if not probable, in this setting. Because the union—and no other organization or individual, including the employee—represents the workers, an employee must work with the union to have personal views taken into account. This circumstance tips the scales in favor of becoming one of them instead of remaining a dissident.

Thus, even though the level of the compulsion is not as active as in \textit{Barnette} or \textit{Wooley}, the same threat exists for the diversity of ideas in the marketplace, or more particularly the workplace. From this analysis, it appears that Justice Powell’s concurring opinion in \textit{Abood} is correct in

\textsuperscript{178} This view of the extent of the forced association in \textit{Abood} is consistent with the view expressed in Justice Harlan’s concurring opinion in \textit{Lathrop v. Donahue}, 367 U.S. 820, 858 (1961):

\begin{quote}
What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one’s hand and recite a belief as one’s own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount to a difference in substance.
\end{quote}

\textit{Id.} at 858. For a further discussion of the \textit{Lathrop} case, see \textit{supra} text accompanying notes 154-58.

\textsuperscript{179} Under many public-sector labor relations laws, the union’s involvement with the nonunion employee extends beyond the payment of an agency fee and the representation of those employees as their exclusive bargaining agent. Thus, the union may play a role in the resolution of any employee/employer grievance. That role may vary from the union having exclusive control of access to the grievance mechanism, see, e.g., \textit{Mich. Comp. Laws Ann.} \textsuperscript{b} 423.211 (West 1978) (making designated representative of public employee unit its exclusive representative), \textit{construed} in \textit{Mellon v. Board of Educ.}, 22 Mich. App. 218, 177 N.W.2d 187 (1970), to the union grievance procedure being optional. Under some statutes, if the nonunion employee opts to complain to the employer without resorting to the union grievance procedure, the union representative has the right to be present at any conference between the employee and employer and no settlement of the dispute may violate the terms of the collective bargaining agreement. \textit{E.g.}, \textit{Ill. Ann. Stat.} ch. 48, \textsuperscript{b} 1606(b) (Smith-Hurd 1984); \textit{Mass. Gen. Laws Ann.} ch. 150E, \textsuperscript{b} 5 (West 1976). \textit{See generally} Finkin, The Limits of Majority Rule in Collective Bargaining, 64 MINN. L. REV. 183 (1980) (discussing the limits that should be imposed on collective bargaining agreements in both the public and private sectors); Note, Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation, 89 HARV. L. REV. 752 (1976) (considering whether right of public employees may be determined through informal contract procedures consistently with the fourteenth amendment’s due process clause).

\textsuperscript{180} Cooptation is defined as “the process of absorbing new elements into the leadership or policy-determining structure of an organization as a means of averting threats to its stability or existence.” P. SELZNICK, TVA AND THE GRASS ROOTS—A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION 13 (1949) (emphasis omitted).

The process of cooptation has been well described in the social science literature. \textit{See, e.g.}, J.S. COLEMAN, COMMUNITY CONFLICT 17 (1957); W. GAMSON, POWER AND DISCONTENT 135-39 (1968); C.W. MILLS, THE POWER ELITE 348-49 (1956); P. SELZNICK, supra, at 13-16.
arguing that the Court's casual treatment of the constitutionality of the public sector agency-shop arrangement is unjustified in light of first amendment principles.\textsuperscript{181}

Ironically, it appears that the constitutional problem taken most seriously by the majority in \textit{Abood}—union use of service fee money to support political causes opposed by some nonunion employees—actually poses a lesser threat to the instrumental values underlying the first amendment preserved in \textit{Barnette}. Assuming that some of the service fee money is used to support candidates and causes opposed by dissident employees, what effect will that fact have on those employees? Will they be less likely to speak out on those issues? Will the union's assertion of one view make them less likely to speak out in favor of an opposing view? This seems unlikely. The union's political involvement is not a surrogate for involvement on the part of individual employees because employees have not given their proxy to the union, authorizing it to participate in the political process in their stead. The union may be their exclusive representative at the collective bargaining table, but not in the voting booth.\textsuperscript{182} The employee loses no freedom to work for candidates or causes.\textsuperscript{183} In fact, it is just as likely that the employee will become more politically involved. Union support of one view may be the catalyst that turns an employee's passive belief in an opposing view into an active involvement. Upgraded political involvement may grow out of annoyance that dues are being used by the union to further causes or candidates the employee opposes. Thus, the danger posed by union expenditures for political activities does not seem nearly as serious as the fear of forced conformity expressed in \textit{Barnette}. Although the use of compulsory dues for political purposes may intrude on the right of selfhood, it does not inevitably infringe on individual willingness to contribute to the marketplace of ideas.

\textsuperscript{181} See supra note 167 and text accompanying notes 167-74.

\textsuperscript{182} The union may not even be able to influence "willing" union members to endorse the union's political positions. For example, 45\% of union households voted for Ronald Reagan in the 1984 presidential election despite union support for Walter Mondale. Raskin, \textit{Labor's Grand Illusion}, N.Y. Times, Feb. 10, 1985, \textsection 6 (Magazine), at 52.

\textsuperscript{183} The participation of public employees in political activities is curtailed by statutory limitations. For a description of these limitations at both the state and federal level, see \textit{Developments in the Law—Public Employment}, 97 Harv. L. Rev. 1611, 1651-60 (1984) [hereinafter cited as \textit{Public Employment}]. The constitutionality of such legislation has been upheld by the Supreme Court. See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 606-18 (1973) (upholding Oklahoma statute restricting the partisan political activities of classified state employees); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 557-81 (1973) (upholding \textsection 9(a) of the Hatch Act, 5 U.S.C. \textsection 7324(a)(2) (1982), which prohibits federal employees from playing an active role in political campaigns, running for local office, and engaging in other significant partisan political activities).
VI. PruneYard Shopping Center v. Robins

The doctrine first announced in the 1940s through *Barnette* had languished during the fifties and sixties and finally picked up steam in the 1970s with *Wooley* and *Abood*. In both cases the *Barnette* principle had been successfully invoked and expanded to cover situations involving something less than a compelled affirmation of a government-dictated belief. Finally, in 1980 with the Supreme Court’s decision in *PruneYard Shopping Center v. Robins*, the Court identified a terminus for the *Barnette* doctrine. Confronted with a claim of forced participation in the dissemination of an idea, the Court distinguished the situation from that of earlier cases.

In *PruneYard* a group of high school students had solicited signatures for a petition declaring opposition to a United Nations resolution against Zionism. In order to obtain signatures, they had set up a table at the privately owned PruneYard Shopping Center in Campbell, California. After being asked to leave the shopping center by a security guard, they filed suit in the California Superior Court alleging they had a right of access to the shopping center. On appeal, the California Supreme Court agreed with the students and ruled that such a right existed under the California Constitution’s protection for speech and petitioning. After this decision, the shopping center and its owner appealed to the United States Supreme Court arguing that California’s interpretation of its state constitution violated their rights under the fourteenth amendment. The first amendment argument made by appellants was that “a private property owner has a First Amendment right not to be forced by


185. The California Superior Court of Santa Clara County ruled that the high school students had no right of access to the shopping center under either the state or federal constitution. That decision was affirmed by the California Court of Appeal. Id. at 77-78.

186. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979). Article I, § 2 of the California Constitution read: “Every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” Section 3 of art. I stated that “people have the right to . . . petition government for redress of grievances . . . .” The California Supreme Court noted that these provisions gave greater protection to free speech than did the first amendment of the United States Constitution and held that the students’ activities were thus protected. Pruneyard, 23 Cal. 3d at 908, 910, 592 P.2d at 346, 347, 153 Cal. Rptr. at 859, 860 (quoting Wilson v. Superior Court, 13 Cal. 3d 652, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975)).

187. Their first two constitutional claims—that the state had “taken” their property without just compensation and, that they had been deprived of property without due process of law—were rejected by the Supreme Court. The Court rejected the “taking” claim on the ground that there was no showing that the commercial value or usefulness of the property had been unreasonably impaired by granting appellees access rights. 447 U.S. at 83. The fourteenth amendment due process argument failed because the state’s action was justified by its desire to promote freedom of expression. Id. at 85.
the State to use his property as a forum for the speech of others." 188 Appellants relied on Wooley and Barnette for authority to support this claim, but Justice Rehnquist's opinion for the Court distinguished both cases.

Wooley was found inapplicable for three reasons. First, a distinction existed because the message in Wooley had been dictated by the government itself. 189 In contrast, the government was not disseminating any particular message in the shopping center but was granting members of the public an access right so that they could display whatever messages they chose. Furthermore, in Wooley the law forbade the Maynards to cover up the state's motto, but the center's owner could "disavow any connection with the message by simply posting signs." 190 Finally, unlike the Maynards' automobile, the shopping center was a business establishment generally open to members of the public. It was therefore unlikely that the message disseminated by the students on shopping center property would be taken to represent the views of the center as opposed to the students. 191

Barnette posed no greater difficulties. The government was not asking the center to communicate their agreement with a government-sponsored idea. 192 The center's owner was not asked to adopt any position, only to provide a forum for the expression of the ideas of others, and was entitled to identify those ideas as ones he disagreed with. 193

188. Id. at 85.
189. Id. at 87.
190. Id. In reality, the shopping center could not "cover up" the message of the high school students, although it could announce that the center did not share the views being expressed, thereby disavowing any association between the center and the message. Justice Rehnquist had dissented in Wooley and argued that the Maynards had not been placed "in the position of either apparently or actually 'asserting as true' the message." Wooley v. Maynard, 430 U.S. 705, 721 (1977) (Rehnquist, J., dissenting). The shopping center owner's position was closely analogous, making Justice Rehnquist's position in the two cases consistent. The self-help remedy Justice Rehnquist suggested for the Maynards—a disclaiming bumper sticker, see supra note 135—thus was promoted from a dissenting view in Wooley to part of the majority opinion in Prune Yard; see also infra note 193 (discussing right to disavow in other cases).

191. 447 U.S. at 87.
192. Id. at 88.
193. The Supreme Court also distinguished Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), in which the Court struck down Florida's right-of-reply statute. See supra note 117. The Court pointed to the fact that the decision in Tornillo rested on the impermissibility of telling a newspaper what to print and the fact that the statute might deter the publication of critical comments about candidates for public office. Prune Yard, 447 U.S. at 88.

The Court's attempts to distinguish Tornillo from Prune Yard ignored some interesting similarities between the cases. In both, the compelled message was not sponsored by the government but came from a member of the public, albeit in Tornillo a candidate for public office. Also, in both cases there was a right to disavow. In Tornillo, the newspaper's labeling an article as a candidate's reply to critical comments previously printed by the paper would serve as a disavowal of the views expressed in the article. Finally, in both cases there was little possibility that the message would be assumed to reflect the views of the provider of the forum. In the newspaper's case, this would be
Two separate concurring opinions in *Prune Yard* commented further on the free speech issue in the case. Justices White and Powell agreed that there was no merit to the claim of interference with freedom of expression by the shopping center owner. Both also agreed, however, that the first amendment claim would not be so easily disposed of were other circumstances presented to the Court.194

Justice Powell elaborated on the circumstances in which a more successful free speech claim might be raised. Three factors, none present in *Prune Yard*, would be important: first, the likelihood that customers would suppose the views expressed in appellees’ petitions reflected the opinions of the property owner; second, an objection to the specific ideas being asserted; and third, the possibility that the views communicated will be so objectionable that a property owner would feel compelled to respond even in the absence of any confusion as to source.

Justice Powell saw *Wooley* as applicable to all property owners and as permitting “a person [to refuse] to allow use of his property as a marketplace for the ideas of others.”195 This principle applied equally whether the state mandated a message of its own or whether it created access for third parties. In either situation, the property owner was faced with an untenable choice: either permit the speech and allow it to be interpreted as the property owner’s own message, or be forced to disavow it, thereby giving up the right to remain silent.196 The ideas expressed could be so objectionable to the property owner that, even in the absence of confusion as to source, a response would be dictated by the conscience of the owner. The state, by creating the right of access, would in effect

---

194. 447 U.S. at 96 (White, J., concurring); id. at 97-101 (Powell, J., concurring).
195. Id. at 97. Justice Powell also read *Abood* to support constitutional protection against being compelled to lend support to an objectionable idea. Because the students had not argued that *Abood* supported their claim, id. at 98 n.2, Justice Powell only briefly discussed the case.
196. Id. at 99.
Jackson's Flag Salute Legacy

compel the owner to speak out in opposition to the views being expressed on the property.

The PruneYard majority, in contrast to Justice Powell, found the situation easily distinguishable from both Wooley and Barnette. Justice Rehnquist's opinion for the majority took the view that the identity of the promulgator of the sentiment being expressed is key. Justice Powell disagreed with that approach and treated as the crux of the matter the level of the coerced individual's antipathy to the message. If the core value protected by the Barnette doctrine is the nonconforming individual's right to be free from government efforts to stamp out the urge to be different, then Justice Rehnquist is clearly correct. It is only when the message being fostered comes with a government seal of approval that an individual's own views are at risk. If the government simply requires access, instead of one insistent message, the result is a cacophony of ideas unlikely to affect a property owner's independence of thought. The source of the coerced message is not critical only if the central value is vindication of personality. In that case, the property owner's reaction to being forced to provide a forum would be more important than the identity of the speaker given access to that forum. Under this approach, the individual's resentment at forced association with a detested cause would be enough to raise a claim of constitutional right. Thus, the opinions of Justices Rehnquist and Powell represent significantly different points of view about the interests deserving of constitutional protection through the free speech guarantee. Justice Rehnquist's majority opinion is concerned with individuality only as an instrument of democratic self-government, but Justice Powell's opinion focuses on individuality for the sake of the individual.

Another factor stressed by the majority opinion and criticized by Justice Powell is the opportunity to disavow, a method the majority advanced for reducing the level of forced association. Although the property owner must allow the speech to take place on the owner's property, at least the owner can disassociate himself from any disagreeable ideas expressed so as to avoid appearing to support them. This means property owners can set the record straight and not appear to others what they are not; they can protect their own persona as they appear to the world. Although the majority viewed this possibility as an advan-

197. Id. at 87.
198. Id. at 98 ("But even when no particular message is mandated by the State, First Amendment interests are affected by state action that forces a property owner to admit third-party speakers.").
199. See supra notes 135, 190, 193.
tage, Justice Powell saw it as a burden because disavowal forces individuals to make a public statement when they would rather be silent.

On closer examination, it appears that the opportunity to disavow is nothing more than a make-weight in this discussion. Unless the individual's ideas are themselves illegal so that their utterance can be punished, or unless they have been required to swear allegiance to a particular idea (as in the oath situation) so that disavowal amounts to perjury, there is always an opportunity to disavow. As Justice Rehnquist had urged in Wooley, a bumper sticker placed alongside the license plate would have been an effective method of disavowal. Even in Barnette, a public statement of opposition to the pledge might have been made (and was) by the Jehovah's Witnesses, but that would have been beside the point. Justice Jackson's fear was not that compelled affirmers lacked an opportunity to disavow, but that they would cease to feel like speaking out against the state-mandated message. Their objection to the government's idea would be swept away in the tide of compelled conformity.

Although the opportunity to disavow may be irrelevant from the perspective of the instrumental values behind Barnette, it has slightly more relevance in the area of protection of personality. From that perspective, if there is a chance to assert a differing view, at least individuals have the chance to correct the record. They need not leave people with the impression that they are something or someone that they are not. This ability to set the record straight, however, is not without its costs, as Justice Powell correctly pointed out. Utilizing this corrective measure requires taking a public position, which in itself may violate notions of privacy that individuals hold dear. Although the opportunity to disavow may make the case marginally less offensive from the viewpoint of the protection of individual personality, the associated costs suggest that this factor should be given little constitutional significance.

The last factor stressed by the PruneYard Court's majority opinion is that the views expressed on shopping center property are not likely to be assumed to be those of the owner. There is a clear relationship between this factor and the opportunity to disavow because both concern public perception of an individual and not the subjective impact on that individual. Even if the public does not associate the ideas expressed with the owner's personal viewpoint, the individual will still feel forced to provide a showcase for disagreeable views. The forced association exists in the property owner's mind even if it does not exist in the perceptions of the public.

This factor, however, is not without significance. If the nature of the compulsion creates no impression that the individual is expressing a viewpoint, then it is unlikely that the individual’s freedom of mind has been affected in any way that threatens the democratic process. Additionally, from the point of view of protection of individual personality, if the public is not likely to view an individual as having made any statement of personal philosophy, the individual will not have been put in the position of giving a false impression to others. Moreover, the individual will not have to choose between that impression and speaking out when silence would be preferred.

In light of these comparisons, the conclusion seems inescapable that PruneYard was rightly decided. Because the message is not the government’s and, equally important, because the forum is created for a variety of messages, rather than a single message repeated over and over again, no likelihood exists of casting a pall on the unorthodox ideas of the property owner. Thus, the value of central concern in Barnette is not threatened. The comparison to Wooley with its concern for individuality, however, could lead to a different result. In PruneYard, the record was barren as to whether the property owner disagreed with the substance of the petition, and the possibility of the public’s connecting the owner with the petition was remote; therefore, in PruneYard, neither the property owner’s identity nor the ability to project that identity was compromised.

A different conclusion might be appropriate, however, if an owner, like the Jehovah’s Witnesses in Wooley, objected to a forced association with ideas the property owner opposed. In such a case, the Wooley precedent would be much more compelling. Although the views conveyed by the unwanted message are not likely to be imputed to the owner, this same factor was also present in Wooley. Whether a particular message infringes on the property owner’s first amendment rights may turn on whether a subjective or an objective test is employed. If owners feel offended by forced association with an idea and feel it presents them to the world in a false light this would—under a subjective test—be enough to give rise to a constitutional objection. An objective test, however, demands that reasonable people would assume the owner’s own views were being expressed.

202. An analogous problem exists in the symbolic speech area. The question is whether the symbolic communication needs to be understood by its intended audience or whether it is enough if the communicators believe they are engaged in an expressive activity even if their act is unlikely to be understood by others. The answer given by the courts under the symbolic speech doctrine is that an objective standard governs. The conduct can qualify as protected expression only if the symbolic
Concern for the protection of personality involves more than a fear that the government is standing in the way of an individual's ability to appear to the world in a desired way. In protecting this interest, it may be equally important that individuals subjectively feel that they are able to present themselves to others as they wish, even if no real danger of a false impression exists. On the other hand, protecting an individual's unrealistic reaction (because no one would in fact confuse that person with the message expressed by others) may push the first amendment beyond any logical stopping place.

The PruneYard situation clearly involves more complex overtones than the Court was prepared to deal with on the basis of the facts presented. Although Barnette itself is not truly implicated in such a situation, Wooley and Abood provide closer analogies. Identifying the limits of first amendment protection when freedom of personality is the value being protected is obviously problematic.

VII. The 1983 Supreme Court Term

A series of cases that raised claims of protection from compelled expression and association marked the 1983 Supreme Court Term. Communication is likely to be understood by its audience. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984); Spence v. Washington, 418 U.S. 405, 410-11 (1974) (per curiam). For a variety of reasons, an objective standard, focusing on understandability, may be justified when attempting to define the limits of protected symbolic expression. See Note, Symbolic Conduct, 68 COLUM. L. REV. 1091, 1113-16 (1968) (arguing that an objective standard assures substantial protection for symbolic conduct and is consistent with the purposes of the first amendment). A similar approach may be inappropriate, however, in compelled-expression cases because the focus is on impermissible impact on a particular individual, and not on communication to an audience.

203. In the period between PruneYard, decided in 1980, and the 1983 Term, the Court decided only one case containing extensive references to Barnette. See Board of Educ. v. Pico, 457 U.S. 853 (1982). In Pico, a number of students had filed suit claiming the school board violated their first amendment rights by removing a number of books from school libraries because of their objectionable content. The district court granted summary judgment before trial in favor of the school board. Pico v. Board of Educ., 474 F. Supp 387 (E.D.N.Y. 1979). The judgment was reversed on appeal and the case was remanded to the district court for trial. The Supreme Court granted certiorari to consider whether any first amendment limitations restrain the discretion of a school board in deciding to remove books from school libraries and whether, in the circumstances of the case before it, these constitutional limits had been exceeded. 457 U.S. at 863.

By a five-to-four vote, the Court decided in favor of the students and remanded the case for trial. Actually, the Court was even more closely divided than its voting pattern indicates. Although voting with the majority, Justice White refused to reach the constitutional issue of "the extent to which the First Amendment limits the discretion of the school board to remove books from the school library." Id. at 883. Instead, he read the record as raising a factual dispute between the parties as to the reasons for the removal of the books and found it unnecessary to reach the difficult constitutional question until that dispute had been resolved at trial.

Seven members of the Court filed separate opinions, with four justices citing to Barnette at least once. In his plurality opinion, Justice Brennan relied on Barnette to condemn the notion of an "officially prescribed orthodoxy." Id. at 871. Thus, for Justice Brennan, if the removal decisions had...
Although *Barnette* was cited only twice (in two dissenting opinions\(^{204}\)) and never discussed at length, the extension of *Barnette* that occurred in *Abood* returned to center stage in three major opinions. The trilogy of cases included *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,\(^{205}\) *Roberts v. United States Jaycees*,\(^{206}\) and *Minnesota State Board for Community Colleges v. Knight*.\(^{207}\) Of these, *Knight* raised the most difficult problem in light of the *Barnette* precedent and provoked the most extensive opinions by members of the Court. All three decisions, however, must be examined to identify the Court's current view of this doctrinal area.

Least surprising was the Court's eight-to-one decision in *Ellis*. The case raised several issues that the Court had specifically left unresolved in *Abood*. The challengers in *Ellis* were nonunion clerical employees of Western Airlines. When their complaint was filed, the exclusive bargaining representative for the Western Airlines clerical employees was the Brotherhood of Railway, Airline and Steamship Clerks (BRAC). In accordance with provisions of the Railway Labor Act permitting the agency shop,\(^{208}\) nonunion airline employees, although not compelled to join the union, were required to pay an agency fee that equalled the amount paid in the form of union dues by union members. The nonunion employees did not challenge the agency-shop arrangement itself,\(^{209}\) but did object to certain union expenditures and to the rebate procedure that refunded their shares of money spent on union ideological activities.\(^{210}\)

The employees specifically objected to the expenditure of funds for six types of union activities: the national convention held by the union been based on a disagreement with the "anti-American" ideas in the books, the decisions would be constitutionally improper.

Justice Brennan's reliance on *Barnette* as precedent for this proposition seems ill-conceived. Whatever ambiguities may remain as to the meaning of Justice Jackson's opinion in that case, it is clear that Justice Jackson did not intend to deprive the government of all mechanisms for spreading favored ideas. Instead, his opinion condemns one means to this end, compelled agreement with government-prescribed ideas. *Barnette*, 319 U.S. at 642. No such compulsion is present in the context of the public school library. See Harpaz, *A Paradigm of First Amendment Dilemmas: Resolving Public School Library Disputes*, 4 W. New Eng. L. Rev. 1, 34 (1981).


\(^{209}\) Such a challenge was foreclosed by the Supreme Court's opinions in Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956) and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Hansen is discussed supra notes 150-53 and accompanying text. *Abood* and later cases posing first amendment challenges to collective bargaining arrangements are the subject of *supra* Part V.

\(^{210}\) See *supra* note 174 (discussing rebate system as a remedial measure).
every four years; litigation not involving the union as a bargaining unit; the union’s monthly magazine; social activities; the union’s death benefits program; and the union’s organizing efforts.\textsuperscript{211} The Court’s task was to decide which of these activities could be funded with agency fees paid by nonunion employees. The need to engage in such precise line-drawing had been identified in \textit{Abood} but that task had been reserved for some other time.\textsuperscript{212} With \textit{Ellis}, that time had finally arrived.\textsuperscript{213}

Because three items on the list of challenged expenditures were statutorily impermissible,\textsuperscript{214} or moot,\textsuperscript{215} the Court decided the constitutional question raised only on the remaining three, authorized expenditures. The Court reiterated and strengthened the holding of \textit{Abood}—the agency-shop arrangement was a justifiable interference with the first amendment right to refuse to associate.\textsuperscript{216}

The precise first amendment issue was whether money spent on the union’s convention, union social activities, and the nonpolitical articles printed in the union’s monthly magazine involved “additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest.”\textsuperscript{217} The Court decided that the social activities were objectionable only because they were union activities, and for no other reason.\textsuperscript{218} Therefore, because spending on these activities did not add to

\begin{footnotesize}
\begin{enumerate}
\item[211] 466 U.S. at 440.
\item[212] \textit{Abood}, 431 U.S. at 236.
\item[213] Part of the controversy was resolved without reaching the first amendment issue. The Court initially asked whether each use made of monies paid by nonunion employees was authorized under the Railway Labor Act, 45 U.S.C. §§ 151-88 (1982). In \textit{International Ass’n of Machinists v. Street}, 367 U.S. 740, 750 (1961), the Court had managed, through the process of statutory construction, to avoid the resolution of a similar first amendment challenge to the Railway Labor Act. See \textit{supra} note 154. On the statutory construction issue, the Court distinguished between authorized and unauthorized expenditures; union expenses were justified if “the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.” \textit{Ellis}, 466 U.S. at 448.
\item[214] Two categories of expenditures were found to be beyond the Act: (1) organizing activities through which the union attempted to recruit new members; and (2) the expenses of litigation not arising out of the collective bargaining activities of the union. 466 U.S. at 451-53. This restrictive view of the categories of union expenditures that can be imposed on dissenting employees because of the free-rider rationale has already been criticized. See \textit{Public Employment, supra} note 183, at 1733.
\item[215] \textit{Ellis}, 466 U.S. at 454. After the filing of the lawsuit, the defendant union had been decertified as the bargaining representative for the Western Airlines’ employees. Thus, the claim for injunctive relief against union expenditures had become moot. What remained was the claim for a refund of money improperly expended by the union and interest on that money. \textit{Id.} at 442. The Court decided that because the money paid into the death benefits system entitled the objecting employees to benefits under the program, equitable considerations did not require a rebate of this money. \textit{Id.} at 454-55.
\item[216] See \textit{supra} notes 143-59 and accompanying text.
\item[217] 466 U.S. at 456.
\item[218] \textit{Id.}
\end{enumerate}
\end{footnotesize}
the interference with first amendment rights imposed by the agency-shop arrangement itself, there could be no constitutional objection.

The challenge to spending on the convention and the union publication, however, raised somewhat more serious issues. Both activities involved communication of ideas: the convention established union policy and identified collective bargaining goals, and the monthly magazine was the union’s method "of communicating information concerning collective bargaining, contract administration, and employees’ rights to employees represented by BRAC." Despite their communicative function, however, these activities were viewed as imposing little additional burden on the rights of nonunion employees. In addition, both activities were justified by the same concerns that supported the agency shop itself. After concluding that all three expenditures were constitutionally permissible uses of the money contributed by nonunion employees, the Court ended its discussion by asserting that, as a policy matter, the union needed to have "flexibility in its use of compelled funds."

219. *Id.* at 450 (quoting from *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 685 F.2d 1065, 1074 (9th Cir. 1982)). In challenging that portion of dues spent on the publication of a monthly magazine, no issue was raised regarding the "political" articles contained in the magazine. Under the then existing rebate program, objecting employees received a rebate for expenses resulting from publication of the political content of the magazine. This procedure required the calculation of the number of lines in the magazine "devoted to political issues as a proportion of the total number of lines." *Id.* One issue in *Ellis* was the costs of producing the part of the magazine that informed union members about the union’s collective bargaining activities. *Id.* at 450-51.

220. *Id.* at 455.

221. *Id.* at 456. A second aspect of the Court’s opinion concerned the constitutionality of the union’s use of a rebate procedure to return to nonunion employees their share of service fees allocated to non-collective-bargaining activities. The Court acknowledged that prior cases had suggested a rebate scheme would be adequate. *Id.* at 443 (discussing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 238 (1977); *Brotherhood of Ry., Airline & S.S. Clerks v. Allen*, 373 U.S. 113, 122 (1963); *International Ass’n of Machinists v. Street*, 367 U.S. 740, 775 (1960)). The Court, however, held that the rebate approach did not keep the union within the statutory guidelines. The union procedure required each employee initially to pay the entire service fee. At a later time, dissenting employees received a refund. The Court viewed this temporary interest-free borrowing of a portion of the service fee money as impermissible. *Id.* at 444. The Court suggested two possible alternatives: "advance reduction of dues and/or interest-bearing escrow accounts." *Id.* Thus, if the nonunion employees were required to pay the entire fee, they were entitled to receive interest on the money rebated to them.

Two years after its decision in *Ellis*, the Supreme Court again ruled on the procedural issues surrounding the return of service fee money to dissenting employees. In *Chicago Teachers Union v. Hudson*, 106 S. Ct. 1066 (1986), the Supreme Court identified three critical requirements for a constitutionally adequate system for protecting the interests of nonunion public employees. First, reiterating its concern in *Ellis*, the Court required the union to adopt a plan that would avoid even temporary improper funding of ideological activities. *Id.* at 1075. The union was required to hold the amount of the fees reasonably in dispute in an interest bearing escrow account. *Id.* at 1078. Second, the Court required that "potential objectors be given sufficient information to gauge the propriety of the union’s fee." *Id.* at 1076. Finally, the Court imposed a new requirement that the union make available a procedure to nonunion employees for raising their objections that would provide "a reasonably prompt decision by an impartial decisionmaker." *Id.* Applying these three criteria, the Court found the union procedure in *Hudson* to be constitutionally deficient because it...
The Court's decision in *Ellis* broke no new ground.\(^{222}\) It attempted to draw a line accurately reflecting the distinction created in *Abood* between collective bargaining and political activities, and it did so even to the absurdity of forcing the union to calculate the number of lines devoted to political causes in the union magazine and to compute the rebate due nonunion employees for those lines.\(^{223}\)

It is difficult to imagine how such a system really protects any significant first amendment concerns of the nonunion employees. The magazine is mailed to nonunion employees, but, because they are not forced to read it,\(^{224}\) they can avoid being influenced by its views. Unlike the visible license plate or recited pledge, the political message in the union's magazine may never even be seen—much less "worn"—by the dissident individuals. Should they leaf through the magazine, the employee would see, in addition to articles about political issues, "articles about negotiations, contract demands, strikes, unemployment and health benefits, proposed or recently enacted legislation, general news, products the union is boycotting, and recreational and social activities."\(^{225}\) Nonunion employees are just as, if not more, likely to be upset by news about negotiations and contract demands as by any political article. The former information, unlike the latter, is likely to impact on the terms and conditions of their employment and, in addition, involves subjects about which they are powerless to do anything short of resigning their jobs. Those union-negotiated job conditions will affect them on a day-to-day basis; by comparison, union views on legislation and political causes are likely to produce no more than a momentary annoyance, are unlikely to be assumed
to be the views of the employee, and can be disavowed or combated by contributions to or work for groups that take opposing positions. It is hard to see how the expenditure of a few pennies of an employee’s money amounts to any greater annoyance than the imposition on the property owner accepted in *Prune Yard*. In that case, even though the shopping center was opened up to proponents of alien causes, the Court was able to view the imposition on the individual owner as not amounting to an invasion of first amendment rights.

Coming after *Prune Yard*, *Ellis* makes even more obvious the distortion of first amendment interests that took place in *Abood*. Although the line drawn in *Abood* quantitatively reduced forced monetary contributions required of nonunion employees, it did so in a way that created no *qualitative* protection for the first amendment rights of nonunion employees working in an agency shop.

The problem of compelled association, which the Court in *Abood* understood to be inextricably connected to the kind of compelled expression outlawed in *Barnette*, arose a second time during the 1983 Supreme Court Term in a vastly different context. In *Roberts v. United States Jaycees*, the Jaycees argued that application of the Minnesota Human Rights Act, outlawing discrimination in places of public accommodation on the basis of sex, to their organization’s male-only membership standards violated the Jaycees’ right to freedom of association under the first amendment. The Eighth Circuit had agreed with their claim, finding that because “the advocacy of political and public causes, selected by the membership, is a not insubstantial part of what it does,” the Jaycees’ right to choose its members was protected by the freedom of association. The Supreme Court reversed in a unanimous decision with seven members of the Court participating.

The basic thrust of Justice Brennan’s opinion for the Court was that Minnesota’s antidiscrimination law was not designed to suppress expression, that it promoted a compelling governmental purpose, and that it did so through the use of the least restrictive alternative. Justice Brennan noted that the Constitution protected the “freedom not to associate,” but he was not convinced that the Jaycees had demonstrated any signifi-

---

226. 468 U.S. 609 (1984). The name “Jaycees” is derived from the organization’s formal name, the Junior Chamber of Commerce.
229. Chief Justice Burger and Justice Blackmun did not participate in the consideration of the case.
cant infringement on that freedom. They case was supported only by unproven assumptions about the impact of being required to admit women to membership. The Court held that even if there was such an infringement, the government had sufficiently justified its action.

Only Justice O'Connor wrote separately in Roberts. While agreeing with the result reached, she expressed profound disagreement with the analysis employed by the majority opinion for two reasons: in one respect, the opinion underprotected groups that engaged in expressive activities receiving the full protection of the first amendment; and in another respect, it overprotected associations of persons who banded together for commercial purposes.

The first type of association, one "predominantly engaged in pro-

231. Justice Brennan recognized two distinct categories of freedom of association. Id. at 617-18. One category protects intimate relationships as an element of personal liberty. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978) (describing the right to marry as a fundamental right of privacy protected by the due process clause of the fourteenth amendment); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (extending protection of due process clause beyond nuclear family); Karst, The Freedom of Intimate Association, 89 YALE L.J. 624 (1980) (defining "freedom of intimate association," and discussing the values at stake and the constitutional doctrines that nurture freedom of intimate association). The other involves the right to associate in order to engage in expressive activities. See, e.g., Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (ordinance limiting amount of contributions to committees formed to support or oppose ballot measures violates first amendment rights of association and speech); NAACP v. Button, 371 U.S. 415 (1963) (litigation activities of NAACP are protected forms of expression and association). The Jaycees argued that both types of associational interests had been infringed. Justice Brennan dismissed the Jaycees claim to interference with a personal relationship on the ground that the Jaycees were a large and unselective organization. 468 U.S. at 620-21. Their claim to an invasion of the right to associate for the purpose of speaking was meritorious, however, because the Jaycees take public positions on political issues and engage in lobbying and fundraising. Id. at 623, 626-27. The evidence in the record convinced Justice Brennan that the invasion involved would be only incidental. Id. at 628.

232. Id. at 628-29. The compelling interest promoted by Minnesota was "[a]ssuring women equal access" to the "various commercial programs and benefits offered to members" of the Jaycees. Id. at 626. This conclusion is consistent with Supreme Court assertions that a governmental purpose of eliminating discrimination satisfies the compelling interest component of strict scrutiny review. E.g., Heckler v. Mathews, 465 U.S. 728, 744-48 (1984); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983). Because the Jaycees' discriminatory membership policies produced harms that were unrelated to the organization's exercise of the right to communicate its ideas, the state was free to eradicate these harms by means that were narrowly tailored to achieve such ends. 468 U.S. at 628-29. This balancing analysis departs from the absolutist position that compelled expression is per se inappropriate to achieve a legitimate or even compelling government end. It is far from clear, however, that this absolutist view represents even Justice Jackson's approach in Barnette, see supra note 28, let alone the view of the Court in more recent cases. For example, in Abood, the Court concluded that the compelling government interest in promoting labor peace and avoiding free riders justified the agency-shop arrangement and the requirement that nonunion employees finance the union's collective bargaining activities undertaken on their behalf. 431 U.S. at 220-23. Justice Brennan also rejected a claim by the Jaycees that the Minnesota law was unconstitutionally vague and overbroad. The statute had been construed by the Minnesota Supreme Court to apply to the membership policies of organizations that were "public" when viewed from the perspective of their "size, selectivity, commercial nature, and use of public facilities," 468 U.S. at 629, and not to apply to private organizations. In Justice Brennan's view, this limiting construction had eliminated any problems of vagueness and overbreadth. Id. at 630-31.
tected expression,

was, under Justice Brennan's analysis, given the burden of "making a 'substantial' showing that the admission of unwelcome members 'will change the message communicated by the group's speech.' " Justice O'Connor believed that such a burden imposed an unreasonable and unrealistic limit on the ability of an association engaged in first amendment speech to select its membership. It was unclear just how such a burden would be met and why it was imposed in the first place.

Even more fundamentally, Justice O'Connor disapproved of the majority's failure to distinguish between expressive associations and commercial associations. In Justice O'Connor's view, expressive associations were entitled to the full complement of first amendment protections for all their activities, but commercial associations could claim only minimal constitutional protections and could be subject to rational state regulations. Distinguishing between the two types of associations required focusing on an organization's purposes and the purposes of its membership in joining the group.

Recognizing that this classification would not always be easy to make, Justice O'Connor nevertheless believed that such a dividing line was constitutionally mandated. Some clear examples from past cases were available as starting points. On the one hand, a large commercial law firm is an association for commercial purposes; partnership decisions are therefore subject to rational state regulation to assure nondiscriminatory practices. On the other hand, an association engaged in lawyering activities in order to further social goals is an expressive association; any regulation of its membership, solicitation, recruitment, or other association practices should be subject to strict judicial review. "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." 241

234. Id. at 635.
235. Id. at 632 (quoting Justice Brennan's opinion for the Court, id. at 627, 628).
236. Id. at 633.
237. Id. at 634.
238. Id. at 636-37.
239. Hishon v. King & Spaulding, 467 U.S. 69 (1984) (holding that allegation by former associate that law firm's decision not to invite her to become a partner was a product of sex-based discrimination stated a claim under Title VII, 42 U.S.C. § 2000e-2 (1982)).
240. NAACP v. Button, 371 U.S. 415, 429-30 (1963) (holding that NAACP efforts to end racial discrimination by instituting civil rights litigation are protected by the first amendment and cannot be regulated by the state in a way that discourages such activities in the absence of a substantial state interest).
241. 468 U.S. at 633.
Justice O'Connor found additional support for her view in the Court's treatment of labor unions. As she interpreted past cases, if the regulation of unions in their role as protector of the business needs of employees was challenged, the state could justify its regulation by showing only that it bore a rational relationship to a legitimate end. Such was the case in Abood, when the Court ruled that nonunion employees could be compelled to support the union's collective bargaining activities. Conversely, when the union promoted ideological goals, individuals could not be compelled to participate in such activities if they objected to the ends being promoted.

Justice O'Connor argued that the activities of the Jaycees should be examined to determine whether it was a commercial or expressive association. To be an expressive association, it was not enough that an organization engaged in some expressive activities. Instead, such activities had to represent the predominant character of the organization. This distinction was critical in the case of the Jaycees. The organization did support certain political causes, but this did not represent the primary focus of the organization. Instead, the group mainly devoted itself to training members in the skills of solicitation and management in order to enhance business expertise. Toward this end, much time and attention was devoted to encouraging members to sell memberships in the Jaycees. Justice O'Connor viewed this agenda as directed at commercial activities, justifying Minnesota's imposition of rational regulations on the operations of the Jaycees.

In Roberts, the Jaycees raised claims of unconstitutional compulsion under both the expressive and associational strands of the compulsion doctrine. Arguing that the state forced the admission of persons to membership against the organization's will was the reverse of the objection raised by nonunion employees under an agency-shop contract. The employees in that setting were being forced to belong to an organization against their will; in Roberts, the constitutional objection was that an association should have the right to select its own members to make certain they will support and work toward the organization's goals. Without membership control, the organization might be forced to accept members who would impede the association's efforts, either by unwilling-

242. Id. at 637.
243. Id. at 638.
244. The opinion of the Court of Appeals recited a lengthy list of political issues on which the national Jaycees and their state and local affiliates had taken public positions. See McClure, 109 F.2d at 1569-70.
245. 468 U.S. at 639.
246. Id. at 640.
ness to commit time and energies or by purposefully setting out to subvert the organization.  

The second claim raised by the Jaycees related to the impact of a state-mandated change in membership policy on the message communicated by the organization. As a male-only association, the Jaycees project an organizational image that will be altered by the forced admission of women. The Jaycees argued that this projected image is the organizational equivalent of a personality. Just as Barnette and Wooley protect an individual's chosen persona, in Roberts the argument was that Minnesota interfered with the personality the Jaycees wished to project to the public. In addition to an adverse effect on its chosen image, there was a further claim of a compelled message. Left on their own, the Jaycees would promote the interests of men in business and not concern themselves with issues of equal treatment for women in the business world. With a change in membership to include women as voting members, these new members may force the organization to alter its agenda and to espouse causes it would not have supported in its male-only days.

These multiple claims of first amendment infringement merit more thorough consideration than they received in the majority or concurring opinions in Roberts. Moreover, the interests at stake in Roberts should be compared with the Court's previous concerns in cases raising claims of protection from compelled association and expression. In Prune Yard, Justice Rehnquist identified three distinguishing characteristics that made the case less constitutionally troublesome: the message disseminated did not originate with the government, there was a chance to disavow, and the views expressed would not be assumed to be those of the shopping center owner. Applying those criteria to the Roberts facts produces an interesting result. Although it was true in Prune Yard that the anti-United Nations Resolution message was not sponsored by the government, that is not the case in Roberts. As a result of compelling the Jaycees to admit women, the government was making it likely that the

247. But see id. at 627 (“The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members.”).

248. But see id. at 627. (“[A]ny claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best.”).

249. As the lower court noted:

If the statute is upheld, the basic purpose of the Jaycees will change. It will become an association for the advancement of young people. Young men will no longer be its only beneficiaries. It is natural to expect that an association containing both men and women will not be so single-minded about advancing men's interests as an association of men only.

organization would promote economic justice for both men and women, a viewpoint different from the previous position taken by the Jaycees. Although this transformation was not explicitly dictated by the government-ordered membership policy, it is a highly probable outcome of the government action. The government has altered the organization's structure in such a way as to make highly likely a change in the organization's message, one consistent with Minnesota's public policy as reflected in its Human Rights Act.

The second *PruneYard* factor is the opportunity to disavow. In *Roberts*, to the extent that the Jaycees organization was transformed from male-only membership to a mixed-gender organization and now supports the advancement of both males and females in business, there is no opportunity to disavow these new views. Because the views are an inevitable result of its new membership, the organization cannot disassociate itself from the interests of some of its members.

The third factor is the probability that the pro-equality viewpoint of its women members will be imputed to the organization. As full voting members of the Jaycees, women will influence the organization's policies and public positions, and they will be assumed to speak for the organization.

Although none of the three critical factors were satisfied in *Prune Yard*, the opposite is true in *Roberts*. In light of this, Justice Brennan's brief treatment of the Jaycees' first amendment argument seems

251. The Jaycees philosophy is summarized by the Creed adopted by the organization as part of its bylaws:

We believe
That faith in God gives meaning and purpose to human life;
That the brotherhood of man transcends the sovereignty of nations;
*That economic justice can best be won by free men through free enterprise*;
That government should be of laws rather than of men;
That earth's great treasure lies in human personality;
And that service to humanity is the best work of life.

Article 2, By-Laws of the United States Jaycees, *reprinted in McClure*, 709 F.2d at 1562 (emphasis added).

The possibility that a compelled change in the membership policy of the Jaycees will produce a change in the organization's philosophy as reflected in its Creed is suggested in the opinion of the Court of Appeals:

But some change in the Jaycees' philosophical cast can reasonably be expected. It is not hard to imagine, for example, that if women become full-fledged members in any substantial numbers, it will not be long before efforts are made to change the Jaycees Creed. Young women may take a dim view of affirming the "brotherhood of man," or declaring how "free men" can best win economic justice. Such phrases are not trivial. The use of language betrays an attitude of mind, even if unconsciously, and that attitude is part of the belief and expression that the First Amendment protects.

*Id.* at 1571.

252. "An organization of young people, as opposed to young men, may be more 'felicitous,' more socially desirable, in the view of the State Legislature, or in the view of the judges of this Court, but it will be substantially different from the Jaycees as it now exists." *McClure*, 709 F.2d at 1571.
inappropriate. Even when a significant first amendment claim exists, the
government may be able to justify the invasion of first amendment inter­
ests;253 however the case should not have been decided without a serious
treatment of the Jaycees' first amendment argument.254

The third case during the 1983 Term involving compelled associa­
tion and expression was Minnesota State Board for Community Colleges v. Knight.255 Of the three 1983 cases, it is by far the most difficult to
evaluate. In Knight, the Court considered a constitutional challenge to
an aspect of the Minnesota Public Employment Labor Relations Act
(PELRA).256 Under the Act, public employees had the right to select an
exclusive bargaining representative to "meet and negotiate" with their
government employer over the "terms and conditions of employ­
ment."257 In addition, professional employees were given the right to
"meet and confer" with their employer on "employment related ques­
tions not subject to mandatory bargaining."258 The professional employ­
ees were required to choose a representative for these "meet and confer"
sessions. If an exclusive bargaining agent had been chosen, that agent

253. See supra note 232.
254. A claim quite similar to the somewhat novel first amendment argument raised unsuccess­
fully by the Jaycees in Roberts has been raised in at least one other recent lawsuit. In Gay Rights
 Ct. App. 1985), vacated, 496 A.2d 587 (D.C. Ct. App. 1985) (original appellate decision vacated and
rehearing ordered after filing of supplemental briefs), two student organizations promoting the cause
of "gay pride" sued Georgetown University for its refusal to grant official recognition to the organiza­
tions, claiming the university's actions violated the Human Rights Act of the District of Colum­
bia, D.C. CODE ANN. § 1-2501 to 2557 (1981), by discriminating on the basis of sexual preference.
The University contended that being forced to recognize the student groups would violate the Uni­
versity's right to freedom of religion—the University is affiliated with the Catholic Church and the
Church's position is that a homosexual lifestyle is morally objectionable.

Although Georgetown University did not make a first amendment freedom of expression argu­
ment, this claim was raised on their behalf by an amicus brief. Brief of Arthur B. Spitzer, Amicus

cited as Georgetown Amicus Brief]. Requiring the University to grant recognition to the two gay
rights groups, thereby subsidizing their activities, would be to compel the university to support the
groups despite the University's disapproval of their activities and purposes. Id. at 28-36. Spitzer
argued such compelled support violates the principles announced in Barne ette, Wooley, and Abood,

and viewed Prune Yard and Roberts as distinguishable. He distinguished Prune Yard on the ground
that the University in fact permitted the plaintiff groups to use its facilities, and that nothing the
Court said in Prune Yard required more than access to facilities. Because the plaintiff groups sought
subsidization and endorsement, the case went beyond Prune Yard. Id. at 34 n.28. Roberts was distin­
guished because, unlike the showing made by the Jaycees, "Georgetown has established clearly in
the record the manner in which subsidizing the plaintiffs' activities would infringe its ability to
communicate its message, rather than the plaintiffs' contrary message, to the university community
and to the broader community." Id. at 35.

257. 465 U.S. at 274; see MINN. STAT. §§ 179.65, 179.66 (1982) (current versions at
§§ 179A.06(5), 179A.07(2) (1984)).
258. 465 U.S. at 274; see MINN. STAT. §§ 179.63, 179.65, 197.73 (1982) (current versions at
§§ 179A.03(19), 179A.06(4), 179A.08 (1984)).
also served as the "meet and confer" representative, and the public employer was not free to "meet and confer" with any other members of the bargaining unit, even to discuss policy matters not subject to mandatory bargaining.259

Under PELRA, the faculty at twenty community colleges in the Minnesota community college system formed a single bargaining unit and selected the Minnesota Community College Faculty Association (MCCFA) as their exclusive bargaining agent. To carry out their charge to meet and confer with the state board operating the community college system (the Minnesota State Board for Community Colleges), MCCFA organized meet-and-confer committees on individual campuses. The representatives on these committees were all faculty members who belonged to MCCFA. Nonmembers were able to communicate their views through unofficial channels, but could not participate in the meet-and-confer sessions.260 The subjects before these committees included "the selection and evaluation of administrators, academic accreditation, student affairs, curriculum and fiscal planning."261

In 1974, a group of community college faculty members who did not belong to MCCFA filed suit challenging the constitutionality of PELRA in so far as it permitted MCCFA to (1) be the exclusive representative for mandatory bargaining and (2) control the selection of meet-and-confer representatives. Although the challenge to the exclusive representative system for mandatory-bargaining subjects failed on the authority of Abood,262 the three-judge district court found the method of choosing meet-and-confer committee members violated the rights of freedom of speech and association of the non-MCCFA faculty. The Association and the State Board for Community Colleges appealed to the Supreme Court, which reversed the district court's finding that appellees' first amendment rights were violated by PELRA.

Justice O'Connor, writing for the Court, reasoned that the meet-

259. 465 U.S. at 274-75; see Minn. Stat. § 179.66(7) (1982) (current version at § 179A.07(4) (1984)).
260. 465 U.S. at 275. Despite the Act's formal prohibition against "meet and confer" sessions with other members of the bargaining unit, the employer may meet informally with other public employees to hear their views. This practice is permitted so long as these meetings do not interfere with the rights of the exclusive representative. See Minn. Stat. §§ 179.65 (1), 179.66 (7) (1982) (current version at § 179A.07(4) (1984)).
261. 465 U.S. at 276.
262. Knight v. Minnesota Community College Faculty Ass'n, 571 F. Supp. 1, 5 (D. Minn. 1982). On appeal, this aspect of the three-judge district court's decision was summarily affirmed by the Supreme Court, 460 U.S. 1048 (1983), although the Court later reversed the district court's holding that the "meet and confer" provisions of PELRA deprived nonmembers of their constitutional rights. See Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. at 279.
and-confer sessions were not a public forum and that appellees—either as members of the public or as public employees—had no constitutionally protected right to be heard by a state policy-making body. Furthermore, non-MCCFA members were free to express their views on the subject of educational policy and were free to associate with whomever they chose because membership in MCCFA was not required by PELRA. Finally, appellees’ equal protection claim was rejected on the ground that the state’s decision to give MCCFA a unique role in the meet-and-confer process was rational.

Justice O’Connor saw Knight as a right-of-access case without a constitutional basis and in no way involving compelled behavior. Although faculty members might feel some pressure to join MCCFA in order to participate in meet-and-confer sessions, this pressure was not considered adequate to give rise to a claim of compelled association.

The situation in Knight was viewed differently by the dissenting Justices. Justice Brennan’s brief separate dissent portrayed PELRA as posing a Hobson’s choice for non-MCCFA faculty members because it compelled them to abandon one of two rights protected by the first amendment:

On the one hand, those faculty members who are barred from participation in “meet and confer” sessions by virtue of their refusal to join MCCFA have a First Amendment right to express their views on important matters of academic governance to college administrators. At the same time, they enjoy a First Amendment right to be free from compelled associations with positions or views that they do not espouse. In my view, the real vice of the Minnesota Public Employment Labor Relations Act (PELRA) is that it impermissibly forces nonunion faculty members to choose between these two rights.

In Justice Brennan’s opinion, the choice presented was constitutionally unacceptable.

Justice Brennan’s evaluation of the case was influenced by his con-

263. See Knight, 465 U.S. at 280 (“A ‘meet and confer’ session is obviously not a public forum.”); see also Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46-47 (1983) (interschool mail system was not a public forum because it has not traditionally been available to members of the public for speech nor had the government designated it as a public forum). But see City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm’n, 429 U.S. 167, 174-75 (1976) (school board meetings are a public forum).

264. 465 U.S. at 283.

265. Id. at 289-90 n.11. The PELRA system is the equivalent of an agency shop. Public employees do not need to join MCCFA. They are, however, required to pay a fair-share fee to defray the costs of the negotiations conducted by the exclusive representative on their behalf. See MINN. STAT. § 179.65(2) (1982) (current version at § 179A.06(3) (1984)).

266. 465 U.S. at 291-92.

267. Id. at 289-90.

268. Id. at 295-96 (footnote omitted).
clusion that the meet-and-confer process played a crucial role in the for-

mation of academic policy for the community colleges. That conclusion
was reinforced by his belief that "many non-union faculty members view
participation in the meet and confer process as 'essential to their role on
the faculty.' " Because the only way to participate in the meet-and-

confer process was by joining MCCFA, significant pressure existed for
faculty members to "abandon their personal or ideological objections to
associating with MCCFA." Placing faculty members in such an un-
tenable position unnecessarily infringed on their first amendment rights,
Justice Brennan argued, and the government could not justify the exclu-
sivity of the meet-and-confer sessions on the same grounds that sup-
ported exclusivity in the collective bargaining context.

Justice Stevens, in a lengthier dissent joined by Justices Brennan and
Powell, approached PELRA from a different but related perspective. He
saw the exclusivity principle in the meet-and-confer context as effectuat-
ing a forbidden form of viewpoint discrimination. Only association
members had a meaningful chance to communicate their views to college
administrators on academic policy matters, and those with opposing,
views were consequently screened out by the statute. In Justice Stevens'
view, the statute was "invalid because the First Amendment does not
permit any state legislature to grant a single favored speaker an effective
monopoly on the opportunity to petition the government."

For the issues raised in this Article, the significant aspect of Knight
is the disagreement between Justices O'Connor and Brennan over
whether the Minnesota statutory scheme was a form of unconstitutional
compelled association because it pressured faculty members to join
MCCFA. In Justice O'Connor's view, pressure did not equal compul-
sion; in Justice Brennan's opinion, pressure in the form of deprivation of
significant rights amounted to impermissible compulsion. Returning
once again to a values discussion and to the three PruneYard factors
helps in deciding which is the better view.

Ever since Barnette, the key value has been protection against forced

269. Id. at 298 (quoting from Appendix to Jurisdictional Statement of Appellant at A-51).
270. Id. at 299.
271. Id. at 299-300.
272. Justice Stevens has stressed in several other recent cases his concern with viewpoint dis-

crimination as a chief vice forbidden by the first amendment. See FCC v. League of Women Voters,
789, 803-04 (1984); Bolger v. Youngs Drug Prods., 463 U.S. 60, 84 (1983) (Stevens, J., concurring);
Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 553 (1981) (Stevens, J., dissenting) ("The
essential concern embodied in the First Amendment is that government not impose its viewpoint on
the public or select the topics on which public debate is permissible.").
273. 465 U.S. at 301.
Jackson's Flag Salute Legacy

conformity to government-supported ideas. To the extent that a government employee feels pressured to join the organization that serves as the exclusive bargaining representative for that employee, it is unlikely the government is attempting to indoctrinate the employee to accept certain ideas. In *Knight* the faculty association was elected by faculty vote and the government employer could not have easily anticipated either the particular entity that would be elected or what the association's views would be on particular collective bargaining issues or on issues of academic policy. The government's purpose was to negotiate with a single employee representative, thereby reducing confusion and easing the task of agreeing on collective bargaining terms. Even if the nonunion public employee were to succumb to pressure and join the union, the government would have no guarantee that any subsequent change in the attitudes and outlook of that employee would favor government-sponsored ideas. Thus, unlike the state purpose asserted in *Barnette* and *Wooley*, the government motive for imposing pressure to conform was not to spread a particular idea or squelch any disfavored belief. In this sense, the *Knight* case is more like *Prune Yard* than *Barnette*.

In its potential impact on personality, however, the situation in *Knight* is more troublesome. To the extent a faculty member was motivated to join MCCFA by the desire to play a significant role in the formation of academic policy, there is a possibility that such a decision would affect the personality of that individual. Whether the impact would be directly upon the individual or only perceived by the world is hard to know. Under PELRA, active participation in the meet-and-confer process would be possible only if one was selected as a meet-and-confer representative. Thus, it is probable that nominal MCCFA membership would not bring about this result, and because active association membership would maximize the chance of gaining a place on a meet-and-confer committee, some identifiable change in the individual could well occur. To be selected, some degree of conformity to association views might be necessary.

*Prune Yard*—in addition to involving no government-sponsored message—focused on two additional factors: the opportunity to disavow the alien message and the likelihood an individual would be assumed to share the ideas of the group with which he or she is forced to associate. In the *Knight* situation no real disavowal of association views would be possible. Such disavowal would probably eliminate any benefit to the individual from joining MCCFA; on a campus where a majority of the

274. For a more extensive discussion of the rationales underlying exclusive bargaining representation, see supra note 159.
faculty belonged to MCCFA, disavowal would doom a faculty member's chances of gaining a place in the meet-and-confer process. In contrast, nonunion employees in *Abood* were easily able to disavow any political positions taken by the union that served as their collective bargaining representative.275

The final *PruneYard* factor was the likelihood that an individual would be associated with the group's views. Although this could occur for association views on widely publicized collective bargaining issues, such a result would be less probable on issues of academic policy for which a party line might not even exist. In fact, what the appellees in *Knight* pressed for was a role in the process whereby academic policy positions were formed. Individuals successful in gaining such a role could influence faculty views on matters discussed at the meet-and-confer sessions, a result at least as probable as that they would be associated with preestablished MCCFA views. Thus, on balance, the danger that an individual would be associated with the views of the collective bargaining representative is no more likely in *Knight* than it would be in *Abood* or in any other agency-shop situation. This factor therefore is not of special significance in the *Knight* setting.

From the twin perspectives of first amendment values and the *PruneYard* factors, the vices of the meet-and-confer provisions in PELRA added some further first amendment burdens to those already imposed by the decision to select an exclusive bargaining agent. As the earlier analysis of *Abood* shows, a major interference with first amendment freedoms occurs under any agency-shop arrangement that gives a union power over all workers, even nonunion employees.276 A careful look at the *Knight* facts, however, demonstrates that additional problems are created by compelling actual association membership as a condition for involvement in the meet-and-confer process. Those burdens pose a threat to the integrity of individual personality, a threat exacerbated by the fact that a faculty member forced to join the association is unable to disavow its views without sacrificing any real chance of involvement in the meet-and-confer process. Any defense of the Court's decision to uphold the requirement of association membership in *Knight*, especially when contrasted with the Court's willingness to strike down the use of compelled fee money for political purposes in *Abood*, must be based on differences in the level of government justification required to permit impositions on first amendment interests, and not on the conclusion that first amendment values are less at risk in *Knight*.

275. See supra text accompanying notes 182-83.
276. See supra text accompanying notes 179-81.
VIII. Pacific Gas & Electric

Since the trilogy of compelled expression cases decided during the 1983 Supreme Court Term, the Court has decided one potentially significant case involving a compelled expression claim. In Pacific Gas & Electric Co. v. Public Utilities Commission,277 the Court reviewed the constitutionality of a California Public Utilities Commission (CPUC) order directing the Pacific Gas and Electric Company (PG&E) to insert periodically certain materials in its billing envelopes. In contrast to its offhanded rejection of the compelled expression and association claims in Roberts and Knight, in Pacific Gas & Electric the Court once again upheld such a claim as a serious intrusion on first amendment rights.

The ruling challenged in Pacific Gas & Electric was prompted by PG&E's practice of distributing a company newsletter along with its monthly bills.278 In 1980, a group objecting to utility rates asked the CPUC to forbid the utility's inclusion of political editorials in its billing envelopes. The group, Toward Utility Rate Normalization (TURN), argued that ratepayers should not have to finance political speech engaged in by the utility. In ruling on TURN's request, the CPUC found that the surplus space279 in the billing envelopes was the property of the utility's customers. The Commission decided to apportion this space between the ratepayers and the utility. Finding that TURN "represented the interests of 'a significant group' of appellant's residential customers,"280 the CPUC permitted TURN to use extra billing envelope space four times a year over a two-year period to communicate its views to ratepayers.281 The Commission stated that ratepayers would receive more of a benefit if their envelope space was used to disseminate a variety of views and not just the views of the utility.282

278. The newsletter contained editorials, public interest features, and information on energy conservation and payment plans offered by the utility. Id. at 905.
279. Surplus space was defined by the CPUC as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." Id. at 906 (quoting Appendix to Jurisdictional Statement at A-2 to A-3).
280. Id. at 906 (quoting Appendix to Jurisdictional Statement at A-15). TURN's appropriateness as a representative of the residential customers was based on TURN's participation as an intervenor in ratemaking proceedings.
281. The Commission authorized TURN to use the space for fundraising and to communicate its views to the customers. No limit was placed on the content of TURN's speech in the mailings, except that it was "required to state that its messages [were] not those of [the CPUC]." Id. at 906-07. TURN was entitled to use more than surplus space so long as it paid the extra mailing costs. Id. at 906.
282. Id. Two qualifications accompanied the ruling. TURN was required to identify its materials as expressing its views and not the views of the utility, and the Commission held open the possibility that it would allow other groups access to the billing envelopes in future rulings. Id. at 907.
After the California Supreme Court refused to review the Commission's order, PG&E appealed the CPUC decision to the Supreme Court claiming the order required it to distribute, in violation of the first amendment, a message with which it disagreed. In a five-to-three decision, the Court reversed the Commission's order.

Justice Powell, in a plurality opinion, viewed appellant's newsletter as the first amendment equivalent of a newspaper. His opinion invalidated compelled access to the billing envelope on the same grounds that the Court had used previously in Miami Herald Publishing Co. v. Tornillo to strike down a state law granting a right of reply to unfavorable editorial commentary in the pages of a newspaper. In drawing this analogy, the opinion emphasized that the right not to speak served the same societal purposes as the right to speak — both assure that public debate on public issues is vigorous. Compelling access as a penalty for expressing certain viewpoints tends to discourage the expression of those viewpoints because the potential speaker often chooses silence to avoid the penalty.

Justice Blackmun took no part in the consideration of the case. Justice Powell's opinion was joined by Chief Justice Burger, and Justices Brennan and O'Connor. Justice Marshall wrote a separate opinion concurring in the judgment. Justice Rehnquist dissented, joined in part by Justices White and Stevens, and Justice Stevens wrote an additional dissent. Justice Powell was of the view that the newsletter's content was close enough to that of a traditional newspaper to merit the full protection of the first amendment and not the lesser level of protection afforded commercial speech, even though its author was a corporation. Id. at 907-08.

The analogy between Pacific Gas & Electric and Tornillo was viewed as compelling despite recognized differences between the two cases. In Tornillo, by avoiding an editorial position critical of the qualifications of a candidate for political office, the newspaper could avoid any right-of-reply obligation because access was triggered only by the paper's expression of particular views. In Pacific Gas & Electric, access rights did not turn on the utility's engaging in the expression of any specific views. 106 S. Ct. at 910. The access decision was based on the Commission's view that the ratepayers owned the extra envelope space and that their interest would be better served by periodically receiving information from TURN. It seems unlikely, given the Commission's property right basis for its rule, that even the total abandonment of the utility's monthly newsletter would eliminate the rights granted to TURN. Id. at 919 (Rehnquist, J., dissenting). In addition, access was not granted to the pages of the utility's own newsletter as it was to the pages of the Miami Herald. Id. at 909 n.7. Despite these differences, the cases were viewed as having one important deterrent effect in common. Although refraining from expressing political views could not completely avoid access by TURN,
Jackson's Flag Salute Legacy

In reaching the conclusion that the CPUC order was unconstitutional, Justice Powell distinguished *PruneYard* on three grounds. First, the shopping center owner in *PruneYard* had not alleged that his own speech would be altered by the presence of students protesting United Nations action; therefore, his right to speak was not burdened. In contrast, PG&E's right to speak was burdened in several ways: it might decide to alter the content of its speech to discourage debate on its views by TURN or feel compelled to respond to opinions expressed by TURN with which it strongly differed. The second distinction was that the center property was open to the public in a way that the utility's billing envelopes were not.

The third distinction was that the shopping center, open to all speakers regardless of the content of their speech, was a content-neutral public forum. In *Pacific Gas & Electric*, access decisions by the Commission discriminated among those seeking access based on the viewpoint they wished to express. The Commission's goals in ordering access were to intrude into the marketplace of ideas and to artificially magnify the views of the utility's opponents by giving those views greater visibility. Justice Powell reasoned that opponents of the utility were the ben-

Justice Powell speculated that the utility's realization "that whenever it speaks out on a given issue, it may be forced—at TURN's discretion—to help disseminate hostile views" might discourage it from expressing such views. *Id.* at 910.


291. *Id.* at 910 n.8.

292. *Id.* at 911. The view that a compelled response is objectionable under the first amendment is consistent with Justice Powell's opinion in *PruneYard*. Concurring in the outcome of that case, Justice Powell distinguished cases in which the owner of the property opposed the views being expressed on his property and might, therefore, feel compelled to respond to those views. For a discussion of Justice Powell's concurring opinion in *PruneYard*, see supra text accompanying notes 194-96.

In *Pacific Gas & Electric*, Justice Powell found the forced-response aspect of the Commission order no less objectionable, even though the compelled speaker was a corporation. *Id.* at 912. In addition to finding the appellant's corporate character not significant, Justice Powell saw no special importance in the fact that the compelled speaker was a regulated utility. *Id.* at 912 n.14.

One further manner in which the access order affected PG&E's free speech rights was suggested in Justice Marshall's concurring opinion. By virtue of the order, PG&E was deprived of four opportunities to use the surplus envelope space to distribute a monthly newsletter. *Id.* at 916 (Marshall, J., concurring). This displacement effect may well have been the CPUC order's most serious intrusion on the utility's rights.

293. *Id.* at 910 n.8.

294. *Id.* at 910-11. The Commission, intent on creating a forum for opinions adverse to those of the utility and for information deemed beneficial to consumers, had selected TURN to present these views. The record in *Pacific Gas & Electric* indicated that at least one application for use of the extra space had been rejected by the Commission on the ground that the group seeking to use the space "neither wished to participate in Commission proceedings nor alleged that its use of the billing envelope space would improve consumer participation in those proceedings." *Id.* at 907 n.5.

295. The Court generally has struck down government attempts to "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) (invalidating $1,000 ceiling on independent expenditures for political candidates); *accord First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790-92 (1978) (striking down law forbidding expenditures by banks and business corporations to influence referendum voting). The
Eficiaries of government favoritism assisting those speakers in spreading their message and at the same time burdening the utility in expressing its views.296 Such viewpoint discrimination has long been viewed as offensive to the first amendment’s equality principle and as justifiable only when supported by a compelling interest.297

Having determined that the Commission's order burdened protected expression, Justice Powell nevertheless would have upheld the order if the state was furthering a compelling interest and had chosen means which were narrowly tailored to further its end.298 The state asserted two interests: assuring an effective ratemaking process299 and “promoting speech by making a variety of views available to appellant’s customers.”300 Although Justice Powell was willing to agree that these interests were compelling, the state failed to satisfy the means component of the standard of review, because compelling access to the billing envelope for TURN's fundraising effort was not sufficiently related to the state's interest in assuring an effective ratemaking procedure.301 Moreover, the state was not free to advance TURN's speech at the expense of the utility's own speech rights as a means of promoting public awareness and debate.302

In his concurring opinion, Justice Marshall stressed two distinctions between Pacific Gas & Electric and Prune Yard: “the degree of intrusive­ness of the permitted access”303 and the fact that “the State has chosen to give TURN a right to speak at the expense of appellant's ability to use the property in question as a forum for the exercise of its own First Court responds more positively only when the government subsidizes some speech without any intent to suppress the speech of others. See, e.g., Regan v. Taxation With Representation, 461 U.S. 540, 548-50 (1983) (upholding tax deductions for contributions to veterans' organizations); Buckley v. Valeo, 424 U.S. at 97-105 (upholding general election campaign financing for major parties).

296. 106 S. Ct. at 911. In criticizing the viewpoint-discriminatory aspect of the Commission's action, Justice Powell found that it exacerbated the chilling effect of the access order. See supra note 289.

297. See supra note 132.

298. 106 S. Ct. at 913. One other argument justifying the CPUC order was also rejected by Justice Powell. His opinion dealt with the Commission's conclusion that the utility's customers owned the surplus space in the billing envelopes and that, therefore, the utility could not complain about the fact that access rights to that space were awarded to groups that represented those customers. Justice Powell found the fact of customer ownership of the surplus space to be irrelevant because, under the Commission's order, the utility was required to distribute TURN's literature in its billing envelope. The envelope itself was not viewed by the Commission as the property of the customers. Justice Powell viewed this circumstance as equivalent to the Maynards being forced to lend their automobile to display the state's message printed on their license plate. Id. at 912.

299. Id. at 913.

300. Id. at 914.

301. Id. at 913.

302. Id. at 914. Because the order did not satisfy the requirement of content neutrality, the opinion also rejected CPUC's argument that its order was a reasonable time, place, and manner regulation. Id.

303. Id. at 915.
Amendment rights. Justice Marshall viewed the intrusiveness in *Prune Yard* as minor because the center was open to the public in ways that were similar to traditional public forums and because the state courts had not allowed activity on the property that was any more intrusive than the activity the owner himself encouraged. By contrast, the billing envelope had not been made available to the public to serve "as a sort of community billboard." Additionally, the facts in *Prune Yard* did not suggest that the property owner was prevented from engaging in protected expression of his own as a result of the access granted to others. In *Pacific Gas & Electric*, however, the forum was limited to the monthly billing envelope. Four of the twelve opportunities each year for communication with utility customers were given over to TURN, ousting the utility from occasions on which it would have used the surplus envelope space for its own speech. This intrusion, given the character of the state's justification, was viewed as impermissible by Justice Marshall. Because the state was interested in promoting speakers with particular viewpoints, it would have been free to utilize its own resources to further the interests of TURN, but it could not use means that interfered with the first amendment rights of the utility.

Three justices dissented in *Pacific Gas & Electric*. Justice Rehnquist's dissent disagreed with the majority in several fundamental respects. First, he did not believe that the access order would demonstrably affect the utility in the exercise of its first amendment rights, and he found the case indistinguishable from *Prune Yard* in this aspect. Second, he was of the view that corporations do not have the

304. Id. at 916.
305. Id. at 915.
306. Id. at 916.
307. Id. at 916-17. In addition to Justice Powell's plurality opinion and Justice Marshall's concurrence, there was one other concurring opinion. Although joining Justice Powell's opinion, Chief Justice Burger also wrote a brief separate opinion stressing his view that the case could be decided on the authority of *Wooley v. Maynard*, 430 U.S. 705 (1977) and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). As in those two cases, the utility was ordered to employ its property to disseminate views that it found objectionable. 106 S. Ct. at 914.
308. Justice Rehnquist's dissent was joined in part by Justices White and Stevens; Justice Stevens also wrote separately.
309. Justice Rehnquist's dissent reaffirmed much of the reasoning relied on in his majority opinion in *Prune Yard*, in which three factors were seen as distinguishing that case from *Wooley v. Maynard*. First, the disseminated message did not originate with the government; second, there was an opportunity to disavow in *Prune Yard*, unlike the situation in *Wooley* where the license plate message could not be covered up, see supra note 190; finally, the third *Prune Yard* factor was the possibility that views expressed would be assumed to be those of the shopping center owner. Under the circumstances of *Prune Yard*, Justice Rehnquist's opinion found no such possibility existed. For a discussion of Justice Rehnquist's opinion in *Prune Yard*, see supra text accompanying notes 189-93.
same free speech rights as individuals and newspapers.310

Justice Rehnquist's opinion took a narrow view of the scope of the first amendment right not to speak. He would protect that right only when "the effect of the action approximates that of direct content-based suppression of speech."311 If the government action granting access "only indirectly and remotely affects a speaker's contribution to the overall mix of information available to society,"312 it would be upheld if it could be justified by a rational basis.

On the facts of the case before him, Justice Rehnquist found the "potential deterrent effect" to be "remote and speculative" and not "sufficiently immediate and direct to warrant strict scrutiny."313 Relying on the fact that no particular action by the utility triggered TURN's right of access, Justice Rehnquist found no logical or evidentiary support for the view that the utility would refrain from speaking out about certain subjects to attempt to discourage TURN from speaking on those subjects.314 He also disagreed with the plurality's conclusion that the utility would feel compelled to respond to views expressed by TURN. As he had in his opinion in PruneYard,315 he viewed the required disclaimer of any association between the utility and the views expressed by TURN, as removing any likelihood of impermissibly compelling PG&E to respond to the opinions expressed by TURN.316 Moreover, because TURN could express its views in other places if denied access to the billing envelopes, the utility might decide to respond to TURN's opinions even in the absence of CPUC's order. Finally, the utility retained complete control over the content of its monthly magazine. Given these facts, Justice Rehnquist saw no way in which PG&E's behavior had been affected by the Commission's order that rose to the level of a significant direct effect on its first amendment rights.

Justice Rehnquist's opinion also offered a more sweeping alternative analysis. He viewed the individual's right to refrain from expression as "a component of the broader constitutional interest of natural persons in freedom of conscience."317 This interest explained the Court's opinions in Barnette, Wooley, and Abood. Justice Rehnquist viewed the interest in

310. Justices White and Stevens did not join this part of the opinion.
311. 106 S. Ct. at 918.
312. Id. at 917 (emphasis in original).
313. Id. at 919.
314. Id. at 920.
316. 106 S. Ct. at 920; see also supra note 190 and text accompanying notes 199-201 (discussing Justice Rehnquist's disavowal analysis in PruneYard and the reasons that caused Justice Powell to dissent in that case).
317. 106 S. Ct. at 920.
Jackson's Flag Salute Legacy

protecting individual "freedom of mind" as inappropriately applied to nonmedia corporations: "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." Recognizing that corporations have been granted free speech rights, Justice Rehnquist nevertheless viewed such rights as arising out of a desire to promote the exchange of information and opinions, and not out of a view that corporations have any independent interest in self-expression. Because freedom of conscience promotes values—such as privacy—separate and distinct from the promotion of a vigorous marketplace of ideas, that freedom ought not to apply to corporations.

The various opinions in Pacific Gas & Electric raise a complicated series of analytic possibilities. On an obvious level, Pacific Gas & Electric presented another opportunity to explore the situation first encountered in Prune Yard. In his Prune Yard opinion, Justice Powell limited the decision to the facts of the case and held open the possibility of a different result if the property owner opposed the message distributed through the use of his property. For Justice Powell, Pacific Gas & Electric was just such a case. The antipathy between the utility and TURN's message was obvious because TURN was granted access rights only because its views were opposed to those of the utility. His Pacific Gas & Electric opinion also reiterated his Prune Yard view that neither the opportunity to disavow nor the nongovernment source of the message are of first

318. Id. (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)).
319. Id. at 921.
320. Id. at 921-22. Justice Stevens' dissenting opinion took a much narrower view of the issues in the case. His view of the CPUC's order was that TURN was granted access for the purpose of fundraising efforts and that the Commission did not authorize TURN to use the surplus space to engage in general advocacy of political viewpoints. Id. at 923. Moreover, because TURN was the only ratepayer organization that had applied for access, he declined to find that the Commission had engaged in viewpoint discrimination. Id. at 922-23. Justice Stevens, given the limited purpose for which TURN was granted access, saw no difficulty in upholding a CPUC order requiring "the utility to act as the conduit for a public interest group's message that bears a close relationship to the purpose of the billing envelope." Id. at 924. Justice Stevens found the access requirement to be similar to a variety of rules, not thought to raise any first amendment concerns, applied to commercial communications by the Securities and Exchange Commission. Id. His rejection of the plurality's viewpoint-discrimination approach comes as something of a surprise given his general receptivity to such claims. See supra note 272.
321. See Prune Yard Shopping Center v. Robins, 447 U.S. 74, 99 (1980). Justice Powell views the opportunity to disavow as part of the burden impermissibly imposed on the speaker in violation of the first amendment. The utility may be forced to take advantage of that opportunity in order to disassociate itself from the views of its opponents. In Pacific Gas & Electric, the Commission's order specifically required that TURN attach a disclaimer to its message stating that the views expressed were not those of the utility. 106 S. Ct. at 907. This disclaimer did not impress Justice Powell as lessening the unconstitutional impact of the Commission order, even though PG&E was not pressured to speak in order to clarify any ambiguity as to the source of the communication. Justice Powell worried that, despite TURN's required disclaimer, the utility would feel pressured to respond
amendment significance because they do not lighten the first amendment burdens created by the order. Also important to the outcome in \textit{PruneYard} was the fact that the state had chosen a content-neutral method of promoting its ends.\textsuperscript{323} In \textit{Pacific Gas & Electric}, the state chose a less favored content-based method of achieving its objectives. As a result, its effort was much more easily struck down.

Despite the differences between \textit{Pacific Gas & Electric} and \textit{PruneYard}, it cannot go unnoticed that \textit{Pacific Gas & Electric} follows two Supreme Court opinions, \textit{Roberts}\textsuperscript{324} and \textit{Knight},\textsuperscript{325} in which claims of compelled expression and association received swift rejection. One wonders what factors present in \textit{Pacific Gas & Electric} made it so easily distinguishable from those earlier decisions.

One factor relevant to this result is that, despite citations to \textit{Barnette} and \textit{Wooley}, it is clear that \textit{Pacific Gas & Electric} is viewed by the plurality as a special subcategory of compelled expression cases in which the obligation of compelled access to private property is triggered by statements the property owner makes. In such cases, the owner may be able to avoid the access obligation by altering the behavior that gave rise to that obligation.\textsuperscript{326} This subtle "content-based penalty"\textsuperscript{327} is in many ways more invidious than a specific compelled governmental message because of its immediate impact on the expression of the person or entity confronted by the penalty.

Another important qualification is that \textit{Pacific Gas & Electric} is a
compelled-access case, like *PruneYard* and *Wooley* insofar as private property owners are obligated to provide a forum for the speech of others—private parties or the government—and not to say something they do not wish to say. Unlike *PruneYard*, however, the access is not granted on a content-neutral basis. Here, the Commission selects some speakers for access based on the content of their speech. This viewpoint discrimination is a special concern under the first amendment and very similar to the government’s dictating a particular message of its own choosing and coercing private parties to participate in the dissemination process, the situation in *Wooley*.

The use of such objectionable means was a critical factor in the analysis of the *Pacific Gas & Electric* plurality and concurring opinions.

A third factor that cannot be ignored in evaluating *Pacific Gas & Electric* is the extent to which the case involves traditional free speech concerns. In Justice Marshall’s analysis of the facts, the utility is prevented from using the envelope space four months out of the year. Thus, not only have access rights been granted, but they have been granted at the sacrifice of the utility’s ability to speak. This partial silencing of a speaker and depriving the speaker of a chosen method of communication turns *Pacific Gas & Electric* into a censorship case, not requiring any compelled expression analysis. Even Justice Powell’s plurality opinion, although it does not emphasize this same adverse impact, nevertheless describes direct invasions of free speech rights when he worries that PG&E will feel pressured to refrain from speaking as a result of its compelled distribution of TURN’s views.

Because the case contains so many of the worst features of prior fact patterns—ousting speakers from space otherwise available for their own speech; imposing access obligations on speakers because they have exercised free speech rights; imposing obligations to spread a message with which the speakers disagree; and acting in a viewpoint-discriminatory manner—it comes as no surprise that the Commission order was invalidated.

Despite the unsurprising nature of the outcome in *Pacific Gas & Electric*, there is one very striking difference between the decision and its doctrinal predecessors. In *Pacific Gas & Electric*, the nature of the de-
bate among the various Justices shifted. For the first time, the debate focused on more than factual similarities with and differences from prior cases; the debate also considered the first amendment values at stake. For the majority, first amendment values associated with freedom of expression are threatened, such as the likelihood that the utility will change its speech as a result of the order and the fact that the utility is deprived of the opportunity to speak four months out of the year. By comparison, for Justice Rehnquist there is no empirical data to support this adverse impact on the marketplace of ideas, and, to the extent *Barnette* and *Wooley* draw their doctrinal origins from the intrinsic values of intellectual individualism, such rights do not apply to the nonmedia corporation. *Pacific Gas & Electric* attempts to confront the values underlying the decision to protect the right not to be compelled to speak; this effort is both commendable and novel in the Court's compelled expression jurisprudence.

The debate over values and the plurality's hostile attitude toward the Commission order raise the question of whether that hostility is justified based on the concerns that prompted the *Barnette* opinion. One of Justice Jackson’s first concerns was the prospect that compelled speakers would alter their own beliefs under the influence of government compulsion and that society would be deprived of their differing views. No member of the Court suggests that such a danger exists in *Pacific Gas & Electric*. There is little danger that the utility, unlike the Jehovah’s Witnesses in *Barnette*, will change its point of view as a result of the forced association with TURN’s opinions. The nature of the utility’s business enterprise dictates many of the views that it holds and makes any change highly improbable.330

A second concern of Justice Jackson was that compelled speakers, even if not changing their beliefs, would be less likely to express their true views as a result of compelled association with government-sponsored ideas. Justices Powell and Rehnquist disagree about this possibility in their opinions in *Pacific Gas & Electric*. Although it is hard to know whether such a result will occur, this seems unlikely on many of the issues of interest to both Pacific and TURN because these issues are contested in mandatory appearances before state and federal regulatory agencies, and the views of the utility are already a matter of public record. As to other issues, such as proposed legislation, even when there are

330. In the same way that commercial speech "may be more durable" and less vulnerable to a chilling effect than political speech, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, Inc., 425 U.S. 748, 772 n.24 (1976), it can be argued that the utility is more likely to adhere to its original views than an individual.
issues on which the utility chooses not to air its views before its customers, it seems doubtful that the prospect of a response by TURN will operate as a significant deterrent factor. As Justice Rehnquist points out, TURN is free to express its views in other forums, as it has in the past, which is just as likely to prompt a response by the utility. Unlike cases in which the proximity of opposing views makes a response more compelling, proximity seems unlikely to play a role in the utility’s decisionmaking.

The only other forced expression concern raised in *Pacific Gas & Electric* is found in Justice Powell’s belief that the utility will feel compelled to respond to TURN when it would prefer to remain silent. In previous cases, such an effect was seen as threatening the individual’s right to develop one’s own personality, even if it was a silent one, free of outside interference. What is doubtful in *Pacific Gas & Electric* is that the utility would realistically prefer silence. As a regulated utility, many of whose policies are established or approved by government bodies, PG&E has little incentive to remain silent when its interests are at stake. In this respect, to the extent that there is a publicly held corporate personality, it is not a personality that is as individualized as its human counterparts. Whatever motivates private individuals to prefer silence—shyness, inarticulateness, preferring to be private persons, uncertainty about their views—seems unlikely to influence the behavior of a large, publicly held, and highly regulated corporate entity. Without taking Justice Rehnquist’s extreme view that corporations are not protected from being forced to speak, in the circumstances of this case there is little realistic likelihood of such an impact on PG&E’s first amendment right to remain silent.

When examined closely, the *Pacific Gas & Electric* fact pattern raises few of the concerns that were implicated in *Barnette*, or even in *Wooley*. The most serious first amendment consequence, depriving PG&E of the use of the surplus space for four months out of the year, directly involves the utility’s right to speak and not its right to refrain from speech or association.331

Despite the Court’s efforts to treat *Pacific Gas & Electric* as a prototypical compelled expression case, in truth the circumstances of the case

331. Any possibility of a forced association claim seems eliminated by the disclaimer contained on TURN’s communications and the fact that TURN is not granted space in PG&E’s own newsletter. The only association between the utility and TURN is the fact that TURN’s newsletter shares physical space with communications from the utility contained in the envelope enclosing the utility bill. This physical proximity bears no relationship to the forced association of the nonunion employee forced to pay union dues or the male members of the Jaycees forced to admit women to membership in their organization.
share few of the philosophical underpinnings of past compulsion cases. Although the Court's focus on values is to be applauded, it has failed to appreciate the important distinctions between Barnette with its concern for intellectual individualism, and the plight of a utility forced to share its billing envelope with its opposition.

IX. A Suggested Two-Tiered Analysis

It is clear that the Supreme Court's approach to the first amendment problem of compelled expression and association is neither consistent nor adequate. The varying first amendment interests at stake in the different factual situations encountered within this general problem area are not appropriately considered.

A. The Analytic Framework

This Article suggests a possible analytic technique for deciding such cases that would avoid at least some of the pitfalls that the Court has encountered. As its first principle, this technique requires considering the nature and extent of the first amendment infringement that has occurred as a factor in the resolution of the case. All invasions of the right to be free from government-compelled expression and association are not equally serious under this approach: an effort is made to separate those cases in which the level of compulsion is sufficiently serious to involve the first amendment interest in intellectual individualism that concerned Justice Jackson in his Barnette opinion. The cases falling into this first category are those in which government compulsion creates a serious risk of forced conformity to government-favored ideas.

A second group of cases, although rising to the level of a first amendment invasion, involve a less worrisome form of invasion. Here, the individual is not alleging that the degree of government intrusion chills the enthusiasm for expressing contrary ideas or seriously compromises individual identity. Instead, the individual typically complains of interference with the freedom to be one's own person unfettered by government constraint. In such cases, the government should be permitted to support its action with a lesser level of justification.

Dividing compelled expression and association cases into two tracks seems justified in light of this Article's detailed evaluation, based on cases the Supreme Court has decided, of how seriously first amendment values are affected. The cases demonstrate a range of different impacts, not all serious to the same degree. The kind of division suggested, moreover, is hardly unusual in first amendment analysis—the Court already distinguishes between categories of speech, protecting some more than others.
based on the unique characteristics of different varieties of speech.\textsuperscript{332} And, when confronted with a claim of government prohibition of speech, the Court customarily distinguishes between direct government censorship of speech that suppresses an idea (content-based cases) and government restraint that is incidental to some purpose other than the desire to suppress an idea (content-neutral cases).\textsuperscript{333} In content-neutral restraint cases, the Court requires a lesser level of governmental justification based on its view that such restraints present fewer threats to basic first amendment values.\textsuperscript{334} Although a parallel two-tiered analysis for compulsion cases is not surprising, the Court has failed to distinguish between these two types of cases in its earlier encounters with compelled expression.

1. \textit{First-Tier Cases}.—If the government directly requires individuals to engage in speech against their will or requires that individuals become more than nominal members of an organization, the case would be viewed as the most serious interference with first amendment values. In such cases, having identified the government's action as a direct compulsion, the inquiry would shift to the government's asserted justification and choice of means. That justification should then be subjected to strict scrutiny. If the government's purpose is to encourage a particular idea or further a particular cause or association, that goal would be inadequate

\textsuperscript{332} See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 743 n.18 (1978) (Stevens, J., concurring) ("A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) ("[G]reater objectivity and hardiness of commercial speech ... may make it less necessary to tolerate inaccurate statements ... ."); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (stating that there are certain narrowly limited classes of speech that may be constitutionally subject to punishment); see also Schauer, \textit{Categories and the First Amendment: A Play in Three Acts}, 34 Vand. L. Rev. 265 (1981) (discussing categorization in free speech analysis).


\textsuperscript{334} The Court's standard of review in content-neutral cases has been described as "an essentially open-ended form of balancing." Stone, \textit{supra} note 333, at 190. In one major category of content-neutral regulation—restrictions classified as time, place, and manner restraints—the test employed by the Supreme Court asks whether the regulations "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The Court's characterization of content-neutral time, place, and manner restraints as presenting a lesser threat to first amendment values and its use of a lower-level of scrutiny for regulations of this type has been viewed with approval. See Farber & Nowak, \textit{The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication}, 70 VA. L. REV. 1219, 1237 (1984).
to justify direct interference. If the government’s purpose is unrelated to a desire to further speech, then the question becomes whether the purpose is a compelling one and whether the choice of means is necessary to accomplish that compelling end. Such strict scrutiny is merited because of the seriousness of the invaded interest in terms of the impact on values protected by the first amendment.

2. Second-Tier Cases.—If compelled behavior is exacted by the government, but the nature of the compelled behavior is—instead of speech or membership—some lesser association with an idea or an organization, a lower level of scrutiny should be applied in order to judge constitutionality. These indirect or incidental associations with ideas are forms of compelled behavior; they involve, however, a lesser impact on individual conscience and are less likely to discourage the individual from expressing contrary ideas. Because such incidental coercive measures involve a less serious challenge to first amendment values, the lower-level of scrutiny is justified. Just as in first-tier cases, despite the lower-level standard of review, a court should be hostile to government efforts to justify the use of compulsion as a means of spreading a particular government-sponsored message or coercing adherence to a government-favored idea.\(^{335}\) As long as the government action is not motivated by such a suspect purpose, the court should uphold a law if it found that: (1) the government’s purpose was both nonsuspect and substantial; (2) the law directly advanced the asserted government purpose; and (3) the law was no more extensive than necessary to serve that purpose.

B. Applying the Two-Tier Approach

1. Barnette Revisited.—Under this two-tiered analysis, Barnette is clearly a first-tier case. The governmental interference is direct: schoolchildren were required to recite the words of the pledge and salute the flag. Because the invasion of first amendment interests is direct, compelling speech itself, strict scrutiny review is mandated. The next inquiry focuses on the government’s purpose for requiring the flag salute. In Barnette, the government’s purpose was its desire to encourage patriotism.\(^{336}\) Because this purpose is simply an attempt to spread a government-favored idea, such a justification is not adequate to excuse a direct compulsion of speech. Although the government’s motive may be per-

\(^{335}\) See supra notes 130-34 and accompanying text.

\(^{336}\) West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 n.2 (1943) (noting that the West Virginia Board of Education resolution adopting the mandatory flag salute described the American flag as the symbol of national unity and the purpose of the mandatory flag salute as promoting national unity).
missible, the means used are not acceptable. Alternative means exist to achieve such an end that do not interfere to the same extent with first amendment interests.

Applied in a case like *Barnette*, this analysis parallels cases of content-based censorship, in which the government desires to suppress a disfavored idea and does so by directly forbidding its utterance. Such a motive is at odds with basic first amendment values. Therefore, such an impermissible motivation will lead to the virtually automatic invalidity of the law, unless the speech involved is entirely unprotected by the first amendment or receives only some lower level of protection. By comparison, when the government attempts to spread an idea instead of suppressing one, no clear rule of invalidity currently exists. Instead, limitations on government-fostered speech have focused on the narrower question of the appropriateness of the means employed, and the Court has held impermissible only those means that compel allegiance to an idea and deprive an individual of the ability to refuse to cooperate with the government’s efforts.


338. Content-based regulations are viewed with less hostility when the speech singled out is not entitled to the full protection of the first amendment. For speech deserving no protection, the government’s justification for content-based censorship usually is directed at the same harmful qualities attributed to the speech that led the Court to consider the speech outside of the protection of the first amendment. See, e.g., New York v. Ferber, 458 U.S. 747, 763-64 (1982) (concluding that “a content-based classification of speech has been accepted because . . . the evil [of child pornography] so overwhelmingly outweighs the expressive interests”). When the government is regulating a category of speech receiving reduced first amendment protection, the Court has been less hostile to content-based regulations that are reasonable in light of the special nature of the speech subject to the regulation. See, e.g., Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978) (commercial speech); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (sexually explicit speech).

339. Government efforts to disseminate an idea are described generally under the heading of government speech. See supra note 134. Although commentators have argued that first amendment limits on government participation as a speaker in the marketplace of ideas are appropriate, e.g., Yudof, supra note 134, at 260-61; Kamenshine, supra note 134, at 1105-06, courts have followed their lead only when the government is engaging in partisan political activities, and then only by relying on nonconstitutional grounds for decision. See, e.g., Anderson v. City of Boston, 376 Mass. 178, 198, 380 N.E.2d 628, 641 (municipality lacks authority to spend funds to influence referendum results); appeal dismissed, 439 U.S. 1060 (1979); Stern v. Kramarsky, 84 Misc. 2d 447, 453, 375 N.Y.S.2d 235, 240 (N.Y. Sup. Ct.) (state agency lacks authority to campaign for passage of proposed amendment to state constitution); see also Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C.L. REV. 578 (1980) (analyzing the statutory and constitutional restraints on governmental partisanship); Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535 (1980) (critiquing the current mode of analysis used to adjudicate municipal referendum advocacy).

340. This hostility to compelled expression motivated by the government’s desire to spread an idea is obvious in the Court’s decision in *Barnette*, 319 U.S. at 641. A similar hostility appeared in *Wooley* when the Court summarily rejected a state justification that was not considered to be view-
work a two-fold distortion of the marketplace of ideas: one distortion occurs because the government-compelled idea is artificially elevated in prominence above others by gaining the advantage of citizen advocates who are compelled to express the idea; the second distortion occurs because some individuals who might otherwise express a differing viewpoint may be discouraged from doing so as a result of the government compulsion.

2. The Loyalty Oath Cases.—A second example of direct interference with the freedom from compelled expression and association is found in the loyalty oath cases. Individuals are compelled to speak against their will by reciting a loyalty oath or affixing their signatures to a form; the government’s asserted purpose is assuring that persons it employs and entrusts with carrying out policies are loyal to their government employer and will endeavor to execute their duties by lawful means.

Unlike Barnette, in the loyalty oath cases the government’s dominant purpose is not a desire to encourage a government-favored idea—acting within the law—but instead to test an individual’s preexisting belief in such an idea, an admittedly subtle distinction. Because the government’s purpose is not the suspect one of spreading a government-approved idea, the compelled speech should not be immediately condemned as inappropriate in terms of first amendment values. There is nothing impermissible about the government’s desire to assure belief in the law on the part of its employees. Moreover, far from being impermissible, such a goal satisfies the compelling government purpose requirement of strict scrutiny review. The outcome of the case therefore turns on the fit between means and ends. The question to be asked is whether use of a compelled loyalty oath is necessary to assure that government employees respect the law and are loyal to their employer.

One way of resolving this question is to focus on the existence of available alternative methods for assuring the loyalty of employees without so directly intruding on interests protected by the first amendment. It may well be that by concentrating on job qualifications, by interviewing prospective applicants to discern attitudes, and by checking refer-
ences of potential employees, the government will be better able to assure loyalty among its employees than by the use of a loyalty oath. The danger of using a loyalty oath for this purpose is that the least law-abiding employees are more likely to be willing to recite the oath and risk perjuring themselves in order to infiltrate government. Thus, the technique may be ineffective for avoiding the danger of disloyal employees and yet appear sufficiently intrusive to persons who would make excellent employees to discourage them from working for the government.

3. Second-Tier Cases: Wooley, Abood, PruneYard, and Pacific Gas & Electric.—Many of the subsequent coercion cases fall into the second tier and merit a lower level of judicial scrutiny. For example, in Wooley v. Maynard, the behavior coerced—displaying the state motto on the Maynards’ license plate—was an incidental restraint on freedom from coerced expression. Because the Maynards’ involvement with the state motto was something less than coerced speaking of the motto, and because the association between the Maynards and the motto was not one that would make the world believe the Maynards were advocates of the state’s “Live Free or Die” message, lower-level scrutiny is justified. A court’s focus for similar fact situations should begin with the government’s purpose behind requiring citizens to bear the state message.

In Wooley, the Court identified two government purposes. One was the state’s desire to spread the state’s motto and communicate “an official view as to proper appreciation of history, state pride, and individualism”, the second was the need for easy identification of properly licensed vehicles. The first purpose, because it involved the desire to spread a particular viewpoint, was not sufficient to justify the compelled behavior, just as such a purpose was not sufficient to justify the use of compulsion in Barnette. The second purpose, even if assumed to be substantial, as required by lower-level review, would require a focus on the fit between means and ends. The suggestion of the Court’s opinion in Wooley was that the means were more extensive than necessary because a state’s license plates can be made easily identifiable without the presence of a motto.

A similar analysis would also apply to facts like those presented in Abood v. Detroit Board of Education. In that case, indirect coercion existed in the form of forced payment of union dues. That degree of

344. 430 U.S. 705 (1977), discussed supra Part IV.
345. 430 U.S. at 716.
346. Id.
347. Id. at 716-17.
348. 431 U.S. 209 (1977), discussed supra Part V.
compelled participation is clearly less than speech itself or compelled active participation in an organization. In addition, the government's purpose was to promote labor peace and to avoid the free-rider effect, and not any desire to promote a particular union message. These articulated purposes were easily viewed as important to the system of labor relations. Just as in New Hampshire's effort to justify the state motto with the need for vehicle identification, the critical question for \textit{Abood} becomes the fit between means and ends.

A third case falling within the second tier is \textit{PruneYard Shopping Center v. Robins}, in which the forced association was indirect. The center's owner was not forced to engage in speech but had to make the shopping center property available as a forum for the expression of the ideas of others. The government's purpose for compelling access to the shopping center property was the state's desire to promote the marketplace of ideas, a value protected by the California Constitution's free speech provision. Government efforts to provide access to a forum for expression are generally viewed as involving a substantial government purpose, although there are significant limits on the means that can be used to achieve this end.

Assuming the propriety of compelled access, the question becomes the traditional one of whether there was a direct fit between means and

349. 431 U.S. at 220-23.

350. Because the analysis of whether such a fit is direct and the requirement no more extensive than necessary involves difficult questions of labor policy and union management, that analysis will not be attempted here. It was the Supreme Court's view in \textit{Abood} that adequate justification existed for imposing the costs of union collective bargaining activities on nonunion employees, \textit{id.} at 222, but that there was no similar reason to make nonunion members pay for the union's political activities. \textit{id.} at 235.

351. 447 U.S. 74 (1980), discussed \textit{supra} Part VI.


353. Prior to its decision in \textit{Pacific Gas & Electric}, the Court had already recognized significant limits on access grants. For example, the government cannot usually open up a forum for expression and exclude speech that advocates a particular point of view. \textit{E.g.}, Board of Educ. v. Pico, 457 U.S. 853, 871 (1982) (Brennan, J.) (plurality opinion). Even subject-matter restraints are strictly scrutinized. \textit{See, e.g.}, Widmar v. Vincent, 454 U.S. 263, 276 (1981) ("requir[ing] the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its context" and applying that scrutiny to a state university regulation that prohibited the use of school grounds for religious worship or teaching); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544 (1980) (inclusion by public utility of controversial, political statements in monthly billing envelopes is neither "a permissible subject-matter regulation[] nor a narrowly drawn prohibition justified by a compelling state interest"); Police Dep't v. Mosley, 408 U.S. 92, 98-99 (1972) (explaining that "justifications for selective exclusions from a public forum must be carefully scrutinized" and, because "picketing plainly involves expressive conduct within the protection of the First Amendment, ... discrimination among pickets must be tailored to serve a substantial governmental interest."). Additionally, government efforts to equalize access to a forum by potential speakers with disproportionately assets have been viewed as violative of basic first amendment principles. \textit{E.g.}, First Nat'l Bank v. Bellotti, 435 U.S. 765, 792 (1978); Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam).
Jackson's Flag Salute Legacy

ends. Provision of access to the shopping center property clearly satisfied that test. Because large numbers of persons can be easily and cheaply encountered for first amendment purposes, such as distributing leaflets and collecting signatures for petitions in a shopping center, making this forum available significantly contributed to the purpose of opening up a forum for expression. In addition, because property owners were permitted to create reasonable time, place, and manner restrictions on access to their property, the access requirement was no more extensive than was necessary to further the government's substantial interest.

The most recent compelled expression case, Pacific Gas & Electric, also is classified as an indirect compulsion case. Like the other second-tier cases, the behavior compelled is less than the direct expression of an idea by the utility. Just as in Prune Yard, the utility was forced to lend its property for the expression of the ideas of others. The connection between the utility and the ideas expressed by TURN was an indirect one especially in light of the disclaimer contained in TURN's communication. The state's purposes for compelling access to the billing envelopes were twofold: fair utility regulation and, as in Prune Yard, promoting the marketplace of ideas. While these purposes are easily viewed as substantial, the CPUC order fails to satisfy the means component of second-tier scrutiny. As Justice Powell's opinion recognizes, effective utility ratemaking can be promoted more directly by a variety of other means that avoid the intrusion on Pacific's first amendment rights resulting from the access order. The second purpose provides even less justification for the choice of means. The state has chosen to advance a favored viewpoint by giving that viewpoint access to private property in a way that imposes a burden on the expression of the property owner. Such means are an impermissible method of promoting the state's interest in encouraging the exchange of views about utility regulation.

354. The modern-day importance of shopping center property as a forum for expression was recognized by the Supreme Court in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc. 391 U.S. 308, 324-25 (1968). Although the Court subsequently overruled Logan Valley, it did so on the ground that state action could not be found under the public function theory by analogizing between the central business district of a city and a shopping center, not because shopping centers were viewed as insignificant forums for expression. Hudgens v. NLRB, 424 U.S. 507, 518, 520-21 (1976).


356. 106 S. Ct. 903 (1986). For a discussion of the Pacific Gas & Electric case, see supra Part VIII.

357. 106 S. Ct. at 907.

358. Id. at 913-14.

359. See, e.g., First Nat'l Bank v. Bellotti, 435 U.S. 765, 790-92 & n.31 (1978) ("Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern them-
Thus, the commission's order is unconstitutional under the second tier analysis.

4. The Difficult Cases: Roberts and Knight.—Although the majority of the compelled expression cases fall relatively easily into either tier one or two for purposes of analysis, two of the three cases decided during the 1983 Term depart from this pattern of easy characterization. The lone exception is Ellis v. Brotherhood of Railway, Airline & Steamship Clerks,360 which follows closely in the footsteps of Abood. The challenge to union use of the agency fee in that case can easily be seen as a government action having only an incidental effect on speech. As in Abood, the outcome turns on the fit between the means (using fee money for certain purposes) and the end (eliminating free riders and achieving labor peace).

In contrast, Roberts v. United States Jaycees361 can be placed in either tier depending on one's perspective. Being compelled to admit women to membership is something less than speech itself; moreover, no one was forced to join the Jaycees against their will. This formal analysis could lead one to conclude that the compelled act amounted to an indirect compulsion and no more.

Moving beyond form and focusing on substance, however, yields a different result. Although the compelled behavior was not speech as such, it could be viewed as symbolic expression.362 Requiring the Jaycees to communicate their approval of becoming a mixed-gender organization could easily be viewed as a direct compulsion, linking the organization with a new message, one not chosen voluntarily. In addition, being compelled to accept new members might be, from the organization's point of view, an interference with associational freedom as severe as forcing an individual to join an organization.

If the effects were classified as direct compulsion, strict scrutiny review would be applied, but such scrutiny is not inevitably "fatal in

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

362. The possibility of classifying compelled behavior as symbolic expression was first suggested by Justice Jackson in Barnette when describing the mandatory flag salute. See supra text accompanying note 22. Although the compelled act of admitting women to membership in the Jaycees is not a universal symbol on the order of the flag salute, the act of admitting women might "be understood as forcing the viewer to be communicative" of approval of women members joining the organization. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) (prohibiting camping in Washington D.C. parks does not violate the first amendment even though the symbolic expression of camping is designed to highlight the problem of the homeless).
Jackson's Flag Salute Legacy

fact. The government purpose was not spreading the idea of equal treatment for women, but, instead, eliminating discrimination against women by places of public accommodation as a social policy objective. The government's target was discriminatory behavior itself and not the communication of the idea of equal treatment as a social good. Of course, it should be noted that spreading this idea was an incidental benefit consistent with the government's primary purpose in altering the membership policies of the Jaycees. Under strict scrutiny review, the government's purpose of eliminating gender discrimination was a compelling one. Thus, the only question that remained concerned the necessity of the chosen means. In similar situations, the Court has shown deference to legislative judgments about the necessity of means adopted to eradicate discrimination. Given a similar deference, the application of the state's human rights law to the membership policies of the Jaycees could survive strict scrutiny review.

Minnesota State Board for Community Colleges v. Knight also requires some effort to categorize accurately. In Knight, faculty members at the Minnesota community colleges were forced to join an organization that functioned as their exclusive bargaining agent if they wished to serve on the meet-and-confer committees that served as the formal mechanism for discussions of academic policy on nonbargaining subjects with the administration of the community colleges. Organization membership was unnecessary if faculty members were willing to sacrifice the opportunity to participate in the meet-and-confer process.

Although faculty members were not compelled to join the organization under a direct state order, this does not relegate the Knight facts to the second tier. The fact that the government used the device of a condition, instead of a direct mandate, does not change the character of the act that the government strongly encouraged. By imposing this requirement, the government compelled actual and active membership in an organization as a precondition to participation in the formal process for discuss-

364. See supra note 232.
365. Id.
ing academic policy. Because faculty members could choose whether to belong to the association, the critical question in *Knight* was whether any kind of compulsion existed. The troubling issue in the case was not whether the compelled association was direct or indirect. If one discounts the mitigating effects of imposing a condition rather than an order, and views the choice given faculty members as only theoretical, then the "compelled" act directly interfered with the freedom from compelled expression and association.

Under this approach, *Knight* would be classified as a direct compulsion case; therefore, the government's burden to justify this compulsion as a legitimate extension of the exclusive representation system of labor relations would be heavier than was the case in *Abood* and *Ellis*. That heavier burden would require some more exact showing of the need for organization membership as a requirement for meet-and-confer committee participation. Nothing in the *Knight* record satisfies this required evidentiary showing. The justification for the Minnesota requirement was described in terms of guaranteeing that the government employer hears only one version of the views of its employees so that reaching an agreement on academic policy matters would be facilitated. Under strict scrutiny review, a more specific showing of the necessity for this requirement would be required for it to survive a constitutional challenge. Such a showing could probably not be satisfied, and the law should consequently be declared to be unconstitutional.

The suggested two-track standard of review does not make resolution of the compelled expression and association cases easy. Nevertheless, the suggested test at the least begins to focus attention on the fact that all cases in which the government is guilty of compulsion do not involve the same degree of threat to first amendment interests. Moreover, unlike the Supreme Court's current approach, the proposal advanced brings this area of first amendment doctrine into the mainstream of contemporary first amendment analysis.

X. Conclusion

Written in the midst of a turbulent period for first amendment jurisprudence, Justice Jackson's pronouncements in *Barnette* appealed to

368. This question produced a serious disagreement between Justices O'Connor and Brennan in *Knight*. Compare 465 U.S. at 271 (O'Connor, J.) ("[T]hey are not required to become members of MCCFA.") with id. at 298-99 (Brennan, J., dissenting) ("Minnesota has put direct pressure on non-union faculty members to join MCCFA.").

369. *Id.* at 291-92.

370. A similar skepticism about the validity of the state's interest in imposing the membership requirement is expressed in Farber & Nowak, *supra* note 334, at 1259.
high-sounding principles, but actually reflected an effort to walk a narrow decisional path avoiding the freedom of religion pitfalls that had previously divided the Court.

In the period after *Barnette*, the decision was relied upon often, but no further attempts were made to refine or comprehend the values that were at the heart of the opinion. Justice Jackson had stressed two ideals: first, freedom from government-compelled ideas as a necessary precondition for avoiding forced conformity and the costs it would impose on society, and second, protection of the individual right to be one's own person, a freedom essential to the ideal of tolerance in a democratic nation. Later decisions did not consciously root themselves in these values. Instead, *Barnette* was applied through a process of factual analogy without any attempt to understand what was really at stake.

Perhaps unintentionally, the *Barnette* doctrine was extended somewhat beyond its original concerns in *Wooley*. In that case, an unconsidered and unenunciated extension of *Barnette* took place, and personality rather than political conformity became the preeminent concern. Subsequent cases reflect an effort to draw a line somewhere, but, again, this effort was effectuated more by seeing factual differences than by making principled distinctions. In *Abood*, the line was drawn between permissible compelled financing of collective bargaining activities and impermissible forced funding of union political activities. In *PruneYard*, the Court looked to the source of the compelled message, the opportunity to disavow, and whether the message would be assumed to reflect the views of the provider of the forum. Although these distinctions could explain the results of the particular cases, they have little relevance to the first amendment values central to the *Barnette* decision.

Ironically, the two situations that involved problems closely similar to those that Justice Jackson addressed in *Barnette* were disposed of by the Court with perfunctory attention to potential first amendment difficulties. In *Abood*, the constitutionality of the agency shop and the use of the agency fee for collective bargaining purposes was easily justified as applied to public employees; in *Knight*, restricting participation in the meet-and-confer sessions to association members was upheld with little concern for the rights of faculty members who did not wish to join the association.

For the first time since *Barnette*, the Court seriously considered the values underlying the compelled-expression doctrine in *Pacific Gas & Electric*. It is too early to tell whether subsequent cases will continue to address these basic questions, or whether the Court will revert to its practice of looking more at facts than exploring values. As a cautionary
note, the Court's willingness to look askance at the Commission's order in *Pacific Gas & Electric*, but to find no first amendment fault in *Roberts* and *Knight* raises additional questions about the level of doctrinal consistency the Court will achieve in future cases.

The area of compelled expression and association is ripe for rethinking. One alternative to the current haphazard analysis employed by the Supreme Court is the use of the two-tiered method of analysis suggested above. Whether this or some other solution to the problem is chosen, it is clear that rational evolution of the doctrine is possible only if an attempt is made to understand the cases in terms of specific values being protected. Clear boundaries for the scope of the values being protected can be presented, and articulated choices must be made. Otherwise, the Supreme Court and the lower courts as well may continue to drift from case to case without any clear touchstones to provide a foundation for analytic development.