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## REFLECTIONS ON COERCED EXPRESSION

*Robert D. Kamenshine\**

### I. INTRODUCTION

In 1943, during the Second World War, patriotism was at a peak. However, the Supreme Court, in *Board of Education v. Barnette*,<sup>1</sup> held that the First Amendment barred the government from requiring public school students to salute the flag, that is, to “communicate [their] acceptance of . . . political ideas” and to “utter what was not in their minds.” Justice Jackson’s opinion cited the experience of “the [e]arly Christians [who] were . . . persecuted for their refusal to participate in ceremonies before the statue of the emperor . . . .”<sup>2</sup> Similarly, on the holiest day of the Jewish religious calendar, Yom Kippur, a meditation speaks “of a people . . . forced to say what they do not mean.”<sup>3</sup> Worshipers are asked to “identify with . . . [their] forebearers who had to say ‘yes’ when they meant ‘no.’”<sup>4</sup>

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\* E. George Rudolph Distinguished Visiting Professor, University of Wyoming College of Law, 1997-98; Attorney, United States Department of Justice Civil Division, Appellate Staff.; B.A. 1961, College of the City of New York; J.D. 1964, Columbia Law School; LL.M. 1967, Harvard Law School.

The following article is a footnoted and updated version of the E. George Rudolph lecture, delivered by the author on April 22, 1998, at the University of Wyoming College of Law. The author deeply appreciates the opportunity to have been the first occupant of the E. George Rudolph Chair and thanks the administration, faculty, staff, and students for a memorable and rewarding year.

The views expressed here are solely the author’s and do not necessarily coincide with those of the United States Department of Justice.

1. 319 U.S. 624 (1943).

2. *Id.* at 633 n.13.

3. CENTRAL CONFERENCE OF AMERICAN RABBIS, GATES OF REPENTANCE 250 (1978).

4. *Id.*

In *Barnette*, as in these historical antecedents, government had directed human beings to express, by mouth and/or by a communicative physical act, a defined political or religious viewpoint. But the contemporary settings of coerced expression are generally less dramatic and more complex.<sup>5</sup> This discussion offers a brief overview of this important area of First Amendment law and proposes an expansive and strict application of the anti-coerced expression principle.

Current controversies often involve measures intended to further First Amendment values by adding new voices to the marketplace of ideas or enhancing the ability of certain “speakers” to reach their audience. One party is compelled to subsidize or facilitate the speech of another, rather than literally to speak. The coerced party may be a corporation, a legal construct not itself possessing a human will. The beneficiary of the compulsion may also be a corporation, or the government itself. The Supreme Court has noted that such enhancements may simultaneously diminish another’s First Amendment rights.<sup>6</sup> For example, government subsidization of the arts may increase the quantity, quality, and diversity of artistic expression, but at the expense of objecting taxpayers.

When does the First Amendment bar government from compelling a private party, human or corporate, to subsidize or facilitate the expression of another party, or of the government? Government collects taxes to fund its own speech<sup>7</sup> and to subsidize private expression.<sup>8</sup> Government also compels direct subsidization of private expression, for example, by requiring payments to labor unions and integrated bars.<sup>9</sup> In other cases, a party may be compelled solely to facilitate another’s speech, for example, by providing air time on television on a fair-compensation basis.<sup>10</sup>

There are still other variables. The compulsion, such as requiring cable companies to lease channels,<sup>11</sup> may involve expression that, unlike the flag salute, has no expressly defined content or viewpoint. Unlike the complainants in *Barnette*, the coerced party may well support, or at least be neutral as to, the viewpoint or content of the compelled expression. The party may

5. See Leora Harpaz, *Justice Jackson’s Flag Salute Legacy: The Supreme Court Struggles To Protect Intellectual Individualism*, 64 TEX. L. REV. 817 (1986) (tracing developments since *Barnette*).

6. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254 (1974); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

7. See *Rust v. Sullivan*, 500 U.S. 173, 193-94 (1991).

8. *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998).

9. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (labor union); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (integrated bar).

10. For example, under 47 U.S.C. § 312(a)(7) (1994), broadcast licensees must allow “a legally qualified candidate for Federal elective office . . . reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station . . . on behalf of his candidacy.”

11. 47 U.S.C. § 532(b)(1) (1994).

simply object to the compulsion *per se*. Again, unlike the complainants in *Barnette*, the coerced party, like a cable operator, may not be personally identified with the coerced expression. Further, the compulsion may not relate to political or religious expression, but to artistic, or commercial expression. Finally, the coerced party may have received a related government benefit, for example, a radio or television broadcasting license to use part of the “publicly-owned” electromagnetic spectrum.

## II. GOVERNMENT USES TAX DOLLARS TO SPEAK OR TO SUBSIDIZE PRIVATE EXPRESSION

### A. Tax Dollars to Fund Government Expression

The Establishment Clause of the First Amendment generally prohibits utilizing taxes to fund religious speech by the government.<sup>12</sup> Given this prohibition, there is little need to consider, under the Amendment’s Free Exercise Clause, any theoretical right of dissenting taxpayers to a proportionate reduction of their taxes. Outside the realm of religion, however, the situation is different.

Absent a corresponding express prohibition of “political establishment” that would forbid the dissemination of a political viewpoint by the government qua government, the extent, if any, to which the First Amendment similarly may constrain non-religious government speech is uncertain.<sup>13</sup> In fact, the Supreme Court has emphasized that there is a considerable latitude for government speech.<sup>14</sup> The rationale has been that such speech: (1) facilitates public debate and is thus an integral part of the demo-

12. *Engle v. Vitale*, 370 U.S. 421, 431 (1962). *But see* *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (sustaining municipality’s display of a creche as part of annual Christmas display, but emphasizing display’s overall non-religious character). In *Marsh v. Chambers*, the Court sustained the employment of a chaplain by a state legislature to provide opening prayers, but did not decide the validity of funding their publication. 463 U.S. 783, 785 n.3 (1983).

13. See RODNEY SMOLLA & MELVIN NIMMER, *FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* §10.03 (1994); Robert D. Kamenshine, *The First Amendment’s Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979).

14. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (“when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes”); *Glickman v. Wilcman Brothers & Elliott, Inc.*, 117 S. Ct. 2130, 2144 n.2 (1997) (Souter J., dissenting) (noting that “the government may have greater latitude in selecting content than otherwise permissible under the First Amendment”); *Keller*, 496 U.S. at 10-13 (emphasizing that the speech of the state bar on political issues was not that of the government); *Wooley v. Maynard*, 430 U.S. 705 (1977) (assuming that New Hampshire was entitled to disseminate the state’s slogan, although not necessarily that dissenting taxpayers had no right to “opt-out”). *But see* *Board of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 854 (1982) (possible First Amendment constraints on government’s role as elementary and secondary school educator); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2184 n.3 (1998) (Scalia J., concurring) (assuming, on non-First Amendment grounds, that “it would be . . . unconstitutional for the government itself to promote candidates nominated by the Republican Party”).

cratic process, and (2) reflects the outcome of that process in that a majority of voters has sanctioned the advancement of certain policies.<sup>15</sup>

Moreover, unlike the case where an objecting party's payments are used to fund the political speech of an organization, such as a union, where the party is entitled to appropriate relief from such an exaction,<sup>16</sup> it has been assumed that an objecting taxpayer may not obtain similar relief where he or she objects to tax dollars funding government political speech.<sup>17</sup> Significantly, the democratic process required for the internal governance of a labor union or an integrated bar has not deterred the Court from holding that dissenting members have a First Amendment right to relief where their dues are used to fund political speech.

### *B. Tax Dollars to Fund Private Expression*

The Establishment Clause generally bars the use of taxes to fund private religious speech.<sup>18</sup> Thus, government subsidization of private artistic expression, arguably "pro" or "anti-religious" in viewpoint, conceivably might trigger a problem under that provision. Certainly the funding of a piece of religious art differs from the valid exhibition of a religiously-themed work of art at a government owned museum, such as the National Gallery of Art.<sup>19</sup> Of course, the meaning of any artistic work is debatable.

#### 15. In *Keller*, the Court stated that

[g]overnment officials are expected as part of the democratic process to represent and to espouse the views of a majority of their constituents. . . . If every citizen were to have a right to insist that no one paid by public express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it would be radically transformed.

496 U.S. at 12-13. In *Abood*, Justice Powell's concurrence observed that "the reason for permitting the government to compel the payment of taxes and to spend money on *controversial projects* is that the government is the representative of the people" (emphasis supplied). *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209, 259 n.13 (1977). Of course, the undisputed duty of elected officials and appointed policy makers to address issues of public concern is unrelated to the creation of institutional programs designed to influence public opinion.

16. See *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 (1986); *Ellis v. Bhd. of Ry., Airline, and Steamship Clerks*, 466 U.S. 435, 443-45 (1984).

17. See *Keller*, 496 U.S. at 12 (emphasizing that for constitutional purposes the integrated bar was not "the government," so that members had First Amendment right to object). There are questions of whether there is any constitutional protection afforded an unwilling taxpayer, and, assuming such protection, whether such a taxpayer would have standing to seek relief. Of course, even more so than in the case of labor unions and integrated bars, the pro rata amount involved would be even more minuscule. *But see Hudson*, 475 U.S. at 305 ("whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear") (citing *Abood*, 431 U.S. at 235)).

18. See *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

19. See *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (noting in the course of sustaining a municipality's display of its creche as part of larger Christmas display that "[a]rt galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith").

Moreover, if the standard by which the art is funded is religiously neutral, and some of the art happens to involve a religious theme chosen by the artist, any establishment problem is minimized.<sup>20</sup>

The guarantee of freedom of speech may also limit the standards that the government applies to determine which private artistic expression to subsidize. In *National Endowment For The Arts v. Finley*,<sup>21</sup> the Court sustained the provision of federal law that required the National Endowment for the Arts (NEA) to “tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public,”<sup>22</sup> but only, in the words of Justice Scalia, “by gutting it.”<sup>23</sup> Many artists and others viewed the “decency” standard as censorial. Many taxpayers, however, objected, on various grounds, to their taxes being used to subsidize certain projects. To the extent that a First Amendment problem remains as to the government allegedly regulating artistic expression by *effective* standards governing which expression to subsidize, an equally significant problem remains with the government compelling objecting taxpayers to do the subsidizing.<sup>24</sup>

Again, to the extent that the government’s funding of private expression is otherwise permissible, it has been assumed that objecting taxpayers have no right to withhold their financial support. In *Buckley v. Valeo*,<sup>25</sup> in which the Court upheld the dollar check-off provision of the Federal Election Campaign Act (FECA), the objecting parties argued that, consistent with the First Amendment, Congress must “permit taxpayers to designate particular candidates or parties as recipients of their money.”<sup>26</sup> The Court’s

20. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 840-41 (1995); *Witters v. Washington Dept. of Serv. for Blind*, 474 U.S. 481, 488-89 (1986) (upholding blind recipient’s use of vocational assistance to study for ministry at a Christian college); *Widmar v. Vincent*, 454 U.S. 263, 271-76 (1981) (no establishment problem in university’s allowing student religious group to use facilities on equal basis with non-religious groups). In *Frodyce v. Frohnmayer*, 763 F. Supp. 654 (D.D.C. 1991), the plaintiffs-taxpayers challenged the funding by the National Endowment for the Arts (NEA) of an exhibition of allegedly anti-religious art. The court, however, held that the plaintiffs lacked standing. It emphasized that first, the plaintiffs, who claimed “offense to their religious sensibilities” had not “even allege[d] that they ha[d] either seen the exhibition or studied the catalogue,” and second, it was the NEA, not Congress in the exercise of its spending power, that had allocated the funds. *Id.* at 656. The court also noted that even if the plaintiffs were successful, this would not decrease the total amount to be spent by the NEA. *Id.* at 657 n.4.

21. 118 S. Ct. 2168 (1998).

22. 20 U.S.C. § 954(d)(1) (1994).

23. 118 S. Ct. at 2180. The Court construed the provision as one which first, embodied “advisory language impos[ing] no categorical requirement,” second, “admonish[ed] the NEA merely to take ‘decency and respect’ into consideration,” and third, “aimed at reforming procedures rather than precluding speech.” *Id.* at 2176 (Scalia, J., concurring).

24. See *id.* at 2185 (Scalia, J., concurring).

25. 424 U.S. 1 (1976).

26. *Id.* at 91. This ignores the point that some taxpayers might have chosen not to fund *any* political speech.

response was ambiguous. It first stated that the appropriation to fund the presidential campaign was “like any other . . . from the general revenue,” except that the amount was measured by the aggregate of the check-off.<sup>27</sup> The Court then noted that “[t]he scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree.”<sup>28</sup> But the Court more broadly concluded that “[t]he fallacy of [the challenger’s] argument is . . . apparent; every appropriation made by Congress uses public money in a manner to which some taxpayers object.”<sup>29</sup> Most recently, in *Rosenberger v. Rector and Visitors of University of Virginia*,<sup>30</sup> the Court held that a public university could not bar a student activities fund from financially supporting a religiously oriented magazine. The Court noted that “our decision cannot be read as addressing an expenditure from a general tax fund.”<sup>31</sup> Justice O’Connor’s concurrence pointed out that because the fund was “[u]nlike monies dispensed from state or federal treasuries,” (that is, the funds were collected from the students,) there was an “opt-out possibility *not available to citizens generally*.”<sup>32</sup>

These assessments ignore the point that First Amendment values really are at stake when the government funds private expression instead of, for example, a disputed weapons system or public works project. When it is expression, not hardware, that is at issue, reliance on the functioning of the democratic process does not provide a comparable excuse for ignoring dissent. I continue to maintain that the First Amendment should be read to preclude government, as an institution, from using tax dollars to advance a position on controversial political issues, whether directly or by subsidizing private parties. Moreover, at least as a matter of theoretical consistency, taxpayers would be entitled to the same dissenters’ rights as the Court recognized in *Abood*.<sup>33</sup> Uniformity of result should go in this direction, not, as

27. *Id.*

28. *Id.* at 91 n.124.

29. *Id.* at 91-92. See *FCC v. League of Women Voters*, 468 U.S. 364, 385 n.16 (1984) (invalidating the prohibition on editorializing by public broadcasters).

30. 515 U.S. 819 (1995).

31. *Id.* at 841.

32. *Id.* at 851 (emphasis added). Justice O’Connor explained that “the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee.”*Id.* She noted “the possibility that the student fee is susceptible to a Free Speech clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees.” *Id.* (citations omitted). This possibility, she argued, “provide[d] a potential basis for distinguishing proceeds of the student fees in this case from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding . . . and from government funds generally.” *Id.* See also *Southworth v. Grebe*, 151 F.3d 717, 732 (7th Cir. 1998).

33. See LAURENCE H. TRIBE, *CONSTITUTIONAL LAW* §12-4 at 807 n.14 (1988). But see THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 693 (1970) (noting that “[w]hile the individual may have somewhat less freedom to express himself as a member of an association than as a general citizen, he has correspondingly greater rights concerning the disposal of his contributions”); Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL RTS. J.L. 1, 14 (1995) (distinguishing private organizations from government, “formed in order to . . . represent the whole

has been suggested, in the direction of treating union members as if they were taxpayers.<sup>34</sup>

The Court's unwillingness to take seriously this concern of dissenting taxpayers has been criticized. Justice Stevens' dissent in *League of Women Voters*<sup>35</sup> characterized as "plainly legitimate and significant . . . the Government's interest in minimizing the use of taxpayer monies to promote private views with which the taxpayers may disagree."<sup>36</sup> The Court's recent upholding of the "decency" standard, albeit in a much diluted form, may, at least temporarily, have assuaged objecting taxpayers and their representatives.<sup>37</sup> Even so, the concern about "decency" does not necessarily exhaust the range of possible objections.<sup>38</sup>

One practical response to the problem of taxpayers who object to government funding of the arts, or at least of some particular artistic endeavors, would be to fund these programs on the same basis as the public funding of presidential campaigns, that is, through a check-off on the income tax. This also might be a useful approach to the equally controversial funding by the federal government of public broadcasting through the Corporation For Public Broadcasting (CPB).<sup>39</sup> Under this proposal, the amount that Congress would appropriate for the arts or the CPB could not exceed the amount that the nation's taxpayers collectively volunteered to spend.

### C. Tax Dollars Provide Fora for Private Expression

When government provides a forum to a private party without requiring fair market value payment for the forum's use, the government is to that

society and deal with all its problems," and "subject to the restrictions on [its] power to act, including the[] power to speak").

34. Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 23-24 (1983); David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 1019 (1982).

35. *FCC v. League of Women Voters*, 468 U.S. 364, 408 (1984).

36. *Id.* at 414-15 n.7.

37. See Jacqueline Prescott, *Funding America's Creativity: NEA's Ivey Pushes for Support*, WASHINGTON POST, Sept. 18, 1998, at C7 ("agency has been taken off the critical list, moving out of the cross hairs of the Republican leadership that two years ago sought to eliminate it").

38. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, (1987), the Court struck down a state sales tax that taxed general interest magazines, but exempted, and thus subsidized, newspapers and religious, professional, trade, and sports journals. In his dissent, Justice Scalia observed that

Perhaps a more stringent, prophylactic rule is appropriate, and can consistently be applied, when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern—a tax exemption, for example, that is expressly available only to publications that take a particular point of view on a controversial issue of foreign policy.

*Id.* at 237 (Scalia J., dissenting).

39. 47 U.S.C. § 396(b) (1994).



extent subsidizing that party's speech.<sup>40</sup> Yet, the First Amendment itself has been held to require that government make so-called traditional public fora—the streets, sidewalks, parks—available to *all* speakers, subject to only reasonable time, place, and manner limits.<sup>41</sup> Traditional public fora are normally made available with little or no charge. It remains unclear whether the First Amendment permits the government to choose to impose a flat user fee on prospective speakers.<sup>42</sup> Even if permissible, the fee would in all probability have to relate to defraying the incremental costs produced by the particular use of the forum, rather than the reasonable market value of such use.

Yet, assuming a valid theoretical basis for an “opt-out” possibility for taxpayers objecting to the government's funding of private expression, this would not necessarily extend to the use of public fora. First, most public fora, the streets and sidewalks for example, are primarily designed, funded, and constructed to serve a non-communicative purpose, and are used only incidentally for First Amendment activity. Thus, any subsidization of expression does not stem from the actual expenditure of tax dollars as much as from the loss of revenue that could be generated by charging a reasonable fee. More importantly, to the extent that the First Amendment itself compels free access to public fora for purposes of engaging expression, there is no basis for complaint by dissenting taxpayers.

### III. GOVERNMENT COMPELS DIRECT SUBSIDIZATION OR FACILITATION OF “PRIVATE” EXPRESSION

#### *A. Subsidization Through Payment of Money*

Labor unions and integrated bars arguably perform quasi-governmental or public functions.<sup>43</sup> Unions are authorized to engage in collective bar-

40. See *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (referring to traditional public fora as involving “the existence of a Government ‘subsidy,’ in the form of Government-owned property”). At least in the realm of mass public transportation, it is commonplace to charge advertisers for the right to display their messages on public buses and subways. See *Lehman v. Shaker Heights*, 418 U.S. 298 (1974).

41. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

42. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992) (invalidating for lack of articulated standards an ordinance permitting a county official to impose a charge for the extra expenses, such as law enforcement and clean up, that the county might incur in providing the use of a public forum).

43. See *Steele v. Louisville & N. R.R. Co.*, 323 U.S. 192, 206 (1944) construing federal labor laws to oblige labor union to represent interest of black as well as white members, especially Justice Murphy's concurrence, addressing the constitutional issue. *Id.* at 208-09. See Dilan A. Esper, Note, *Some Thoughts on the Puzzle of State Action*, 68 S. CAL. L. REV. 663, 717 (1995). In *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), the Court summarized the “guidelines” to be followed “in determining which activities a union constitutionally may charge to dissenting employees,” stating that “chargeable activities must (1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding ‘free riders’; and (3) not significantly add to the bur-

gaining as a means of preserving labor peace. Integrated bars are permitted to participate in the formulation and enforcement of standards of professional conduct to ensure that attorneys, as officers of the court, play a proper role in the administration of justice. To this extent, the money that government requires be paid to such organizations resembles taxes used to fund communication inherent in the performance of the government's vital functions,<sup>44</sup> and there is no First Amendment right to withhold support.<sup>45</sup>

The decision in *Glickman v. Wileman Brothers & Elliott, Inc.*<sup>46</sup> rejected a First Amendment challenge, by objecting fruit growers, to federal marketing orders requiring them to fund an advertising campaign promoting consumption of agricultural products. The functioning of an agricultural marketing cooperative, including promotion of agricultural commodities, is quasi-governmental.<sup>47</sup> If this is the implicit rationale, however, then even if the objecting growers could have established that they disagreed with the "views" expressed in some of the advertising, there would have been no right to object.<sup>48</sup> This is because the function of promoting the fruits is like providing collective bargaining representation in *Abood*, or governing the bar as in *Keller*.<sup>49</sup>

But when these organizations spend dues to advance positions on what, under the FCC's now rescinded fairness doctrine,<sup>50</sup> would have been deemed "controversial issues of public importance," they are no longer acting in a quasi-governmental capacity and no longer enjoy any special status. The reasons for which the government gave them such status are inapplicable. Therefore, at this point, although private organizations have the First

dening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 518.

44. This is valid communication even under my view as to the limits the First Amendment places on advocacy by the government.

45. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) (government's interest sufficiently strong so that all in group may be required to contribute to performance of the function).

46. 117 S. Ct. 2130 (1997). See Dave Smith, Note, *Forced Advertising: Free Speech or Not Even?* *Glickman v. Wileman Bros. & Elliott, Inc.*, 33 LAND & WATER L. REV. 779 (1997).

47. Justice Souter's dissent, referring to the Court's decisions involving labor unions and the organized bar, spoke of the "freedom from compulsion to subsidize speech and other expressive activities undertaken by private and quasi-private organizations." *Glickman*, 117 S. Ct. at 2144.

The *Glickman* majority opinion did not even see the case as raising a serious First Amendment issue. The opinion perceived the case as involving only a "policy judgment" so that the program's "debatable features [were] insufficient to warrant special First Amendment scrutiny." *Id.* at 2141.

48. The majority opinion noted that it was "fair to presume that [the growers] agree with the central message of the speech," *id.* at 2138, and that any "disagreement with particular messages" had "no bearing on the validity of the entire program." *Id.* at 2137.

49. Thus, the majority readily concluded that the disputed "non-ideological expenditures" fell on the valid side of the standard applied in *Keller*, 496 U.S. at 13-14, and *Lehnert*, 500 U.S. at 518 for identifying those collective expenditures that dissenting members may be compelled to pay. *Glickman*, 117 S. Ct. at 2140. See Smith, *supra* note 46 at 793 (suggesting that "the generic advertising portion of the marketing orders . . . would have a good chance of surviving scrutiny" under the *Lehnert* standards).

50. *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5049; 63 R.R.2d 541(1987), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1989).

Amendment right to speak—for example, the right “to endorse or advance a gun control or nuclear weapons freeze initiative,”<sup>51</sup> the government may not compel their members to subsidize such speech.

### *B. Subsidization Through Uncompensated Provision of a Forum*

As previously noted, when government provides a forum without requiring payment, this is a form of subsidization. In *Marsh v. Alabama*,<sup>52</sup> the Court held that the First Amendment required even a nominally private party to provide access to a forum.<sup>53</sup> Typically, however, the government elects to require a private party to provide a forum, for example, in the regulation of cable operators or broadcasters. Where the law or regulation does not provide for compensation, this is similar to a so-called “unfunded mandate,”<sup>54</sup> the equivalent of imposing a tax. The requirement that cable operators “must carry” certain over-the-air stations is an example of this.<sup>55</sup>

### *C. Facilitation Through Compensated Provision of a Forum*

There are instances where the government compels access on a compensated basis—where there is no compelled subsidization. For example, federal law requires cable operators to provide several “leased access” channels to independent programmers<sup>56</sup> and requires broadcasters to provide “reasonable access” at (normal) rates to candidates for elective office.<sup>57</sup> The Fifth Amendment does not safeguard the discretion of a property owner against compulsion by government to sell or lease.<sup>58</sup> Rather, government, or its private delegee, may take property for a “public purpose,” provided it pays “just compensation,” that is, fair market value.<sup>59</sup>

51. *Keller v. State Bar of Cal.*, 496 U.S. 1, 16 (1990).

52. 326 U.S. 501 (1946).

53. *Id.* at 509. The Court held that for constitutional purposes a so-called company town owned by a corporation was public, so that the First Amendment rights of its residents while on town property were protected against corporate interference. After *Marsh*, the Court embraced, but ultimately rejected a similar analysis as applied to privately owned shopping centers. See *Hudgens v. NLRB*, 424 U.S. 507, 519-20 (1976).

54. See Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1501 *et seq.*

55. 47 U.S.C. §§ 534, 535 (1994). See *Turner Broadcasting System, Inc. v. FCC* (hereinafter *Turner II*), 520 U.S. 180 (1997) (sustaining rules as applied to carriage of commercial stations).

56. 47 U.S.C. § 532(b)(1) (1994).

57. 47 U.S.C. § 312(a)(7) (1994). The constitutionality of this requirement was sustained in *CBS, Inc. v. FCC*, 453 U.S. 367, 396-97 (1981).

58. See Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 210-11 (1998).

59. See *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987), involving the Pole Attachment Act, which did not require the utility to lease its poles to a cable company, but just regulated rates at which poles could be leased. The Court distinguished between “a commercial lessee and an interloper with a government license,” and stated that it did not decide the issue of FCC-required access. See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that requiring a landlord to install a cable company’s equipment on the landlord’s building is a taking).

Thus, even if the "leased access" and "reasonable access" provisions would amount to a so-called "taking" for a "public purpose,"<sup>60</sup> they satisfy the requirement of the Fifth Amendment by reason of the payments required of the program producers and the candidates. Even with compensation, the First Amendment concern remains. There is the continuing impingement on the decisionmaking power of the affected party who, for reasons sufficient to itself, might have elected to refrain from leasing a channel to a particular programmer or providing access to candidates.<sup>61</sup> Recall that in *Tornillo*, which invalidated a requirement that a political candidate attacked in a newspaper's editorial be given space to reply, the candidate desiring to make the reply did not have to pay for access. Assume, however, that the Florida law at issue instead were like the federal "reasonable access" requirements for broadcasters. Given the Court's focus on the impairment of the newspaper's "editorial discretion," it is improbable that this modification would have changed the result.

#### IV. TRIGGERING STRICT SCRUTINY OF COMPELLED EXPRESSION

##### *A. Government's Substitution of Its Choice for That of the Regulated Party ("Editorial Discretion")*

First Amendment values are implicated in all of the above scenarios, yet, they present many variables. There is, however, one consistent and critical element: Government is substituting its choice for that of the regulated party. Whether government is determining the content of a publication, parade, or programming on a broadcasting station or a cable system, paying taxes or dues, providing space on a vehicle, or administering a shopping mall, the key element for First Amendment analysis is that government intervention deprives a party of a choice on whether to subsidize and/or otherwise facilitate the creation and/or dissemination of expression.

At times, the Court has emphasized the choice exercised by one category of communicators, the so-called "editorial discretion" of the mass media.<sup>62</sup> But "editorial discretion" is synonymous for the same kind of choice

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60. Note that where the government has compelled access without compensation, the affected party has claimed a taking of property in violation of the Fifth Amendment. *See PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 82-84 (1980) (rejecting takings argument).

61. *See Century Fed., Inc. v. Palo Alto*, 710 F. Supp. 1552, 1554-55 (N.D. Cal. 1984).

62. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257 (1974); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666-68 (1990) (noting the "unique role of media corporations," in course of upholding constitutionality of a state law that forbade corporate independent expenditures in support of state political candidates, but exempted "media corporations"); *Leathers v. Wedlock*, 499 U.S. 439, 443 (1991) (noting that cable television "is, in much of its operation, part of the 'press.'"); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., concurring in judgment in part and dissenting in part) (emphasizing editorial discretion and objecting to applying varying

as was protected in *Barnette*.<sup>64</sup> And once having accepted the “editorial discretion” of the mass media, there was no satisfactory way of differentiating such choice from that of other businesses. Thus, in *Pacific Gas & Electric Company v. Public Utility Commission*,<sup>65</sup> the Court recognized the discretion of a non-media corporation, a public utility, to determine what additional material to include in the envelope within which it disseminated a newsletter to its customers.<sup>65</sup> Later, in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*,<sup>66</sup> upholding the right of the organizers of a parade to choose its participating organizations and thereby “to exclude the message it did not like,” the Court stated that the right “to shape . . . expression” is not “restricted to the press, being enjoyed by business corporations generally . . . .”<sup>67</sup> The point, the Court concluded, “is simply to shield those choices of content that in someone’s eyes are misguided, or even hurtful.”<sup>68</sup> As discussed below, the element of governmental interference with choice in expression should ordinarily trigger strict scrutiny without reference to several other factors that the Court now weighs in assessing a compelled expression claim.

### *B. Nature of the Compulsion—Content/Viewpoint Neutral vs. Content/Viewpoint Specific*

The government’s compelling a party to speak or to subsidize/facilitate the speech of others should be strictly scrutinized, regardless of whether the compulsion is viewpoint or content-based. Yet, in analyzing compelled expression cases, the Court, as in almost all decisions involving limitations on speech, has deemed it critical to determine whether the government has imposed a viewpoint- or content-based requirement and has held that strict review must be applied only where such a basis is found.<sup>69</sup>

The assumption that the analytical framework governing restrictions of

degrees of First Amendment protection to different mass media).

63. The Court also vindicated such choice when it held in *Wooley* that a New Hampshire motorist could not be required to display the state’s motto—Live Free Or Die—on the license plates affixed to his car. It was not suggested that the motorist was otherwise involved in disseminating information via displays on his car (perhaps through bumper stickers). This was a pure compelled subsidization case involving the uncompensated provision of a forum, that is, the car. *Wooley v. Maynard*, 430 U.S. 705 (1977).

64. 475 U.S. 1 (1986).

65. *Id.* at 20-21. *Pacific Gas* may well have had a larger “audience” than a local cable company. See *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 797-802 (1978) (Burger, C.J., concurring) (arguing that media and non-media corporations were entitled to equal First Amendment rights).

66. 515 U.S. 557 (1995).

67. *Id.* at 574.

68. *Id.*

69. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992); *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 641 (1994). The Court has emphasized that the compulsion in both *Tornillo* and *Pacific Gas* were content-based. *Id.* at 653-54.

speech should strictly carry over to compelled expression is questionable.<sup>70</sup> Of course, viewpoint and content-based compulsions raise obvious First Amendment concerns like those in cases involving restrictions on speech.<sup>71</sup> But this does not mean that strict review of compelled expression must be confined to such cases. There may be additional concerns that warrant a broader application of strict review.

Consider a few examples. What if, in *Tornillo*, the state had simply provided that in communities with only one daily paper, the paper would be required to have an opinion-editorial page in which opinion pieces from the public had to be published on a first-come, first-served basis? There would arguably have been no triggering content-related event. Of course, the requirement that the published pieces express opinions could be considered, in an attenuated way, a content-based restriction.<sup>72</sup> But within the Court's current analytical framework, there would be no overt censorial concern and thus no persuasive reason to apply strict review. Nevertheless, there is little doubt that the Court would have reached the same result as in the actual case.

What if the requirement in *Tornillo* were recast to mandate a "public access page," further diminishing the "content-related" concern?<sup>73</sup> Or consider a requirement that specified, without regard to content, that a newspaper add three additional pages.<sup>74</sup> This requirement would be consistent with

70. See Gacbler, *supra* note 34, at 1009.

71. See *Police Dept. v. Mosley*, 408 U.S. 92 (1972) (invalidating a law allowing picketing of a school, but only as to labor disputes). Of course, the line between content- and non-content-based restrictions can be highly problematic and subjective, as demonstrated by the discussion in *Turner I*, 512 U.S. at 642 ("[d]eciding whether a particular regulation is content based or content neutral is not always a simple task"). See John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 113-14 (1996).

The Court's concern that content-based compulsions induce self-censorship (*Turner I*, 512 U.S. at 654) seems somewhat speculative especially if one considers that in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), the Court found the very same point unpersuasive as to the alleged effects of the fairness doctrine. Of course, in its 1985 *Fairness Report*, the FCC adopted this point (based largely on self-serving comments of broadcasters) in the course of concluding that the doctrine was no longer justified. *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning General Fairness Obligations of Broadcast Licensees*, 102 F.C.C.2d 142, 58 R.R.2d 1137 (1985).

72. In *League of Women Voters*, the Court determined that a prohibition on "editorializing" was content-based, that is, that an editorial, was a genre of speech. *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984).

73. In the course of holding that the FCC lacked statutory authority to impose access requirements on cable companies, the Court, in *FCC v. Midwest Video Corp. (Midwest Video II)*, 440 U.S. 689 (1979), noted the substantial First Amendment problems that such compelled access would raise. *Id.* at 705 n.14, 709 n.19. These First Amendment problems had been discussed by the court of appeals. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-57 (8th Cir. 1978).

74. In *United States v. Midwest Video Corp. (Midwest Video I)*, 406 U.S. 649 (1972), the Court held that the FCC was empowered to require cable companies to originate programming (including studio requirements etc). Apparently, no consideration was given to the argument that this was a compelled speech case. In fact, the emphasis was on furthering First Amendment values by adding to the programming available to viewers. *Id.* at 667-669 & 668 n.27.

maintaining “editorial discretion” in the sense that the newspaper could decide *what* to put in the three pages. But is not part of editorial discretion, presumably protected by the First Amendment, the ability to decide *what not* to publish?”<sup>75</sup>

The application of strict review to compelled expression that is not overtly viewpoint- or content-based would likely lead to the invalidation of additional regulations—such as the cable “must carry” requirements—that are at least arguably enlightened promotions of the public interest. Such a semi-absolutist approach, making superfluous the extensive discussion in *Turner I* aimed at determining whether the “must carry” regulations were content-based,<sup>76</sup> would apply the First Amendment as a prophylactic measure. The approach, contrary to the thrust of First Amendment thinking that emphasizes the value of regulation in furtherance of First Amendment values,<sup>77</sup> reflects a distrust of democratic government’s regulation of speech in free speech values.

Even without overt viewpoint- or content-based regulation, the risks of de facto favoritism by government, and the consequent threat to First Amendment values, may well outweigh the arguable benefits that could flow from such regulation.<sup>78</sup> Moreover, while in the field of economic regulation, current constitutional doctrine tolerates the well known problems of unintended consequences, the critical role of the First Amendment in maintaining the democratic process makes more problematic the risk of such consequences in the regulation of speech.

75. See *Buckley v. Valeo*, 424 U.S. 1, 39 (1975) (invalidating campaign expenditure limits as an unjustified though content neutral restriction on “the quantity of campaign speech by individuals, groups, and candidates”). But see *Chicago Cable Communications v. Chicago Cable Comm’n*, 879 F.2d 1540 (7th Cir. 1989), cert. denied, 493 U.S. 1044 (1990) (upholding municipal rule requiring cable franchise to originate local programming).

76. At the least, since the question in *Turner I* was that close, any doubt should have been resolved in favor of finding a content-based restriction, and therefore not applying the intermediate standard of review obtained from *United States v. O’Brien*, 391 U.S. 367 (1968). But see C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 S. CT. REV. 57, 82 (endorsing *Turner II*’s “sensible result,” upholding the must-carry rules, but disputing the Court’s focus on whether there was content-based regulation, since the “Court’s individual choice notion of the ‘heart’ of free speech does not support objections to content-motivated structural regulation of media enterprises”).

77. See CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 46-92, 107-114 (1993). But see Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992).

78. One is reminded of certain tax legislation, where facially neutral provisions are designed to assist favored interests. See Martin H. Redish & Howard M. Wasserman, *What’s Good for General Motors: Corporate Speech and The Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 240 (1998); McGinnis, *supra* note 71, at 114 (“[s]pecial rules targeted at the operations or structure of the communication media inevitably affect content, even if they do not expressly refer to it”). It is interesting in this regard to compare the present First Amendment jurisprudence, with dual levels of scrutiny, to that applied in cases involving a woman’s constitutional right to terminate a pregnancy. There, the level of scrutiny applied does not vary with the government’s reasons for a challenged regulation.

### C. State of "Mind" of the Party Subject to Compulsion

As just discussed, the fundamental principle governing compelled expression should be the strong presumption that participation in the "system of freedom of expression" must be free of government compulsion. Yet, another strand in the Court's compelled speech cases emphasizes the extent, if any, to which the coerced party disagrees with the disseminated views.<sup>79</sup> Several commentators have focused on this strand in arguing that less First Amendment protection should be accorded to the expressive choices of corporations, which, as legal constructs are themselves incapable of disagreeing with anything.<sup>80</sup> But state of mind is a make-weight factor in the Court's analysis.<sup>81</sup>

Under both the Establishment and Free Exercise Clauses, a person may not be compelled to support his or her own church, much less another's.<sup>82</sup> Admittedly, there is a compelling historical basis for this position in the realm of religion. Nevertheless, it is hard to imagine that the *Buckley* Court would have upheld a requirement that during a presidential election, each person must contribute to the candidate or party of his or her choice.

Of course, where a party is compelled to utter, display, subsidize, or facilitate an opposed political or religious message, the government's action is especially objectionable. Thus, it is not surprising that the Court would allude to such disagreement where it exists. Certainly, however, consistent with *Barnette*, the flag salute could not be imposed on a student who admitted to agreeing with the sentiments in the pledge of allegiance, but simply did not want to recite it, that is, chose not to make his or her sentiments public.<sup>83</sup> Nor is it reasonable to suppose that after *Wooley*, a motorist could

79. In *Glickman*, the majority opinion emphasized that the case was not comparable to those "in which an objection rested on political or ideological disagreement with the content of the message." *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130, 2140 (1997).

80. See, e.g., Baker, *supra* note 76, at 82; Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 820-22 (1995); Harpaz, *supra* note 5, at 902; Mitchell C. Tilner, *Government Compulsion of Corporate Speech: Legitimate Regulation or First Amendment Violation? A Critique of PG&E v. Public Utilities Commission*, 27 SANTA CLARA L. REV. 485, 503 (1987). But see Redish & Wasserman, *supra* note 78, at 94.

81. *Glickman*, 117 S. Ct. at 2148 (Souter, J., dissenting).

82. See *Flast v. Cohen*, 392 U.S. 83, 102-04 (1968) (relying on historical context of religion clauses); *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-13 (1947).

83. Justice Jackson's opinion observed that "the issue as we see it [does not] turn on one's possession of particular religious views or the sincerity with which they are held." *West Virginia Bd. Of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Of course, compelling a student to learn the pledge and, perhaps, to demonstrate his or her knowledge by citing it would raise a different issue. See *Mozert v. Hawkins Cty. Bd. Educ.*, 827 F.2d 1058, 1065 (6th Cir. 1987) *cert. denied* 484 U.S. 1066 (1988) (observing that in *Barnette* students were "not merely made acquainted" with the flag salute so that they might be informed as to what it is or even what it means); *Cf. Abington Sch. Dist v. Schempp*, 374 U.S. 203, 225 (1963) (distinguishing between bible reading as a religious exercise versus a program of study about religion).



be compelled to display a state's motto as long as he or she agreed with, or was at least neutral as to its sentiment. In fact, as noted by Justice Souter's *Glickman* dissent,<sup>84</sup> in *Hurley*, the Court stressed that the principle of choice—that the speaker has the right to tailor the speech—“applies not only to expressions of value, opinion, or endorsement,” as to which the speaker's agreement or disagreement would pertain, “but equally to statements of fact the speaker would rather avoid.”<sup>85</sup>

#### *D. Extent to Which Coerced Party is Likely to be Identified with the Subsidized Speech*

In *Hurley*, the Court rejected an analogy to the must-carry rules sustained in *Turner II* on the ground that “a parade, unlike a cable system, is not a mere ‘conduit’ that is unlikely to be identified with the speech it carries.”<sup>86</sup> But the consideration that a party may be identified with the speech that is governmentally compelled (either in the sense that third-parties may reasonably assume such identification or that the coerced person reasonably may feel that he or she is so identified) is again a make-weight. There are indeed circumstances where adverse consequences may befall someone who is publicly identified as supporting an unpopular viewpoint.<sup>87</sup> Moreover, there is the consideration that a party has an interest in not being misidentified as having a particular viewpoint, that is, maintaining an identity or persona.<sup>88</sup>

Nevertheless, in the previously discussed hypothetical about compelled contributions to a political campaign or candidate favored by the contributor, would the requirement be any more valid if total confidentiality were maintained, even to the extent that the candidate or political party receiving the compelled support would not be informed of its source? Again, the central point is that compelled subsidization is objectionable even if there is no identification between the contributor and the subsidized expression. That is why it is irrelevant that the party, whose support is compelled, may have the

84. *Glickman*, 117 S. Ct. at 2148.

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

86. 574 U.S. at 576-77. See also *Glickman*, 117 S. Ct. at 2139, noting that “[t]he use of assessments to pay for advertising” did not “require [the objecting growers] to be publicly identified or associated with another's message.” (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980)). *But see Glickman*, 117 S. Ct. at 2147 (Souter J., dissenting) (suggesting “the principle that [any protected speech] is outside the government's power to coerce or to support by mandatory subsidy without further justification.”).

87. See, e.g., *Buckley v. Valco*, 424 U.S. 1, 74 (1975).

88. See *Gaebler*, *supra* note 34, at 1010. Interestingly, a corporation, perhaps as much as a human being, has a strong interest in disassociating from views that its managers consider will detract from the image of the corporation that they have sought to foster or will alienate its customers.

available option of clarifying a disagreement with the message being disseminated. Thus, the point made by Justice Rehnquist in *Wooley*, that the objecting party simply could have displayed his own message on his car to properly disclaim support for the state's message,<sup>89</sup> did not persuade the Court.

### E. Nature of the Compelled Expression

Justice Souter's dissent in *Glickman* reads the majority opinion as holding that the Court's compelled expression decisions apply to only political or ideological speech.<sup>90</sup> Although the Court does differentiate *Glickman*, in part on the basis of the non-ideological character of the advertising,<sup>91</sup> this reading is probably exaggerated. Nevertheless, Justice Souter properly replies that "nothing in those cases suggests that the government has free rein to compel funding of nonpolitical speech" (which might include art, for example, as well as commercial advertising).<sup>92</sup>

The concern as to the nature of the compelled expression relates more to the standard of review that should be applied in cases involving protected, but nonpolitical, speech. The primary focus is commercial speech. Justice Souter's *Glickman* dissent argued that "laws requiring an individual to engage in or pay for expressive activities are reviewed under the same standard that applies to laws prohibiting one from engaging in or paying for such activities."<sup>93</sup> The standard of review that should be applied in a compelled expression case that involves any expression that enjoys First Amendment protection should not, however, depend on a judgment as to its relative value. The important factor is that the party's liberty to refrain from speaking or subsidizing is curtailed.<sup>94</sup> The analysis, however, with respect to imposition of various disclosure requirements, such as those relating to product hazards and contents, is different.

The principal rationale for applying First Amendment protection to

89. *Wooley v. Maynard*, 430 U.S. 705, 722 (1977) (Rehnquist, J., dissenting). Similarly, in *Prune-Yard*, it should not have been persuasive that the owner of the shopping mall was unlikely to have been identified with the anti-war message of the demonstrators. *Prune-Yard Shopping Center*, 447 U.S. at 88.

90. *Glickman*, 117 S. Ct. at 2147 (Souter, J., dissenting).

91. *Id.* at 2140.

92. *Id.* at 2147 (Souter, J., dissenting). The public indecency statute at issue in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) could be regarded as involving compelled artistic expression. In its application to bar nude dancing as an art form by requiring that the dancers wear minimal coverings, the statute arguably compelled an addition to the ideas and emotions the dancers wished to convey.

93. *Glickman*, 117 S. Ct. at 2149 (Souter, J., dissenting). Thus, in concluding that the compelled subsidization was invalid, he applied the less rigorous commercial speech standard of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

94. One commentator recently has argued for the elimination of the separate *Central Hudson* standard for determining whether a regulation of commercial speech is valid. Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 S. CT. REV. 123.

commercial speech is that the speech provides useful information upon which the consumer can make an informed decision.<sup>95</sup> Deceptive commercial speech has no such benefit and, consequently, enjoys no First Amendment protection.<sup>96</sup> The truth or falsity of such speech is thought to be objectively determinable, and government may require that misleading speech be corrected by additional speech.<sup>97</sup> Such compelled disclosure is consistent with the consumer autonomy rationale for protecting commercial speech in the first place. In virtually every case, the regulated party has already chosen to speak, even if minimally, regarding the offered product or service. Given the utilitarian rationale for according First Amendment protection against curtailment of commercial speech, it is difficult to discern any rationale for preserving a right against compelled disclosure where necessary to prevent the consumer from being misled.<sup>98</sup> Also, the compelled speech, in the sense of disclosure of material facts, often serves the important if not compelling interest in safety.<sup>99</sup>

By contrast, the validity of the disclosure requirement upheld in *Meese v. Keene*<sup>100</sup>—that exhibitors of certain foreign films (here Canadian films relating to environmental issues) had to disclose that the Department of Justice had determined the films to be “political propaganda” in that they were political and were distributed by “agents” of “foreign principals”—is far from clear.<sup>101</sup> In the Court’s view, “Congress simply required the dissemi-

95. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Coun. Inc.*, 425 U.S. 748, 763-65 (1976); *Central Hudson*, 447 U.S. at 563.

96. *Virginia Pharm. Bd.*, 425 U.S. at 771; *Central Hudson*, 447 U.S. at 563. Compare with *Brown v. Hartlage*, 456 U.S. 45 (1982) (false promises by political candidate may not be made actionable).

97. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 656 (1985) (upholding requirement that attorneys who advertise availability of representation on a contingent fee basis disclose method of calculating such fees). But see *Ibanez v. Florida Dep’t. of Bus. and Prof’l Regulation*, 512 U.S. 136, 146-47 (1994) (invalidating disclosure requirement because danger that public would be misled was only “hypothetical”); *International Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (applying *Central Hudson* standards to invalidate Vermont law requiring labeling of products from cows treated with growth hormone).

98. See Caren Schmulen Sweetland, Note, *The Demise of a Workable Commercial Speech Doctrine: Dangers of Extending First Amendment Protection to Commercial Disclosure Requirements*, 76 TEX. L. REV. 471, 501-04 (1997).

99. In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992), the Court upheld as “reasonable licensing and regulation by the state,” a requirement that a physician “provide information about the risks of abortion, and child birth, in a manner mandated by the State.” One commentator, distinguishing the ordinary commercial disclosure cases, has suggested “that *Casey* and current First Amendment doctrine have underestimated the substantial individual and societal interests in the physician’s free speech.” Robert D. Goldstein, *Reading Casey: Structuring the Woman’s Decision-making Process*, 4 WM. & MARY BILL RTS. L.J. 787, 854 (1996).

100. 481 U.S. 465 (1987).

101. The stated objective was “to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.” *Meese*, 481 U.S. at 469.

nators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda.”<sup>102</sup> But the Court’s reliance on this *Virginia Pharmacy Board*<sup>103</sup> “more information is better” rationale was overly simplistic. Only commercial speech—price information—was there at issue, whereas communication about the origin and nature of a film or book is closely connected to and may adversely affect non-commercial communication.<sup>104</sup>

*F. The Government’s Having Elected to Confer a “Monopolistic” Position on the Party it Seeks to Regulate*

In *Pacific Gas*, Justice Rehnquist’s dissent argued that because Pacific Gas was a corporation and a regulated public utility, and not a part of the institutional media, it should not enjoy “negative free speech rights.”<sup>105</sup> The fact that a corporation has statutorily conferred advantages should not, however, generally determine the extent to which it enjoys protection against compelled expression, in particular the level of scrutiny to be applied.<sup>106</sup> Although corporate status, as with other property rights, does confer certain advantages, these advantages are generally available. There is not a certain number of authorized corporations, after which no other group of investors may incorporate.

Unlike Pacific Gas’s corporate status, the fact that the utility enjoyed a governmentally-conferred monopolistic status, with regulation by a commission being substituted for competition, should have altered the result.<sup>107</sup>

102. *Id.* at 480-81.

103. *Id.* at 481-82.

104. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995), (invalidating state law prohibiting distribution of anonymous campaign literature); *Riley v. National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 74, 85 (1988) (invalidating state law requiring charitable solicitors to disclose “fundraiser’s profit). In *Riley*, the Court rejected the application of *Virginia Pharmacy Bd.* because the Court “[d]id not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.” *Riley*, 487 U.S. at 796. The Court stressed that “[o]ur lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.” *Id.*

105. *Pacific Gas & Elec. Co. v. Public Util. Comm’n*, 475 U.S. 1, 33-35 (1986). He further relied on the pragmatic rationale of *Bellotti*, that corporate speech deserves protection only because it contributes to the marketplace of ideas. *Id.*

106. See *Redish & Wasserman*, *supra* note 76.

107. Later, in *Hurley*, the Court distinguished the case of the cable companies in *Turner I and II* on the ground that cable is “a franchised channel giving monopolistic opportunity to shut out some speakers.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 577 (1995). “This power,” the Court asserted, “gives rise to the Government’s interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed.” *Id.* See also *Turner I*, 512 U.S. at 656. Aside from any questions as to whether a monopoly actually was conferred (see *Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d 1327 (9th Cir.), *cert. denied*, 114 S. Ct. 2738 (1994) (holding unconstitutional the city’s granting of a *de facto* monopoly cable franchise); *Cable Television Consumer Protection and Competition Act of 1992*, 47 U.S.C. § 541(a)(1) (prohibiting prospectively the granting of exclusive franchises)), it is worth noting

The Court previously had held that such monopolistic status does not turn a private public utility into a governmental actor for purposes of state action analysis.<sup>108</sup> Nevertheless, as with a labor union or an integrated bar, the traditional monopolistic public utility at least partakes of a quasi-governmental character. The material, relating to opposition to a rate increase, that the Public Utility Commission required Pacific Gas to disseminate, directly bore on implementation of the regulatory process necessitated by the utility's monopoly.

Thus, contrary to the argument in Justice Powell's plurality opinion, the Court's prior holding that a public utility generally enjoyed the First Amendment right to participate in the marketplace of ideas, should not have been determinative.<sup>109</sup> Justice Powell pointed out that the Court's ruling, under the concededly valid requirement of the securities laws that a corporation's management must include in proxy statements the proposals of disident shareholders, concerned only the internal governance of the corporation, not the corporation's communications with the general public as a participant in the marketplace of ideas.<sup>110</sup> But the close nexus of the compelled expression to regulation of the utility's governmentally sanctioned monopoly status should have made it unnecessary to apply more than an intermediate level of scrutiny to the Commission's requirement. In that sense, as pointed out in Justice Stevens' dissent,<sup>111</sup> the requirement differed from a general restraint on the utility's expression and indeed was analogous to that mandated under the securities laws.

*PruneYard*, holding that government may require the owner of a shopping mall to allow its property to be used for political speech, is a second case which might better be analyzed in terms of the government's conferring monopolistic benefits on the regulated party. Prior to *PruneYard*, the Court had rejected the state action argument that the First Amendment required a private shopping mall to be operated as a traditional public forum.<sup>112</sup> But as the proponents of finding state action in the shopping mall cases had emphasized, the government provided substantial benefits—zoning changes, new access roads, sewers, and related infrastructure.<sup>113</sup> These

that in *Turner I*, while the federal government was imposing the compulsion, it was not the franchisor.

108. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

109. *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 17 n.14 (1986) (citing *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 534 n.1 (1980), where the Court determined that the utility's status "as a privately owned but government regulated monopoly [did not] preclude its assertion of First Amendment rights" to express its "opinions or viewpoints on controversial issues of public policy" *Id.* at 531).

110. *Pacific Gas*, 475 U.S. at 14 n.10.

111. *Id.* at 39-40.

112. *Hudgens v. NLRB*, 424 U.S. 507 (1976).

113. *Lloyd Corp. Ltd. v. Tanner*, 407 U.S. 551, 575-77 (1972) (Marshall, J., dissenting).

were specifically designed and intended to enable the shopping mall to be built, with the almost inevitable effect of replacing the community's traditional commercial downtown shopping area. Moreover, unlike the provision of a traditional public forum, the government's provision of these benefits was voluntary. Thus, in *PruneYard*, it is not so much the factors identified by Chief Justice Rehnquist's majority opinion and Powell's concurrence that compelled the result. Rather, assuming circumstances comparable to those in *Lloyd*, one could better analyze the decision in terms of the government (state and municipality) having conditioned the receipt of benefits, in particular favorable zoning with monopolistic implications, upon the shopping mall's operation as a public forum.<sup>114</sup>

*Red Lion*, emphasizing the "scarcity" of the electromagnetic spectrum<sup>115</sup> to justify licensing requirements constraining the editorial discretion of broadcasters,<sup>116</sup> is another instance in which the government's conferring a monopolistic benefit may offer a more persuasive rationale for the court's ultimate conclusion. It was recently suggested that one might consider the grant of a license to be the conferral of a benefit by the government, that is, the reasonable market value of the license, that justifies applying a more lenient standard of review to such requirements.<sup>117</sup> The more critical aspect, however, is that the government has conferred a monopolistic degree of control over a type of government property, a limited public forum.<sup>118</sup>

114. One could also focus on the strong, perhaps compelling interest of the government in maintaining the open character of such shopping malls that largely replaced the traditional downtown shopping areas (effectively the same kind of balancing that went into the *Marsh* state action decision). See *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 317-19 (1968). The interests that dictate that the government may not limit the use of a traditional public forum; that is, that it is required to subsidize or at least facilitate expressive activities occurring in such fora, apply to regulation of what is, for practical purposes, a substitute private forum—a private shopping mall.

115. This scarcity flows from the laws of physics and from the fact that the government has divided up the spectrum according to various uses.

116. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388-89 (1969). The most recent example of such a requirement, although couched in terms of a license renewal guideline, is the FCC's implementation of the Children's Television Act of 1990 [hereinafter CTA], Pub. L. No. 101-437, 104 Stat. 996 (1990), 47 USCA §§ 303a, 303b, 394 (1994). See *Policies And Rules Concerning Children's Television Programming*, 11 F.C.C.Red. 10660 (1996) (authorizing FCC's Mass Media Bureau to find broadcaster in compliance with CTA's requirements if broadcaster meets Commission's guideline of three hours of children's programming per week).

117. *Time Warner Entertainment Co., v. FCC*, 105 F.3d 723, 726 (D.C. Cir. 1997) (Williams, J., dissent from denial of rehearing en banc).

118. See Kamenshine, *supra* note 13, at 1142-43 (analyzing a broadcast license as the government's having conferred on a private entity a monopolistic control over a public forum); Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 1997 CALIF. L. REV. 1687, 1732-38, 1754-65 (distinguishing between the public forum and the *quid pro quo* rationales for regulation and suggesting that the public forum doctrine is the best vehicle for assessing the validity of broadcast regulation). Professor and former FCC Commissioner, Glen O. Robinson, points out, however, that "[s]aying that the government owns 'property' in the spectrum is simply a way

What difference does it make if spectrum is auctioned off as mandated by recent legislation?<sup>119</sup> Once the government sells the “property,” it has been suggested that the scarcity rationale of *Red Lion* may vanish.<sup>120</sup> The property conceptualization, however, may suggest that even with a sale, the government may explicitly, or even implicitly, reserve certain “easements;” in effect not selling the entire property. For example, if the government were to sell a parcel of land, it would be entitled to reserve an easement whereby public access to a historical or scenic site might be preserved. As with the sale of any property, the purchase price would be reduced by the reasonable value of what the seller, here the government, has reserved.

A somewhat different conceptualization involves the suggestion that the reduction in price may represent an alternative form of subsidy. More specifically, with respect to the requirement that a Direct Broadcast Satellite (DBS) provider bear some of the operating costs and overhead as to channels reserved for educational programming, it was pointed out that “the differential—money that the government could have received had it not imposed the programming requirement—constitutes a subsidy exactly matching the pecuniary burden imposed by the provision.” This may well entitle the government to impose such requirements on the purchaser.<sup>121</sup>

## V. CONCLUSION

*Barnette* indeed presented the most compelling case for invalidating compelled expression. In deciding subsequent cases, the Court has alluded to many factors. But its approach lacks coherence. The fundamental principle, still applicable to the more subtle and complex problems of today, is the strong presumption that participation in the “system of freedom of expression” should be voluntary. Strict review of compelled expression, including compelled subsidization and/or facilitation of a third party’s expression, should be the general rule. Government should rely on avenues other than compelled expression to enhance the market place of ideas.

As for government speech and government subsidization of private

of describing the governments’ control of the uses of radio frequencies, in space, in order to prevent what the common lawyer might call a nuisance and an economist would call an ‘externality.’” Glen O. Robinson, *The Electronic First Amendment: an Essay for the New Age*, 47 DUKE L.J. 899, 912 (1998).

119. Pub. L. 105-33, Title III, §§ 3002(a)(1) to (3), 3003, 111 Stat. 258, 260 (Aug. 5, 1997), 47 U.S.C. 309(j).

120. See WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT 542 n.98, 545 n.104 (1995); WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 87-88 (1984).

121. See *Time Warner*, 105 F.3d at 728 (Williams, J., dissent from denial of rehearing en banc); Logan, *supra* note 118, at 64. For criticism of current non-scarcity-based theories advanced in support of regulating the electronic media, see RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Robert Corn-Revere, ed., The Media Institute 1997).

speech, practicality, not theory, bars recovery by dissenting taxpayers. The problem is made worse to the extent that the Court first rejects any implied political establishment limits, and second, out of concern for the rights of potential grantees, adheres to the view that the First Amendment bars the extending of grants under standards, such as the “decency” provision, if meaningfully enforced. Certainly, to reflect the concerns of dissenting taxpayers, Congress should consider restructuring the way in which funding for grants is determined.