

# VIRGINIA LAW REVIEW

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VOLUME 105

MARCH 2019

NUMBER 1

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## *ARTICLES*

### THE GOVERNMENT-COULD-NOT-WORK DOCTRINE

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*The Supreme Court has recently declared that it is presumptively unconstitutional for the government to compel individuals to do or pay for things to which they have religious or political objections. Last Term, the Court applied this declaration to uphold the First Amendment arguments made by public-sector employees, and it appears poised to vindicate similar claims by religious objectors to antidiscrimination laws in the future. But this declaration is wrong. Indeed, throughout American history—from the Articles of Confederation through *Lochner v. New York* and *Employment Division v. Smith*, the Court itself has repeatedly rejected the notion that compulsory laws, in and of themselves, are presumptively unconstitutional.*

*This Article offers a novel examination of the history of challenges to compulsory laws inside and outside the context of the First Amendment. For centuries, the Supreme Court has faced hundreds of challenges to objectionable taxes, objectionable drafts, objectionable regulations, and objectionable funding conditions. With few exceptions, the Court has responded that the “government could not work” if it lacked the power to compel people to do things to which they objected. Although the Constitution prescribes many specific limits on the powers of the federal and state governments, the Constitution’s very purpose was to*

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*create a union that had the power to compel political minorities to accept the will of a political majority. Such a union would be incompatible with a governing document that prohibited officials from compelling people to take any action to which they religiously or politically objected—even when those objections were sincerely held.*

*Borrowing the Supreme Court’s own language, I call the Court’s typical response the “government-could-not-work” doctrine, and conclude that objectionable compulsion, in and of itself, should not trigger the strict scrutiny of *Abood v. Detroit Board of Education*. Rather, compulsory laws should be treated the same as any other law, and analyzed for whether they are arbitrary, are discriminatory, or otherwise violate specific constitutional limits.*

I. HISTORY .....	11
A. 1787–1943 .....	11
1. <i>The Origins of the Government-Could-Not-Work Doctrine</i> .....	11
2. <i>The First Amendment Non-Exception</i> .....	14
3. <i>The Public–Private Exception</i> .....	16
B. 1943–1982 .....	19
1. <i>West Virginia v. Barnette and Its Aftermath</i> .....	19
2. <i>The Court Reins in Barnette</i> .....	23
3. <i>The Continuous Public-Private Exception</i> .....	25
C. 1982–Present .....	28
1. <i>The Government-Could-Not-Work Doctrine Returns</i> ...	28
2. <i>The Persistent Public–Private Exception</i> .....	33
II. THE GOVERNMENT-COULD-NOT-WORK DOCTRINE .....	35
III. APPLICATIONS .....	42
A. <i>Controversial Recipients</i> .....	42
B. <i>Agency-Fee Arrangements</i> .....	45
C. <i>Municipal Speech</i> .....	53
D. <i>Antidiscrimination Laws</i> .....	58
IV. CONCLUSION .....	60

For over two thousand years, conscientious people from Plato to Gandhi have grappled with the dilemma of how to respond when a government orders you to do something you disagree with—say, pay a tax that

will fund a war.<sup>1</sup> Perhaps the most famous answer comes from the book of Matthew, when Jesus of Nazareth declared, “Render . . . unto Caesar the things which are Caesar’s; and unto God the things that are God’s.”<sup>2</sup> One way to interpret this declaration contends that you should always comply with fairly imposed civil obligations—at least until you can persuade others to accommodate your views.<sup>3</sup> A second argues that if conscience so dictates, you should disobey the government and accept whatever punishment it doles in return.<sup>4</sup>

Recently, a group of constitutional lawyers have offered a third option: Sue the government. Adopting a libertarian interpretation of the First Amendment’s protection of free speech and religious exercise, these lawyers argue that it is presumptively unconstitutional for the government ever to put one’s moral obligations in conflict with one’s civil obligations.

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<sup>1</sup> Compare, e.g., Plato, *Crito* 54a–54d, in *The Collected Dialogues of Plato* 93 (Hugh Tedenick trans., 1987), with Plato, *Apology* 28b–38b, in *The Collected Dialogues of Plato*, supra, at 51–68. See also Alexander Meiklejohn, *Political Freedom* 21–24 (1960) (articulating the distinction between Socrates’s disobedience to the law in *Apology* and Socrates’s obedience to the law in *Crito*).

<sup>2</sup> Matthew 22:21 (King James).

<sup>3</sup> See, e.g., Romans 13:1–2 (King James) (“Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God . . . .”); Thomas Aquinas, *On Law, Morality, and Politics* 64 (Richard J. Regan trans., 2d ed. 2002) (“[Just laws] have obligatory force in the court of conscience from the eternal law, from which they are derived.”); Immanuel Kant, *What is Enlightenment?*, in *Foundations of the Metaphysics of Morals* 85, 87 (Lewis White Beck trans., 1959) (1785) (“Many affairs which are conducted in the interest of the community require a certain mechanism through which some members of the community must passively conduct themselves with an artificial unanimity . . . . Here argument is certainly not allowed—one must obey.”).

<sup>4</sup> See, e.g., 1 Peter 2:19 (King James) (“For this *is* thankworthy, if a man for conscience toward God endure grief, suffering wrongfully.”); Augustine, *On the Free Choice of the Will, On Grace and Free Choice, and Other Writings* 10 (Peter King ed. & trans., 2010) (“[A] law that is not just does not seem to me to be a law.”); Mohandas K. Gandhi, “Render Unto Caesar,” in *48 The Collected Works of Mahatma Gandhi* 483 (1989) (“Jesus’s whole preaching and practice point unmistakably to non-co-operation, which necessarily includes nonpayment of taxes. Jesus never recognized man’s authority as against God’s.”); Martin Luther King, Jr., *Letter from Birmingham Jail*, in *Why We Can’t Wait* 77, 86 (1964) (“I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.”); John Locke, *A Letter Concerning Toleration* 43 (1689) (“[A] private Person is to abstain from the Action that he judges unlawful, and he is to undergo the Punishment, which it is not unlawful for him to bear.”); Henry David Thoreau, *Resistance to Civil Government (Civil Disobedience)*, in *Political Writings* 1, 10 (Nancy L. Rosenblum ed., 1996) (1849) (“Under a true government which imprisons any unjustly, the true place for a just man is . . . a prison.”).

As evidence, they draw on cases such as *West Virginia v. Barnette*, in which the Supreme Court struck down a regulation that compelled objecting school children to recite the pledge of allegiance.<sup>5</sup> In the past few years these lawyers have asked the Court to extend *Barnette*'s logic to petitioners who object to birth control, labor unions, vaccinations, same-sex marriage, and all kinds of politically charged topics.<sup>6</sup>

The Supreme Court has been sympathetic to these lawyers, in one case declaring that the First Amendment generally “prevent[s] the government from compelling individuals to express certain views” or “pay subsidies for speech to which they object.”<sup>7</sup> The Court has even acted on this declaration to invalidate laws that tax public-sector employees and donate the revenue to labor unions.<sup>8</sup> But this declaration is wrong. Treating compulsory laws as presumptively invalid not only contradicts historical practice, it's also at odds with the Court's precedent in nearly every other constitutional context.<sup>9</sup>

The First Amendment, along with the rest of the Constitution, was adopted to create a functional government out of the embers of a failing

<sup>5</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>6</sup> See, e.g., *Janus v. Am. Fed'n*, 585 U.S. \_\_\_\_ (2018); *Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm'n*, 584 U.S. \_\_\_\_ (2018); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam); *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016) (per curiam); *Davis v. Miller*, 136 S. Ct. 23 (2015) (mem.); *Phillips v. City of New York*, 136 S. Ct. 104 (2015) (mem.) (cert denied).

<sup>7</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (citations omitted). This has also been called the “Jeffersonian proposition” because of a line in Thomas Jefferson's draft “Bill for Establishing Religious Freedom.” See Thomas Jefferson, A Bill for Establishing Religious Freedom, in 2 *The Works of Thomas Jefferson* 438, 439 (Paul Leicester Ford ed., 1904) (“[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical . . .”); Micah Schwartzman, *Conscience, Speech, and Money*, 97 *Va. L. Rev.* 317, 319 (2011).

<sup>8</sup> *Janus*, 585 U.S. at \_\_\_\_ (slip op. at 48); *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014); *Knox v. Serv. Emps Union, Local 1000*, 567 U.S. 298, 310–14 (2012); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516–17 (1991); *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 304–06 (1986); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 456 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222–23 (1977); see also *United Foods*, 533 U.S. at 410 (generic advertising); *Keller v. State Bar*, 496 U.S. 1, 12–14 (1990) (bar association).

<sup>9</sup> See Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 *Val. U. L. Rev.* 555, 557, 581–82 (2006) (calling the declaration “seriously misguided,” “inconsistent with important precedents,” and “so radical that the Court felt impelled . . . immediately to intervene to disavow it”); see also Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 *Loy. L.A. L. Rev.* 439, 492 (2014) (arguing that a requirement to pay for union services does not violate the First Amendment because it should not be considered compelled speech).

state.<sup>10</sup> For any government to function—especially in a politically and religiously pluralistic society like the United States—it must be able to compel residents to do all sorts of things a minority might disagree with, from paying taxes and obeying generally applicable laws to accepting conditions on public benefits.<sup>11</sup> Accordingly, the Supreme Court has rejected claims brought under every clause of the First Amendment and other articles of the Constitution whenever it has realized that “government would not work” were it constitutionally prohibited from compelling citizens to do or pay for things they might not like.<sup>12</sup> Even the author of *Barnette* recognized the danger of converting the First Amendment into “a suicide pact.”<sup>13</sup>

This Article molds these Supreme Court moments of clarity into a coherent doctrine, which I call the “government-could-not-work” doctrine. Analyzing a wide variety of cases involving laws that mandate or forbid behavior, I conclude that objectionable compulsion, in and of itself, should not make a law presumptively unconstitutional, triggering the so-called strict scrutiny that the Court currently applies when a person objects to subsidizing a labor union. As the Court has declared throughout its history—with a brief exception between about 1940 and 1980—

<sup>10</sup> See, e.g., Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 9 *The Papers of James Madison* 317–22 (Robert A. Rutland & William M.E. Rachal eds., 1975) (writing of the “difficulties” and “mortal diseases” of the Articles of Confederation).

<sup>11</sup> See *Emp’t Div. v. Smith*, 494 U.S. 872, 885, 888–89 (1990); Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 8 (1948); Letter from James Madison to James Monroe (Apr. 9, 1786), in 9 *The Papers of James Madison*, supra note 10, at 25–26 (“Government cannot long stand which is obliged in the ordinary course of its administration to court a compliance with its *constitutional* acts, from a member not of the most powerful order . . .”).

<sup>12</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015) (Free Speech Clause); see also, e.g., *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 389–90 (2011) (Petition Clause); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 68–69 (2006) (implied right of association); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–70 (1991) (Free Press Clause); *Smith*, 494 U.S. at 888–89 (Free Exercise Clause); *Greer v. Spock*, 424 U.S. 828, 836–37 (1976) (Assembly Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947) (Establishment Clause).

<sup>13</sup> *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). By “suicide pact,” neither Justice Jackson nor I refer to the post-September 11 idea that the Constitution recognizes a “law of necessity” that empowers the President to abandon the Bill of Rights in an emergency. See Michael Stokes Paulsen, *The Constitution of Necessity*, 79 *Notre Dame L. Rev.* 1257, 1259 (2004); Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 *Notre Dame L. Rev.* 1299, 1301 (2004). Rather, I think we both refer to the longstanding idea that the First Amendment should be construed as “part of a Constitution which creates a government for the purpose of performing several very important tasks.” *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 102 (1973) (quoting 2 Zechariah Chafee, Jr., *Government and Mass Communications* 640–641 (1947)).

applying such strict scrutiny every time a person challenges a compulsory law would cripple the government. Although this declaration has often been grounded in debatable functional considerations, it is normatively justified by the “republican principle” that in most contexts, a majority should be permitted to set the policy for an entire community despite a vocal minority.<sup>14</sup> In other words, I argue that the First Amendment doesn’t render American citizens uniquely exempt from the universal dilemma of having to decide whether to abide by a disagreeable law.

In this respect, the Article provides a novel response to the recent resurgence of “First Amendment libertarians”: lawyers who seek to use the First Amendment as a deregulatory tool to invalidate various compulsory laws such as label requirements, antidiscrimination restrictions, or healthcare mandates. Critics such as Archibald Cox, Charlotte Garden, Cass Sunstein, Robert Post, and Toni Massaro have long taxed First Amendment libertarians with “reviving the philosophy of *Lochner v. New York* in the guise of first amendment doctrine.”<sup>15</sup> Over the past forty years, these critics of First Amendment libertarianism have offered countless examples of how unreasonable it would be if it were presumptively unconstitutional for the government to, say, require a student to take an objectionable math test, require a driver to purchase objectionable auto insurance, or require a major corporation to pay objectionable taxes.<sup>16</sup> But these scholars generally do not tie their criticisms of First Amendment libertarianism to existing constitutional doctrine, and certainly not outside of First Amendment law. This Article, by contrast, demonstrates that the Supreme Court historically has confronted the same arguments raised by First Amendment libertarians when interpreting several other clauses of the Constitution—including the Tax and Spending Clause, the Property Clause, the Takings Clause, the Equal Protection Clause, and, of course, the Due Process Clause at issue in *Lochner*. Each time, the Court has

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<sup>14</sup> See *infra* note 44.

<sup>15</sup> Archibald Cox, Foreword: Freedom of Expression in the Burger Court, 94 Harv. L. Rev. 1, 28 (1980); see also Charlotte Garden, The Deregulatory First Amendment at Work, 51 Harv. C.R.-C.L. L. Rev. 323, 323–24 (2016) (pointing out similarities between recent deregulatory First Amendment theories and *Lochner*-era substantive due process cases); Toni M. Massaro, Tread on Me!, 17 U. Pa. J. Const. L. 365, 368 (2014) (suggesting compelled speech regulations deserve greater deference than what the Court has given in recent years); Robert Post, Compelled Commercial Speech, 117 W. Va. L. Rev. 867, 879–80 (2015) (emphasizing a recent Supreme Court trend to use the commercial speech doctrine to invalidate marketplace regulations).

<sup>16</sup> See, e.g., Robert Post, Compelled Subsidization of Speech: *Johanns v. Livestock Marketing Association*, 2005 Sup. Ct. Rev. 195, 216 (2005).

ultimately rejected the argument that compulsory laws are presumptively unconstitutional—because “government could not work” in a pluralistic society if that were true.

Part I of this Article charts the history of the Court’s reaction to anti-compulsory arguments over three stages. In the first stage, from 1787 through 1942, the Court generally upheld compulsory laws from libertarian constitutional challenges on the ground that “[g]overnment could exist only in name” if any clause of the Constitution presumptively prohibited the government from compelling people to do things they didn’t want to do.<sup>17</sup> In the second stage, after 1942, the Court had an “overnight shift,”<sup>18</sup> exemplified by *Barnette*, after which it began declaring it presumptively unconstitutional for the government to compel people to do things that they conscientiously objected to doing.<sup>19</sup> In the third stage, after about 1982, the Court once again declared that “we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.”<sup>20</sup> Although this pattern is not true in every case—as mentioned, labor law is a notable exception—it is consistent across all types of cases involving compulsion, from “compelled activity” cases in which the government forces someone to do something;<sup>21</sup> “compulsory condition” cases in which the government forces someone to accept something as a condition of working for the government, entering its property, or receiving its

<sup>17</sup> See, e.g., *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

<sup>18</sup> Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 2. For a more recent analysis of this shift, including its lessons for present-day critics of First Amendment libertarianism, see Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 Colum. L. Rev. 1915, 1956–92 (2016).

<sup>19</sup> Compare *Jones v. Opelika*, 316 U.S. 584, 596–97 (1942) (government could not work if it could not tax religiously motivated commercial conduct), and *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593–94 (1940) (religious toleration could not work if “the freedom to follow conscience has itself no limits in the life of a society”), with *Martin v. City of Struthers*, 319 U.S. 141, 146–47 (1943) (government *can* work without municipal power to prohibit door-to-door proselytizing), *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943) (government *can* work without power to tax missionary evangelism), and *Barnette*, 319 U.S. at 636–37 (government *can* work without power to coerce children to affirm patriotic creed).

<sup>20</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 885, 888–89 (1990).

<sup>21</sup> Compare, e.g., *Wooley v. Maynard*, 430 U.S. 705, 713–15 (1977) (striking down a law for compelling activity), and *Barnette*, 319 U.S. at 642 (same), with *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (upholding a law despite compelled activity), and *Smith*, 494 U.S. at 888–90 (same).

money;<sup>22</sup> and “compelled subsidy” cases in which the government forces someone to pay for something.<sup>23</sup>

Part II of the Article offers a defense of the Court’s reaction to libertarian, anticompsory arguments: a reaction that I call the government-could-not-work doctrine. I argue that the doctrine is not only consistent with common sense, but it also reflects a basic principle interwoven into the Constitution’s structure, history, and text. The Constitution prescribes many specific limits on the powers of the federal and state governments. But the Constitution’s very purpose was to create a union that had the power to compel political minorities to accept the will of a political majority. Such a union would be incompatible with a governing document that prohibited officials from compelling people to take any action to which they religiously or politically objected—even when those objections were sincerely held. Even First Amendment absolutists have subscribed to this view. As Alexander Meiklejohn has written,

at the bottom of every plan of self-government is a basic agreement, in which all the citizens have joined, that all matters of public policy shall be decided by corporate action, that such decisions shall be equally binding on all citizens, whether they agree with them or not, and that, if need be, they shall, by due legal procedure, be enforced upon anyone who refuses to conform to them.<sup>24</sup>

Meiklejohn wrote that a person who disagrees with a community’s decision to tax certain behavior and spend the revenue promoting certain customs is not “objecting to tyranny or despotism. He is objecting to political freedom. He is not a democrat. He is [an] anarchist . . . .”<sup>25</sup> The

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<sup>22</sup> Compare, e.g., *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 221 (2013) (striking down law for its compelled condition on receiving money), *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (invalidating an employment decision for its compelled condition on working for the government), and *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939) (striking down a law for its compelled condition on entering government property), with *Garcetti v. Ceballos*, 547 U.S. 410, 418–19, 424 (2006) (upholding an employment decision despite its compelled condition on working for the government), *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680–81 (1992) (upholding a law despite its compelled condition on entering government property), and *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (upholding a law despite its compelled condition on receiving government money).

<sup>23</sup> Compare, e.g., *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (striking down a law for compelling a subsidy), and *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (same), with *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557–59, 567 (2005) (upholding law despite a compelled subsidy), and *United States v. Lee*, 455 U.S. 252, 260 (1982) (same).

<sup>24</sup> Meiklejohn, *supra* note 11, at 8–9.

<sup>25</sup> *Id.*



government-could-not-work doctrine takes this view of self-government as the baseline for interpreting the terms of the Constitution. In the words of Zechariah Chafee, Jr., it construes the First Amendment “as part of a Constitution which creates a government for the purpose of performing several very important tasks. The Amendment should be interpreted so as not to cripple the regular work of the government.”<sup>26</sup>

Part III of this Article explores the implications of this doctrine with a few examples. I argue that even though objectionable compulsion alone does not make a law presumptively unconstitutional, there are plenty of compulsory laws that violate specific constitutional limits, as when a compulsory law invidiously disfavors a particular religion or ideology (violating the Equal Protection Clause),<sup>27</sup> is arbitrary or unrelated to a legitimate objective (violating the Due Process Clause),<sup>28</sup> or imposes irrelevant conditions on benefits (violating the Taxing and Spending Clause).<sup>29</sup> One such limit that the First Amendment itself has historically imposed is a prohibition on compulsory laws that *misattribute*, or make others think that a person compelled to do something is doing it voluntarily.<sup>30</sup> With these sorts of limits in mind, I apply the government-could-not-work doctrine to four contemporary debates: public funding of non-governmental organizations like Planned Parenthood, agency-fee arrangements that support public-sector unions, partisan political activity by cities, and antidiscrimination laws that require public- and private-sector employees to cater to same-sex couples. I contend that in each of these contexts, courts should be skeptical of dissenters who claim a First

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<sup>26</sup> 2 Chafee, *supra* note 13, at 640–41; *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 102–03 (1973) (quoting 2 Chafee, *supra* note 13, at 640–41); see Thomas I. Emerson, *The System of Freedom of Expression* 17–18, 708–17 (1970); Robert Post, *Recuperating First Amendment Doctrine*, 47 *Stan. L. Rev.* 1249, 1273 (1995); Cass R. Sunstein, *Free Speech Now*, 59 *U. Chi. L. Rev.* 255, 258–62 (1992); Meiklejohn, *supra* note 11, at 8–9, 68; Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 *Sup. Ct. Rev.* 245, 253.

<sup>27</sup> See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993); *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972).

<sup>28</sup> See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 141–42 (1951). See also *id.* at 162–63 (Frankfurter, J., concurring) (“The requirement of ‘due process’ is not a fair-weather or timid assurance,” but rather represents “a profound attitude of fairness between man and man, and more particularly between the individual and government.”)

<sup>29</sup> Compare, e.g., *Agency for Intern. Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013) (First Amendment), with *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–83 (2012) (Taxing and Spending Clause).

<sup>30</sup> See *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63–65, 69 (2006) (citations omitted); *Abner S. Greene, (Mis)Attribution*, 87 *Denv. U. L. Rev.* 833, 839–43 (2010).

Amendment right to disrupt governmental programs or to exempt themselves from participating in them. For example, I criticize the Court’s labor-law decisions because they turn on the flawed assumption that compelling an employee to subsidize a labor union presumptively violates the Free Speech Clause.<sup>31</sup> But such arrangements are functionally identical to other contexts in which the government taxes a group of people and subsidizes nongovernmental organizations, political candidates, or even religious entities—and in those situations, the government-could-not-work doctrine subjects the assessments to minimal scrutiny.<sup>32</sup>

In sum, I argue that democratic governments necessarily compel their citizens to do things that some people will find objectionable. Deciding what to do when confronted with such an obligation has always been a difficult, personal challenge. But the mere presence of this dilemma—religious, political, or otherwise—does not mean that a government of the United States is prohibiting the free exercise of religion or abridging the freedom of speech. The authors of the First Amendment wanted a government that tolerated dissent, not a government that would be incapacitated by it.

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<sup>31</sup> See, e.g., *Janus v. Am. Fed’n of State, County, & Mun. Emps. Council*, 585 U.S. at \_\_\_\_ (slip op. at 9); *Knox v. Serv. Emps. Union, Local 1000*, 567 U.S. 298, 310 (2012) (“[C]ompulsory subsidies for private speech are subject to exacting First Amendment scrutiny . . .”).

<sup>32</sup> As I’ll discuss later, agency-fee arrangements are functionally a tax on public-sector employees. See *infra* Section III.B. See *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 184 (2007) (calling the power to collect agency fees “the power, in essence, to tax government employees”); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562–63 (2005) (treating a targeted assessment on a small group of people as a tax); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (treating a student-activities fee as a tax); Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 *N.Y.U. L. Rev.* 144, 220–23 (2016) (discussing the functional similarities between a “direct-payment” model and a “government-payer” model). Yet outside the context of agency-fee arrangements, the Court has rejected “[t]he simplistic argument that every form of financial aid” to religious or political institutions violates the First Amendment. *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009) (acknowledging that governments must have latitude to subsidize private institutions to promote a public purpose); *Buckley v. Valeo*, 424 U.S. 1, 91–92 (1976) (upholding the public financing of political candidates).

## I. HISTORY

## A. 1787–1943

1. *The Origins of the Government-Could-Not-Work Doctrine*

The story of the government-could-not-work doctrine begins in 1787, when James Madison and other delegates gathered in Philadelphia to revise the Articles of Confederation. At the time, the Articles were the governing source of law for the collective “United States of America.”<sup>33</sup> And as every civics student knows, the Articles didn’t work very well. The Articles created a Congress and gave it responsibility to provide for “the common defence” and “general welfare.”<sup>34</sup> But the Articles didn’t give Congress power to tax anyone. Instead, Congress could only request contributions from individual states.<sup>35</sup> And if a state didn’t like one of Congress’s decisions, that state could simply withhold its contribution.<sup>36</sup>

The inability of Congress to compel objecting states to pay for its basic functions exasperated people like Madison. When he learned that New Jersey was withholding all future contributions until some of its “grievances were redress’d,”<sup>37</sup> Madison criticized the “impotency” of the Articles and observed that “[a] Government cannot long stand which is obliged in the ordinary course of its administration to court a compliance with its *constitutional* acts, from a member not of the most powerful order.”<sup>38</sup> Madison was no fan of tyrannical majorities,<sup>39</sup> but he thought even a “suffering” minority “can not long respect a Government which is too feeble to protect their interest.”<sup>40</sup> He and the other delegates went to Philadelphia with instructions to “render the federal constitution adequate to the exigencies of Government & the preservation of the Union.”<sup>41</sup>

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<sup>33</sup> Articles of Confederation of 1781, art. I.

<sup>34</sup> Id. art. V.

<sup>35</sup> Id.

<sup>36</sup> This happened often. Between 1781 and 1786, Congress collected only \$2.4 million of the \$15.7 million it requisitioned. 30 *Journal of the Continental Congress* 44–46 (1786).

<sup>37</sup> Letter from James Monroe to James Madison (Mar. 19, 1786), in 8 *The Papers of James Madison*, 506–08 (Robert A. Rutland & William M.E. Rachal eds., 1975).

<sup>38</sup> Letter from James Madison to James Monroe (Apr. 9, 1786), in 9 *The Papers of James Madison*, supra note 10, at 25–26.

<sup>39</sup> See *The Federalist* No. 51, at 351–52 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>40</sup> Letter from James Madison to James Monroe (Aug. 7, 1785), in 8 *The Papers of James Madison*, supra note 37, at 333–36.

<sup>41</sup> 3 *The Records of the Federal Convention of 1787*, 14 (Max Farrand ed., 1911).

The Philadelphia convention, of course, drafted a new constitution, one that gave a new Congress “Power To lay and collect Taxes . . . and provide for the common Defence and general Welfare,”<sup>42</sup> and do all sorts of things that objecting states were “bound thereby” to follow.<sup>43</sup> In urging the states to ratify the Constitution, Madison and other supporters emphasized the “fundamental principle” in any republican government, “that the majority govern and that the minority comply with the general voice.”<sup>44</sup> As future Chief Justice Oliver Ellsworth told the ratifying convention in Connecticut, no “efficient government” could “establish justice and righteousness” without a “coercive principle” to enforce its laws.<sup>45</sup> “Government implies the power of making laws,” Alexander Hamilton added. “It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience.”<sup>46</sup>

Soon after the ratification of the Constitution in 1788, Congress began passing hundreds of laws that compelled people or states to do things they didn’t wish to do. The very first Congress that met in 1789 made it unlawful for officers in the Treasury Department to take actions that might compromise their impartiality, such as engaging in “the business of trade or commerce.”<sup>47</sup> Congress prohibited anyone from owning slaves on federal territory northwest of the Ohio River.<sup>48</sup> Congress also granted

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<sup>42</sup> U.S. Const. art. I, § 8, cl. 1.

<sup>43</sup> *Id.* art. VI, § 2.

<sup>44</sup> 3 The Records of the Federal Convention of 1787, *supra* note 41, at 240–41 (Jan. 7, 1788) (statement of Oliver Ellsworth in the Connecticut Convention); see also Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* 7, 32–33, 42–43 (Philadelphia, Prichard & Hall 1787) (stating that “the opinions of a *majority* must give law to the *whole State*”). Madison called this the “republican principle.” *The Federalist* No. 10, at 60 (James Madison) (Jacob E. Cooke ed., 1961); see also Thomas Jefferson, *First Inaugural Address*, 4 Mar. 1801, *in* 33 *The Papers of Thomas Jefferson* 148, 148–52 (Barbara B. Oberg ed., 2006) (calling “absolute acquiescence in the decisions of the majority” the “vital principle of republics”).

<sup>45</sup> 3 The Records of the Federal Convention of 1787, *supra* note 41, at 241–42.

<sup>46</sup> *The Federalist* No. 15, at 95 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also *The Federalist* No. 21, at 129 (Alexander Hamilton); *The Federalist* No. 22, at 140 (Alexander Hamilton) (“To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser. Congress, from the nonattendance of a few States, have been frequently in the situation of a Polish diet, where a single veto has been sufficient to put a stop to all their movements. A sixtieth part of the Union, which is about the proportion of Delaware and Rhode Island, has several times been able to oppose an entire bar to its operations.”).

<sup>47</sup> Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67.

<sup>48</sup> Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 53.

pensions to some but not all veterans, provided they complied with certain regulations.<sup>49</sup>

Many people and state legislatures objected to these sorts of laws as unconstitutionally compulsory.<sup>50</sup> But a guiding principle of Supreme Court jurisprudence for the country's first century and a half was that in areas where the federal government had an enumerated power to act, that power was "without limitation," despite the objections of individuals or states.<sup>51</sup> "[T]he general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers," Justice William Johnson wrote in an 1816 opinion explaining why the Court could review state interpretations of federal law. If the federal government could be "obstructed in its progress by an opposition which it cannot overcome," he continued, "government is no more."<sup>52</sup> Such review must include criminal cases, Chief Justice John Marshall added in 1821, or else "the course of the government may be, at any time, arrested by the will of one of its members. . . . No government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws . . . ."<sup>53</sup>

<sup>49</sup> Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95.

<sup>50</sup> See, e.g., *Ex parte Curtis*, 106 U.S. 371, 372–74 (1882); *Strader v. Graham*, 51 U.S. (10 How.) 82, 96, 97 (1851); *Emerson's Heirs v. Hall*, 38 U.S. 409 (13 Pet.), 413–14 (1839).

<sup>51</sup> *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537–39 (1840); see *United States v. Wurzbach*, 280 U.S. 396, 398–99 (1930); *Ex parte Curtis*, 106 U.S. at 373–74; *United States v. Cook*, 257 U.S. 523, 527 (1922); *Emerson's Heirs*, 38 U.S. at 413–14.

<sup>52</sup> *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 362–63 (1816) (Johnson, J., concurring); *United States v. Worrall*, 2 U.S. (2 Dall.) 384, 395 (C.C.D. Pa. 1798) (opinion of Peters, J.) ("[T]he existence of the Federal government would be precarious, it could no longer be called an independent government, if . . . an appeal must be made to the State tribunals, or the offenders must escape with absolute impunity.").

<sup>53</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 302, 384–85, 387–88 (1821). The Court's many cases construing the federal government's implied powers also relied on this understanding that the Constitution created a workable federal government and should be interpreted as such. See, e.g., *United States v. Lee*, 106 U.S. 196, 206 (1882) (government could not work if it could be sued by anyone at any time); *Tennessee v. Davis*, 100 U.S. 257, 262–63 (1879) (same if it couldn't protect its officers from state-court prosecutions); *Kohl v. United States*, 91 U.S. 367, 371 (1875) (same if it lacked the power of eminent domain); *United States v. Marigold*, 50 U.S. (9 How.) 560, 567 (1850) (same if it couldn't protect itself with criminal legislation); *United States v. Tingey*, 30 U.S. (5 Pet.) 115, 128 (1831) (same if it couldn't enter into a contract without first passing a law); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828) (same if it couldn't acquire territory peaceably); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 861–62 (1824) (same if it couldn't engage in private transactions); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431–32 (1819) (same if an objecting state could tax the federal government); *Dugan v. United States*, 16 U.S. (3 Wheat.)

## 2. *The First Amendment Non-Exception*

Of course, the Constitution also contained explicit limits on the federal government's power to act, including the First Amendment's Speech and Religion Clauses and the Fifth Amendment's Takings and Due Process Clauses. But when dissidents alleged that these limits prohibited the federal government from compelling a person to do or pay for something to which they politically or religiously objected, the Court responded the same way: "[g]overnment could exist only in name" if that were true.<sup>54</sup>

The Court consistently applied this approach to First Amendment challenges to compulsory laws. The first time the Court interpreted the Amendment, in 1878, it denied the claim of a Mormon man who asked for an exemption from a federal ban on polygamy. The man argued that he had a divine obligation to marry multiple women or else he would suffer "damnation in the life to come."<sup>55</sup> But the Court responded that a religious exemption from a compulsory law would "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."<sup>56</sup> "Suppose one believed that human sacrifices were a necessary part of religious worship," the Court asked, "would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"<sup>57</sup>

Over the next fifty years, the Court repeatedly emphasized that the Religion Clauses of the First Amendment built "a wall of separation between church and State," a wall that not only prohibited government from purposefully supporting or attacking particular religious beliefs, but also prohibited religious dissidents from standing in the way of compulsory laws just because they passionately disagreed with them.<sup>58</sup> For example, in 1890, the Court denied another request for a religious exemption from a criminal law, writing that "[p]robably never before in the history of this country has it been seriously contended that the whole punitive power of the government . . . must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance."<sup>59</sup> In

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172, 181 (1818) (same if it couldn't sue without first passing a law); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805) (same if it lacked implied powers).

<sup>54</sup> *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

<sup>55</sup> *Id.* at 161.

<sup>56</sup> *Id.* at 166–67.

<sup>57</sup> *Id.* at 166.

<sup>58</sup> *Id.* at 164.

<sup>59</sup> *Davis v. Beason*, 133 U.S. 333, 341–43 (1890); see also *Cleveland v. United States*, 329 U.S. 14, 20 (1946) ("[I]t has long been held that the fact that polygamy is supported by a

1905, the Court rejected an argument that a person has the constitutional right to hold out from being vaccinated, writing, “[w]e are unwilling to hold . . . that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority” and endanger “the welfare and safety of an entire population.”<sup>60</sup> And in 1934, the Court rejected the argument “that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so,”<sup>61</sup> writing, “[o]ne who is a martyr to a principle . . . does not prove by his martyrdom that he has kept within the law.”<sup>62</sup>

In the similar contexts of the First Amendment’s Free Press and Free Speech Clauses, the Court also held that government could not work if the freedom of the press or the freedom of speech were “the freedom to do wrong with impunity.”<sup>63</sup> Such a freedom, the Court held in 1918, would allow speakers to “defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends.”<sup>64</sup> So in 1937, when the Associated Press claimed that

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religious creed affords no defense in a prosecution for bigamy.” (citing *Reynolds v. United States*, 98 U.S. 145 (1878)); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 50 (1890) (“The State has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced.” (citing *Davis v. Beason*, 133 U.S. 333 (1890))); *Murphy v. Ramsey*, 114 U.S. 15, 44–45 (1885) (upholding a statute that disenfranchised men in plural marriages on the ground that Congress may “withdraw all political influence from those who are particularly hostile to its” goals).

<sup>60</sup> *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 37–38 (1905); see also *Mo., K. & T. Ry. Co. v. Haber*, 169 U.S. 613, 628 (1898) (government could not work if individuals could introduce diseased cattle to a state against its will); *Crowley v. Christensen*, 137 U.S. 86, 89–90 (1890) (holding the government may regulate the sale of liquors to protect the general welfare); *R.R. Co. v. Husen*, 95 U.S. 465, 470–71 (1877) (A state “may exclude from its limits convicts, paupers, idiots, and lunatics . . . as well as persons afflicted by contagious or infectious disease.”).

<sup>61</sup> *United States v. Macintosh*, 283 U.S. 605, 623 (1931). Most of the Court’s cases in this area concerned a statute that required new citizens to swear to “support and defend the Constitution.” 8 U.S.C. §§ 381–82 (1925)). Although the Court ruled that Congress *could* require citizens to swear they would take up arms, see *United States v. Schwimmer*, 279 U.S. 644, 650–51 (1929), the Court’s majority shifted over whether Congress *did* so. Compare *United States v. Bland*, 283 U.S. 636, 637 (1931) (it did), with *Girouard v. United States*, 328 U.S. 61, 68–69 (1946) (it did not).

<sup>62</sup> *Hamilton v. Regents*, 293 U.S. 245, 268 (1934) (Cardozo, J., concurring); accord *In re Summers*, 325 U.S. 561, 571–72 (1945); *Selective Draft Law Cases*, 245 U.S. 366, 377–78 (1918).

<sup>63</sup> *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419–20 (1918).

<sup>64</sup> *Id.*

the National Labor Relations Act might make it more expensive to publish newsworthy information, the Court responded that “[t]he publisher of a newspaper has no special immunity from the application of general laws.”<sup>65</sup> And in 1941, the Court summarized all of First Amendment law to that point when it noted that “[o]ne would not be justified in ignoring the familiar red traffic light because he thought it his [conscientious] duty to disobey the municipal command.”<sup>66</sup>

### 3. *The Public–Private Exception*

The one area before the 1940s when the Court occasionally departed from its defense of compulsory laws was when it confronted “a law that takes property from A. and gives it to B.”—a type of law that Justice Samuel Chase condemned in 1798 as “against all reason and justice.”<sup>67</sup> In constitutional terms, the Court applied its distaste for this sort of law by holding that the Due Process Clause and the Takings Clause of the Fifth Amendment prohibited Congress from taxing someone or condemning his or her property and giving it to a “private” individual. At the same time, the Court recognized that one of the animating purposes of the Constitutional Convention was to create a federal government with sufficient power to compel states and individuals to finance Congress’s understanding of the general welfare.<sup>68</sup> And, as the first Treasury Secretary Alexander Hamilton argued, the general welfare often required the use of eminent domain or “bounties”—taxpayer-funded grants—that went directly to merchants, manufacturers, and other private individuals.<sup>69</sup>

<sup>65</sup> *Associated Press v. Nat’l Labor Relations Bd.*, 301 U.S. 103, 119, 132–33 (1937); see also *Associated Press v. United States*, 326 U.S. 1, 19–20 (1945) (“It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.”).

<sup>66</sup> *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); see also *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (finding that freedom of speech and press “does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom”); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).

<sup>67</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388–89 (1798) (opinion of Chase, J.).

<sup>68</sup> *Id.* at 394; *The Federalist* No. 41, at 276–77 (Madison) (Jacob E. Cooke ed., 1961); Letter from Thomas Jefferson to Robert Smith (Aug. 22, 1802), in 38 *The Papers of Thomas Jefferson*, supra note 44, at 275–77.

<sup>69</sup> Alexander Hamilton, Report on the Subject of Manufactures (Dec. 5, 1791), in 10 *The Papers of Alexander Hamilton* 230, 230–40 (Harold C. Syrett ed., 1966); Alexander Hamilton,



Accordingly, in the first half of the nineteenth century, the Court spent much of its time evaluating compelled subsidies and asking whether the subsidies were “private” transfers from “A. to B.”<sup>70</sup> or instead whether they were lawful taxes and takings that promoted a “public purpose.”<sup>71</sup> It took until the 1890s before the Court realized that it was making a distinction without a difference: a legislature could transfer property from A to B *and* serve a public purpose at the same time. For example, a government might tax its residents and offer the revenue to a railroad to provide transportation; it might give bonds to banks on favorable terms to provide finance; or it might condemn a person’s land and give it to a private university to provide education.<sup>72</sup> If the Court struck down all these subsidies as illegal transfers from A to B, “government [could not] accomplish any work of public utility.”<sup>73</sup> This realization led the Court to ease up on its willingness to strike down taxes and takings that “expropriat[ed] money from one group for the benefit of another.”<sup>74</sup> Instead, while warning legislatures not to compel subsidies for a private purpose, it deferred to their “familiarity with local conditions” to decide whether a purpose was public

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Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), *in* 8 *The Papers of Alexander Hamilton* 97, 97–134 (Harold C. Syrett ed., 1965).

<sup>70</sup> *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 658 (1829); see also *Citizens’ Sav. & Loan Ass’n v. Topeka*, 87 U.S. 655, 663 (1875).

<sup>71</sup> See generally Breck P. McAllister, *Public Purpose in Taxation*, 18 *Calif. L. Rev.* 137 (1930) (discussing public purpose doctrine in taxation). See *Clark v. Nash*, 198 U.S. 361, 370 (1905) (upholding compelled transfer of property to build ditch as public use); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (upholding compelled transfer of property to railroad as public use); *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (striking down compelled transfer of property to farmers as private); *Middleton v. Mullica Twp.*, 112 U.S. 433, 438–39 (1884) (upholding bonds in support of bounties as public); *Parkersburg v. Brown*, 106 U.S. 487, 500–01 (1883) (striking down bond in support of manufacturer as private); *Ottawa v. Carey*, 108 U.S. 110, 118–19, 124 (1883) (upholding bond given to bank as public); *Ottawa v. Nat’l Bank*, 105 U.S. 342, 345–46 (1882) (upholding bond given to bank as public); *Cty. of Livingston v. Darlington*, 101 U.S. 407, 415 (1880) (upholding appropriation for a reform school as public); *Davidson v. New Orleans*, 96 U.S. 97, 104–05 (1878) (upholding tax for draining swamps as public); *Hackett v. Ottawa*, 99 U.S. 86, 93–95 (1879) (upholding appropriation issued to manufacturers as public); *Twp. of Burlington v. Beasley*, 94 U.S. 310, 314 (1877) (upholding aid to mill as public); *Citizens’ Sav. & Loan Ass’n*, 87 U.S. at 665 (striking down assessment to pay manufacturers as private); *Rogers v. Burlington*, 70 U.S. 654, 665 (1866) (upholding assessment to pay railroad as public).

<sup>72</sup> *Cole v. La Grange*, 113 U.S. 1, 6–7 (1885) (listing other examples).

<sup>73</sup> *Taylor v. Ypsilanti*, 105 U.S. 60, 63–65 (1882); *Legal Tender Cases*, 79 U.S. 457 (12 Wall.), 551–52 (1871).

<sup>74</sup> *United States v. Butler*, 297 U.S. 1, 61 (1936).

or private.<sup>75</sup> “There must be a limit to individual argument in such matters if government is to go on,” the Court wrote in 1915.<sup>76</sup>

The Court even deferred to legislative spending decisions that had the effect of subsidizing religious institutions. “Otherwise,” the Court wrote, “a state’s power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states.”<sup>77</sup>

The Court’s opposition to compelled subsidies reemerged during the *Lochner* era, however, when employers challenged legislation that forced them to pay higher wages than they wanted, to charge lower prices than they wanted, or to give money to employees whom they ideologically disagreed with.<sup>78</sup> At first, the Court again struck down these laws as “compulsory exaction[s]” from *A* (the employer) to *B* (the employee or customer)—upholding only laws that took money from businesses “clothe[d]” or “impressed with a public interest.”<sup>79</sup> But during the New

<sup>75</sup> *Madden v. Kentucky*, 309 U.S. 83, 87–88 (1940) (tax); see *Green v. Frazier*, 253 U.S. 233, 239–40 (1920) (tax); *Jones v. City of Portland*, 245 U.S. 217, 224 (1917) (taking); *Brazee v. Michigan*, 241 U.S. 340, 343 (1916) (tax); *O’Neill v. Leamer*, 239 U.S. 244, 249–50 (1915) (taking); *Union Lime Co. v. Chicago & N.W. Ry. Co.*, 233 U.S. 211, 218–20 (1914) (taking); *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 608 (1908) (taking); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531–32 (1906) (taking); *Clark v. Nash*, 198 U.S. 361, 369–70 (1905) (taking); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159–60 (1896) (tax). Today, few people have any (due process) issue with a legislature taxing people and giving the revenue to a private business; the “public use” requirement is considered coterminous with a legislature’s police power. But takings that do the same thing remain controversial, even though the Supreme Court has maintained its policy of deferring to legislatures. Compare *Kelo v. City of New London*, 545 U.S. 469, 482–84 (2005) (deferring to a legislature’s judgment about “public use”), with *id.* at 510–11 (Thomas, J., dissenting) (calling that case an example of “tak[ing] property from A. and giv[ing] it to B.”); see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) (deferring to a legislature’s judgment); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240–41 (1984) (same); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (same).

<sup>76</sup> *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

<sup>77</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 6 (1947); *Bradfield v. Roberts*, 175 U.S. 291, 297 (1899).

<sup>78</sup> See, e.g., *Adair v. United States*, 208 U.S. 161, 174–76 (1908) (striking down a law that prohibited employers from discriminating against members of a labor union because Congress could not “compel any person, in the course of his business and against his will, to accept or retain the personal services of another”); accord *Coppage v. Kansas*, 236 U.S. 1, 12–13 (1915); see also *Ribnik v. McBride*, 277 U.S. 350, 358 (1928) (striking down price-fixing legislation); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 546, 552, 557–58 (1923) (striking down a minimum wage law); *Lochner v. New York*, 198 U.S. 45, 53 (1905) (defining the “right to make a contract” as “[t]he right to purchase or sell labor” on one’s own terms).

<sup>79</sup> *Adkins*, 261 U.S. at 546, 557–58; *Nebbia v. New York*, 291 U.S. 502, 554–55 (1934) (McReynolds, J., dissenting); *Charles Wolff Packing Co. v. Court of Indus. Relations of Kansas*, 262 U.S. 522, 536–37 (1923) (noting that this line of cases was doctrinally independent

Deal, the Court once again embraced a philosophy that government could not work unless courts deferred to legislative judgments about whether an employer could be “subject to control for the public good.”<sup>80</sup> The Court recognized that compelling an employer to pay workers high wages could result in “hardship,” but a legislature had to be free to weigh “individual cases” against “the general class of employees in whose interest the law is passed.”<sup>81</sup> “For protection against abuses by legislatures,” the Court instructed people to “resort to the polls, not to the courts.”<sup>82</sup>

### B. 1943–1982

#### 1. *West Virginia v. Barnette and Its Aftermath*

In 1943, the Court had an “overnight shift” in its approach toward exemptions and compulsory laws.<sup>83</sup> In a series of cases involving Jehovah’s Witnesses, the Court suggested that it might be presumptively unconstitutional for the government to compel people to do certain things to which they conscientiously objected.<sup>84</sup>

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from the Court’s taxing and takings cases); see generally Barry Cushman, *Rethinking the New Deal Court* (1998) (discussing the doctrinal changes leading to the “switch in time” in the New Deal era); Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 *Harv. L. Rev.* 759 (1930) (discussing the historical evolution of the “affected with the public interest” doctrine).

<sup>80</sup> *Nebbia*, 291 U.S. at 525–30 n.15–35, 536–37 (citing cases listed in *supra* note 75 and overruling *Ribnik*); *Olsen v. Nebraska ex rel. W. Reference & Bond Ass’n*, 313 U.S. 236, 245–46 (1941) (rejecting the “clothed in a public interest” test discarded in *Nebbia* as “little more than a fiction”).

<sup>81</sup> *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–98 (1937) (quoting *Adkins*, 261 U.S. at 563 (Taft, J., dissenting)) (overruling *Adkins*); see also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46 (1937) (overruling *Coppage* and *Adair*).

<sup>82</sup> *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877)).

<sup>83</sup> *Kalven*, *supra* note 18, at 2.

<sup>84</sup> See generally *Kessler*, *supra* note 18 (discussing a series of cases involving Jehovah’s Witnesses in which the Court struck down economic regulations on First Amendment grounds). Compare *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593–95 (1940) (finding that religious convictions do not “relieve the citizen from the discharge of political responsibilities”), and *Jones v. Opelika*, 316 U.S. 584, 596–97 (1942) (holding a licensing requirement imposed on religious books did not violate freedom of religion), with *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636–37 (1943) (finding that “[o]bserving the limitations of the Constitution will not weaken the government in the field appropriate for its exercise”), *Martin v. City of Struthers*, 319 U.S. 141, 146–47 (1943) (upholding freedom to distribute religious information to households), and *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943) (finding license tax for religious proselytizers to be unconstitutional).

The seminal case, *West Virginia v. Barnette*, involved a state resolution that compelled public school students to recite the pledge of allegiance while saluting the flag.<sup>85</sup> Two Jehovah's Witnesses objected and were expelled for insubordination.<sup>86</sup> The Court reversed this decision after noting that West Virginia could offer no "allegation that remaining passive . . . would justify an effort even to muffle expression."<sup>87</sup> Justice Robert Jackson concluded his opinion for the Court with one of the most famous perorations in Supreme Court history: "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."<sup>88</sup>

This peroration was never literally true. As two of the six Justices in the majority wrote to explain their votes, "[n]o well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the state, as to everything they will or will not do."<sup>89</sup> Indeed, even Justice Jackson warned a few years later against "convert[ing] the constitutional Bill of Rights into a suicide pact."<sup>90</sup> What they and the rest of the opinion objected to wasn't that a teacher had "prescribe[d] what shall be orthodox," but that the state had offered no legitimate reason why it had forced students "publicly to profess" their allegiance to that orthodoxy.<sup>91</sup>

Nevertheless, over the next few decades, the Court applied *Barnette's* peroration broadly in cases involving Jehovah's Witnesses,<sup>92</sup> political

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<sup>85</sup> 319 U.S. at 626

<sup>86</sup> *Id.* at 629–30.

<sup>87</sup> *Id.* at 633–34.

<sup>88</sup> *Id.* at 642.

<sup>89</sup> *Id.* at 643–44 (Black, J., and Douglas, J., concurring).

<sup>90</sup> *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); see also *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 740–41 (1996) ("This Court, in different contexts, has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.").

<sup>91</sup> *Barnette*, 319 U.S. at 634, 641–42; see, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 606–07 (1961).

<sup>92</sup> *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981); *Wooley v. Maynard*, 430 U.S. 705, 715, 717 (1977); *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944); *Taylor v. Mississippi*, 319 U.S. 583, 588–89 (1943).

minorities,<sup>93</sup> and expressive corporations<sup>94</sup> to require the government to offer a “compelling” justification before it could force a person to take action he or she disagreed with. Otherwise, the Court held, the First Amendment required the government to give the person an exemption. Similarly, the Court began enforcing the Establishment Clause for the first time, holding that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”<sup>95</sup> Regardless of whether such taxes served a “public purpose,” the Court allowed anyone to sue to enjoin any state effort to compel them to advance or inhibit religion.<sup>96</sup>

After *Barnette*, the Court also began wielding the First Amendment as if it were the Due Process Clause, reversing so-called arbitrary decisions to fire employees because of public statements that were “neither shown nor can be presumed to have in any way either impeded [the] proper performance of his daily duties . . . or to have interfered with the regular operation of the [place of employment] generally.”<sup>97</sup> The Court also began

<sup>93</sup> *Frazer v. Ill. Dep’t of Emp’t. Sec.*, 489 U.S. 829, 835 (1989); *Hobbie v. Unemp’t. Appeals Comm’n of Fla.*, 480 U.S. 136, 141–42 (1987); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958).

<sup>94</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654–55 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573–74 (1995); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797–98 (1988); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 10–12 (1986); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); see also *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 212 (2013) (holding that a requirement that organizations expressly oppose prostitution as a condition of federal funding violates First Amendment free speech protections).

<sup>95</sup> *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 210–11 (1948) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)).

<sup>96</sup> *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968); see *Aguilar v. Felton*, 473 U.S. 402, 411–12 (1985) (striking down a federal program to send public-school teachers into religious schools to provide remedial aid); *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 385–87 (1985) (similar); *Wolman v. Walter*, 433 U.S. 229, 250–51 (1977) (striking down school voucher program that resulted in funding parochial schools); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) (striking down direct aid to parochial schools); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 779–80 (1973) (striking down state grants for repairs of parochial institutions); *Lemon v. Kurtzman*, 403 U.S. 602, 612, 625 (1971) (striking down state reimbursement of parochial schools).

<sup>97</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1968). Most of the decisions before *Pickering* struck down oaths denying past affiliation with Communists, out-of-favor political parties, and other arbitrarily designated organizations. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605–06 (1967); *Bond v. Floyd*, 385 U.S. 116, 135–37 (1966); *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234, 261–62 (1957) (Frankfurter, J., concurring in the

striking down conditions on accessing public parks<sup>98</sup> or receiving unemployment benefits that were “frankly aimed at the suppression of dangerous ideas.”<sup>99</sup> Overall, it interpreted *Barnette* as holding that people couldn’t “constitutionally be compelled to relinquish the First

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result); *Schwartz v. Bd. of Bar Exam'rs. of N.M.*, 353 U.S. 232, 246–47 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 191–92 (1952); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 141–42 (1951); see also *Cole v. Richardson*, 405 U.S. 676, 680–81 (1972) (providing an overview of the Court’s oath cases); *Baird v. State Bar*, 401 U.S. 1, 7–8 (1971) (holding that “views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law”). The Court also struck down vague oaths, see *Whitehill v. Elkins*, 389 U.S. 54, 58–59 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 372–73 (1964); *Elfbrandt v. Russell*, 384 U.S. 11, 17–18 (1966); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 288 (1961), and other hiring decisions that arbitrarily discriminated against religious groups, see *McDaniel v. Paty*, 435 U.S. 618, 628–29 (1978); *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1961), or members of political parties, see *Elrod v. Burns*, 427 U.S. 347, 355–56 (1976) (plurality opinion); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *United States v. Robel*, 389 U.S. 258, 266 (1967); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960). *Pickering* gave rise to a balancing test: When a government disciplined an employee because of the individual’s *speech on a matter of public concern*, the Court would *balance the interests* of the individual as a citizen and the government as an employer. See *Branti v. Finkel*, 445 U.S. 507, 517 (1980); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414–15 (1979); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233–34 (1977); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87 (1977); *City of Madison v. Wis. Emp’t. Relations Comm’n*, 429 U.S. 167, 174–76 (1976); *Elrod*, 427 U.S. at 355–56 (plurality opinion); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 582–83 (1972) (Douglas, J., dissenting).

<sup>98</sup> *Hague v. CIO*, 307 U.S. 496, 515–16 (1939); see also *Cox v. Louisiana*, 379 U.S. 559, 562 (1965) (upholding Louisiana’s prohibition on picketing and parading in or near courthouses for the State’s interest in assuring “that the administration of justice at all stages is free from outside control and influence”); *Poulos v. New Hampshire*, 345 U.S. 395, 402–03 (1953) (upholding licensing requirement for both religious and non-religious groups); *Cox v. New Hampshire*, 312 U.S. 569, 574–75 (1941) (determining a municipality’s public highways regulations to not be inconsistent with civil liberties). After an influential 1965 article documenting this trend, the Court began calling similar types of public property a “public forum.” *Kalven*, *supra* note 18, at 11–12; see *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981) (university meeting rooms); *City of Madison*, 429 U.S. at 174–76 (school board meeting); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555–56 (1975) (municipal theater); *Healy v. James*, 408 U.S. 169, 180–81 (1972) (college campus).

<sup>99</sup> *Speiser v. Randall*, 357 U.S. 513, 518–19 (1958) (quoting *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 402 (1950)); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155–56 (1946); see also *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250, 261–62 (1974) (finding that an Arizona law involving a durational residence requirement for free medical care penalized indigents for “exercising their right to migrate and settle” in the state); *Sherbert v. Verner*, 374 U.S. 398, 404–06 (1963) (holding unconstitutional the disqualification for unemployment compensation benefits because of refusal to work on Saturday for religious purposes); *Graham v. Richardson*, 403 U.S. 365, 374–75 (1971) (“The saving of welfare costs cannot justify an otherwise invidious classification.” (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969))).

Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.”<sup>100</sup>

## 2. *The Court Reins in Barnette*

This expanded version of *Barnette*'s peroration soon proved unworkable in practice, however. For one thing, a variety of contexts emerged in which the government was seriously hobbled without the ability to force people, particularly its own employees, to profess certain sentiments. In addition, people began demanding exemptions from all sorts of ordinary laws—from the draft<sup>101</sup> and taxes<sup>102</sup> to antidiscrimination,<sup>103</sup> minimum-wage,<sup>104</sup> and child labor restrictions.<sup>105</sup> The Court quickly realized that many of these laws—and the public interests they served—could not survive a form of judicial scrutiny that required the government to prove that every incidental form of compulsion was absolutely necessary.<sup>106</sup> “To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion . . . would radically restrict the operating latitude of the legislature,” Chief Justice Earl Warren wrote in 1961. In a “cosmopolitan nation made up of people of almost every conceivable religious preference, . . . it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way” burden a person’s religious practice.<sup>107</sup> “It is readily apparent

<sup>100</sup> *Pickering*, 391 U.S. at 568.

<sup>101</sup> *Gillette v. United States*, 401 U.S. 437, 461–62 (1971).

<sup>102</sup> *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990); *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 699–700 (1989); *United States v. Lee*, 455 U.S. 252, 259 (1982).

<sup>103</sup> *N.Y. State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13–14 (1988); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

<sup>104</sup> *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 299 (1985).

<sup>105</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

<sup>106</sup> One problem was that the “exemption balancing process necessarily [led] to underestimating the strength of the countervailing state interest,” which “[was] often ‘compelling’ only in relation to cumulative concerns.” William P. Marshall, In Defense of *Smith* and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308, 312 (1991). Another was that strategic gamesmanship could lead people to challenge the relatively insignificant aspects of larger regulatory schemes. Stephen Pepper, Taking the Free Exercise Clause Seriously, 1986 B.Y.U. L. Rev. 299, 327–28 (1986). A third problem was that a grant of a religious exemption to one person could harm another person’s rights. Thomas C. Berg, The New Attacks on Religious Freedom Legislation, and Why They Are Wrong, 21 Cardozo L. Rev. 415, 430–31 (1999); J. Morris Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 345–46 (1969).

<sup>107</sup> *Braunfeld v. Brown*, 366 U.S. 599, 606–07 (1961) (plurality opinion).

that virtually *every* action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection,” Chief Justice Warren Burger added in 1986. “While libertarians and anarchists [would] no doubt applaud this result, it is hard to imagine that this is what the Framers intended.”<sup>108</sup>

Accordingly, in the 1970s, the Court began an unsteady return to its pre-*Barnette* holdings, declaring that the Bill of Rights is not “a ‘suicide pact,’” and a workable government had to be able to, say, force a Secret Service agent to swear “that he does not believe in assassination of the President.”<sup>109</sup> In employment cases and cases involving public property, the Court offered many examples in which uninhibited expression would be “inconsistent” with the government’s “legitimate operational considerations,”<sup>110</sup> including on military bases,<sup>111</sup> and in prisons,<sup>112</sup> schools,<sup>113</sup> courthouses,<sup>114</sup> and post-office boxes.<sup>115</sup> “The guarantees of the First Amendment have never meant ‘that people who want to propagandize

<sup>108</sup> *Bowen v. Roy*, 476 U.S. 693, 707 n.17 (1986) (plurality opinion).

<sup>109</sup> *Am. Commc’ns Ass’n, v. Douds*, 339 U.S. 382, 408–09 (1950) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting)); see *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (holding that the Central Intelligence Agency could require employees to promise to “protec[t] intelligence sources and methods from unauthorized disclosure” (alteration in original) (quoting 50 U.S.C. § 403(d)(3) (1976))); *Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980) (“[T]he military has greater authority over a serviceman than over a civilian.”).

<sup>110</sup> *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129–31 (1977); see *Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 464–65 (1979) (per curiam); *Arnett v. Kennedy*, 416 U.S. 134, 162 (1974); *Broadrick v. Oklahoma*, 413 U.S. 601, 606–07 (1973); *U.S. Civil Serv. Comm’n v. Letter Carriers*, 413 U.S. 548, 566–67 (1973); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 162–63 (1971); *Konigsberg v. State Bar*, 366 U.S. 36, 55 (1961); *In re Anastaplo*, 366 U.S. 82, 95–96 (1961); *Beilan v. Bd. of Pub. Educ.*, 357 U.S. 399, 405–06 (1958); *Adler v. Bd. of Educ.*, 342 U.S. 485, 492–93 (1952); *Garner v. Bd. of Pub. Works*, 341 U.S. 716, 723–24 (1951); *Gerende v. Bd. of Supervisors*, 341 U.S. 56, 56–57 (1951) (per curiam); *Osman v. Douds*, 339 U.S. 846, 847 (1950) (per curiam); *Am. Commc’ns Ass’n*, 339 U.S. at 409.

<sup>111</sup> *Greer v. Spock*, 424 U.S. 828, 836–38 (1976); *Flower v. United States*, 407 U.S. 197, 198–99 (1972) (per curiam).

<sup>112</sup> *Jones*, 433 U.S. at 129–30; *Pell v. Procunier*, 417 U.S. 817, 822–24 (1974); *Procunier v. Martinez*, 416 U.S. 396, 409–10 (1974); *Adderley v. Florida*, 385 U.S. 39, 46–48 (1966).

<sup>113</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 117–18 (1972); *Police Dep’t v. Mosley*, 408 U.S. 92, 94–95 (1972); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

<sup>114</sup> *Cox v. Louisiana*, 379 U.S. 559, 562 (1965).

<sup>115</sup> *USPS v. Greenburgh Civic Ass’n*, 453 U.S. 114, 130–31 (1981).



protests or views have a constitutional right to do so whenever and however and wherever they please,” the Court explained.<sup>116</sup>

The Court also recognized the shackles it would impose on public spending if it held that government could not force recipients of public spending to use those benefits a certain way—as when Congress offered tax exemptions for business expenses but not for lobbying expenses,<sup>117</sup> when it compelled Medicaid recipients to spend subsidies on childbirth but not abortions,<sup>118</sup> or when it forced state recipients of financial aid to comply with the Civil Rights Act of 1964.<sup>119</sup> “[W]e must construe [the First Amendment] as part of a Constitution which creates a government for the purpose of performing several very important tasks,” the Court wrote in 1973. It “should be interpreted so as not to cripple the regular work of the government.”<sup>120</sup>

### 3. *The Continuous Public-Private Exception*

The area of the law most illustrative of the Court’s internal conflict about compulsory laws between 1940 and 1980 were laws involving compelled subsidies, where the Court resurrected the same “private” versus “public” distinction that it had once applied with the Due Process and Takings Clause.<sup>121</sup> In the 1960s, workers in heavily regulated industries—railway employees and lawyers—began arguing that the First Amendment prohibited the government from compelling them to subsidize a union or a bar association’s political activities.<sup>122</sup> These workers attracted the support of liberal justices like William O. Douglas and Hugo Black, who wrote that they could “think of few plainer, more direct abridgements of the freedoms of the First Amendment than to compel persons to support

<sup>116</sup> *Greer*, 424 U.S. at 836–37 (quoting *Adderley*, 385 U.S. at 48); see also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974) (finding that a city’s decision to limit public transit advertising to “innocuous and less controversial” messages “does not rise to the dignity of a First Amendment violation”).

<sup>117</sup> *Cammarano v. United States*, 358 U.S. 498, 512–13 (1959).

<sup>118</sup> *Harris v. McRae*, 448 U.S. 297, 316–18 (1980); *Maher v. Roe*, 432 U.S. 464, 474–75 n.8 (1977).

<sup>119</sup> *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974).

<sup>120</sup> *CBS, Inc., v. Democratic Nat’l Comm.*, 412 U.S. 94, 101–03 (1973).

<sup>121</sup> *Ry. Emp. Dep’t v. Hanson*, 351 U.S. 225, 236–37 (1956); Brief for Appellants at 58–59, *Am. Fed’n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538 (1949) (Nos. 48-27, 48-34, 48-47).

<sup>122</sup> *Machinists v. Street*, 367 U.S. 740, 750 (1961); *Lathrop v. Donohue*, 367 U.S. 820, 845–47 (1961); see also *Ry. Clerks v. Allen*, 373 U.S. 113, 120–21 (1963) (reiterating the permissible remedies for dissenting employees suggested in *Street*).

candidates, parties, ideologies or causes that they are against.”<sup>123</sup> But on the other side, conservative justices Felix Frankfurter and John Marshall Harlan II contended that government could not work if the First Amendment prohibited legislatures from compelling people to subsidize causes with which they disagreed. The workers’ argument was “contradicted in the everyday operation of our society,” the Justices wrote; the “untenability of such a proposition becomes immediately apparent when it is recognized that this rationale would make every governmental exaction the material of a ‘free speech’ issue.”<sup>124</sup> “On the largest scale,” for example, “the Federal Government expends revenue collected from individual taxpayers to propagandize ideas which many taxpayers oppose.”<sup>125</sup> And the Justices “supposed it beyond doubt” that a federal taxpayer couldn’t sue the Internal Revenue Service “if he is offended by what is put out by the United States Information Agency,” the “Judicial Conference of the United States,” or any other commission that makes “legislative recommendations” on “the desirability of passing or modifying” laws.<sup>126</sup>

Frankfurter’s and Harlan’s arguments carried the day in 1976, when a senator named James Buckley challenged a federal law that compelled taxpayers to subsidize any presidential candidate who asked for public funding—including candidates of objectionable political parties.<sup>127</sup> The Court upheld the public-financing scheme as no different from “any other appropriation from the general revenue . . . . The fallacy of [Buckley’s] argument is therefore apparent: every appropriation made by Congress uses public money in a manner to which some taxpayers object.”<sup>128</sup>

The following year, however, when a public-school teacher named David Louis Abood objected to a Michigan law that compelled him to pay fees to a labor union, the Court in *Abood v. Detroit Board of Education*

<sup>123</sup> *Lathrop*, 367 U.S. at 873 (Black, J., dissenting); accord *id.* at 883–85 (Douglas, J., dissenting) (“[Otherwise] we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades.”).

<sup>124</sup> *Id.* at 852, 857 (Harlan, J., concurring in the judgement).

<sup>125</sup> *Street*, 367 U.S. at 808 (Frankfurter, J., dissenting).

<sup>126</sup> *Lathrop*, 367 U.S. at 857, 861, 864–65 (Harlan, J., concurring in the judgement).

<sup>127</sup> *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (per curiam). The public financing scheme worked by appropriating money from the general revenue to candidates who agreed to accept certain fundraising restrictions. *Id.* at 86. Although the amount of financing available was determined by “individual taxpayers, . . . who on their income tax returns may authorize payment to the Fund of one dollar,” all taxpayers contributed to the fund regardless of how they filled out the dollar check-off. *Id.* As the Court emphasized, the “check-off [wa]s simply the means by which Congress determine[d] the amount of its appropriation.” *Id.* at 91 n.124.

<sup>128</sup> *Id.* at 91–92.

declared it presumptively unconstitutional for government to compel anyone “to contribute to the support of an ideological cause he may oppose.”<sup>129</sup> The Court based this conclusion in its expanded version of *Barnette*.<sup>130</sup> “[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State,” the Court wrote.<sup>131</sup> “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.”<sup>132</sup>

The *Abood* Court provided no explanation for why it treated compelled support of unions as constitutionally suspect when it had just held in *Buckley* that compelled support of political candidates was immune from First Amendment scrutiny.<sup>133</sup> Nor did it address any of Justices Harlan and Frankfurter’s examples of publicly financed commissions that, like labor unions, lobbied legislatures and recommended changes in the law. The only person who attempted to distinguish *Abood*’s labor union from *Buckley*’s public-financing scheme was Justice Lewis Powell, in a concurrence, in which he made a circular argument 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 representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.<sup>134</sup>

<sup>129</sup> 431 U.S. 209, 222–35 & n.31 (1977).

<sup>130</sup> *Id.* at 234–35.

<sup>131</sup> *Id.* at 234–35.

<sup>132</sup> *Id.* at 222.

<sup>133</sup> See *Wooley v. Maynard*, 430 U.S. 705, 721 (1977) (Rehnquist, J., dissenting) (positing, one month before joining the majority in *Abood*, that “were New Hampshire to erect a multitude of billboards, each proclaiming ‘Live Free or Die,’ and tax all citizens for the cost of erection and maintenance, . . . that case would not fall within the ambit of *Barnette*”).

<sup>134</sup> *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment); see Laurence H. Tribe, *American Constitutional Law* § 12-4, at 588–91 n.8 (1978) [hereinafter *Tribe, American Constitutional Law*] (“The reconciliation attempted by Justice Powell in his concurring opinion is not wholly satisfying.”); David A. Anderson, *Of Horses, Donkeys, and Mules*, 94 *Tex. L. Rev.* See Also 1, 4–5 (2015) (“[T]he government-private dichotomy offers no predictable way to decide cases; it only produces *ipse dixit* results.”).

## C. 1982–Present

## 1. The Government-Could-Not-Work Doctrine Returns

Beginning in 1982, the Court decisively rejected its approach toward compulsory laws of the previous forty years.<sup>135</sup> “[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order,” Justice Antonin Scalia wrote in 1990.<sup>136</sup> The government-could-not-work principle from the Court’s pre-*Barnette* days explained why. “However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen’s religious needs and desires,” Justice Sandra Day O’Connor wrote in 1988. “The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs” that they sincerely believe are wrong.<sup>137</sup> For example, “[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”<sup>138</sup> Neither could “civic obligations of almost every conceivable kind,” from jury service or military service “to health and safety regulation, such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.”<sup>139</sup> Accordingly, the Court declared, “[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.”<sup>140</sup> Such a proposition “contradicts both constitutional tradition and common sense.”<sup>141</sup>

By the twenty-first century, this government-could-not-work principle returned the Court to the world before *Barnette*. Generally speaking, as in 1942, the Court now presumes that a “neutral law of general applicability” is constitutional even if it compels a person to do something that he or she

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<sup>135</sup> See Laurence H. Tribe, *Constitutional Choices* 209–10 (1985).

<sup>136</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 888 (1990).

<sup>137</sup> *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452 (1988).

<sup>138</sup> *United States v. Lee*, 455 U.S. 252, 260 (1982).

<sup>139</sup> *Smith*, 494 U.S. at 888–89 (internal citations omitted).

<sup>140</sup> *Gillette v. United States*, 401 U.S. 437, 461–62 (1971).

<sup>141</sup> *Smith*, 494 U.S. at 885.

believes is wrong<sup>142</sup> or if it makes it more difficult to publish the news<sup>143</sup> or speak out.<sup>144</sup> The Court closely scrutinizes only laws passed with the discriminatory intent to burden particular religions,<sup>145</sup> publishers,<sup>146</sup> or speakers.<sup>147</sup> And this principle applies even to laws that compel a person “publicly to profess” something. “[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed,” Chief Justice

<sup>142</sup> *Id.* at 885–886 and n.3.

<sup>143</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–70 (1991); *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 103 (1973); see also *Herbert v. Lando*, 441 U.S. 153, 176–77 (1979) (rejecting protections to the editorial process for relevant material in litigation); *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) (affirming preconditions for a warrant “afford sufficient protection against the harms” related to searching newspaper offices); *Zacchini v. Scripps–Howard Broad. Co.*, 433 U.S. 562, 576–579 (1977) (rejecting the notion of a constitutional immunity for the press under the First and Fourteenth Amendments); *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972) (no protections for a newspaper reporter in response to a grand jury subpoena); *Citizen Pub. Co. v. United States*, 394 U.S. 131, 139–40 (1969) (rejecting First Amendment immunity for news companies in antitrust matters); *Mabee v. White Plains Publ’g. Co.*, 327 U.S. 178, 184 (1946) (asserting the press “has no special immunity from laws applicable to business in general”); *Okla. Press Publ’g. Co. v. Walling*, 327 U.S. 186, 192–93 (1946) (declining to recognize newspaper publishing business immunity from the Fair Labor Standards Act).

<sup>144</sup> *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 655–56 (1994); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 79 (1976) (Powell, J., concurring); *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

<sup>145</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (striking down ordinance that discriminated against Santeria Church); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (striking down state law that discriminated against clergy); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (striking down ordinance that treated Jehovah’s Witnesses differently from other sects); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (striking down ordinance that allowed park commissioner to engage in religious discrimination); *Kunz v. New York*, 340 U.S. 290, 293–94 (1951) (same). In light of this antidiscrimination value served by the Free Exercise Clause, scholars have called the “report of its death” at the hands of *Smith* “an exaggeration.” Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850, 850–51 (2001).

<sup>146</sup> *Ark. Writers’ Project v. Ragland*, 481 U.S. 221, 229 (1987) (striking down tax that discriminates among publishers); *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 591–92 (1983) (striking down tax that discriminates against the press). The Court has also interpreted the Free Press Clause and Free Speech Clause to prohibit prior restraints. See, e.g., *Watchtower Bible & Tract Soc’y of N.Y. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002).

<sup>147</sup> See *Turner Broad. Sys.*, 512 U.S. at 637 (distinguishing between content-based laws that compel speech and content-neutral laws that do the same).

John Roberts wrote in 2006.<sup>148</sup> To contend that the First Amendment prohibits all compelled activities just because it prohibits forcing a student to pledge allegiance “trivializes the freedom protected in *Barnette*.”<sup>149</sup>

This rejection of the expanded version of *Barnette* applies to more than just requests for exemptions. Since 1982, the Court has forcefully declared that a workable government demands virtual immunity from the First Amendment when compelling activity in certain employment,<sup>150</sup> proprietary,<sup>151</sup> and funding<sup>152</sup> contexts. With government employees, the Court has completely immunized compulsion “in the course of official business” and with respect to “speech that owes its existence to a public employee’s professional responsibilities.”<sup>153</sup> The Court has explained that “government offices could not function if every employment decision became a constitutional matter,” as “the practical realities involved in the administration of a government office” are incompatible with “intrusive oversight by the judiciary in the name of the First Amendment.”<sup>154</sup> For example, “surely a public employer may, consistently with the First Amendment, prohibit its employees from being ‘rude to customers,’ a standard almost certainly too vague when applied to the public at large.”<sup>155</sup> Just as surely, an employer could tell defiant employees “to stop, rather than relying on counterspeech.”<sup>156</sup> “When someone who is paid a salary so that she will contribute to an agency’s effective operation begins to do or say things that detract from the agency’s effective operation, the government employer must have some power to restrain her.”<sup>157</sup> A contrary rule, one that “constitutionalize[d] the employee grievance,” would

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<sup>148</sup> *FAIR*, 547 U.S. at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

<sup>149</sup> *Id.*

<sup>150</sup> *Connick v. Myers*, 461 U.S. 138, 146 (1983).

<sup>151</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46–47 (1983).

<sup>152</sup> *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983).

<sup>153</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421–23 (2006).

<sup>154</sup> *Connick*, 461 U.S. at 143, 146–49, 154; see also *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387–88 (2011) (adopting a similar conclusion in the Petitions Clause context); *NASA v. Nelson*, 562 U.S. 134, 150 (2011) (Fourth Amendment); *Engquist v. Oregon Dep’t of Agr.*, 553 U.S. 591, 598–600 (2008) (Equal Protection Clause).

<sup>155</sup> *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion). *Waters* was a four-Justice plurality opinion, but Justice Antonin Scalia agreed with it on these points. See *id.* at 686 (Scalia, J., concurring in the judgment).

<sup>156</sup> *Id.* at 672 (plurality opinion).

<sup>157</sup> *Id.* at 675 (plurality opinion).

displace run-of-the-mill “managerial discretion” with “permanent, and intrusive . . . judicial oversight.”<sup>158</sup>

For the same reason, the Court has also applied deferential scrutiny to what it calls “nonpublic forums,” or governmental institutions in which “the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”<sup>159</sup> In cases involving compulsion in schools,<sup>160</sup> prisons,<sup>161</sup> office buildings,<sup>162</sup> and other public institutions,<sup>163</sup> the Court has reaffirmed the principle that the government has the “inherent and inescapable” power to decide who can access its property and what they may do there.<sup>164</sup>

<sup>158</sup> *Garcetti*, 547 U.S. at 420, 423 (quoting *Connick*, 461 U.S. at 154); *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (“To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices.”). The Court *does* continue to intervene when an employee is fired for speaking as a citizen on “matters of public concern.” See *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016) (supporting a political candidate); *Lane v. Franks*, 573 U.S. 228, 237–38 (2014) (testifying in court); *United States v. Treasury Employees*, 513 U.S. 454, 465 (1995) (speaking to the general public about literature); *Rutan v. Republican Party*, 497 U.S. 62, 75–76 n.8 (1990) (supporting a political party); *Rankin v. McPherson*, 483 U.S. 378, 384–87 (1987) (discussing the assassination of the president in a nondisruptive context).

<sup>159</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46–47 (1983) (quoting *USPS v. Greenburgh Civic Ass’n*, 453 U.S. 114, 129–30 (1981)) (internal quotation marks omitted).

<sup>160</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988); see *Morse v. Frederick*, 551 U.S. 393, 406 (2007); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986).

<sup>161</sup> *Beard v. Banks*, 548 U.S. 521, 530 (2006) (prison); see also *Am. Freedom Def. Initiative v. King Cty.*, 136 S. Ct. 1022, 1022–23 (2016) (Thomas, J., dissenting from denial of certiorari) (questioning advertising in public transit spaces).

<sup>162</sup> *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (plurality opinion) (post office); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 805–06 (1985) (office fundraiser).

<sup>163</sup> *Int’l Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 680–81 (1992) (airports).

<sup>164</sup> *Perry*, 460 U.S. at 46–49; see also *Morse v. Frederick*, 551 U.S. 393, 406 (2007) (finding that the government can regulate some speech in schools that they could not outside of schools); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673–74 (1998) (finding that public broadcasters can exercise editorial discretion in selecting programming); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (finding that school officials can regulate content of student paper in a reasonable manner); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986) (finding that school officials can suspend a student for giving a lewd and indecent speech at a school assembly); *Minn. State Bd. v. Knight*, 465 U.S. 271, 286–87 (1984) (finding that status as public employees gives no special constitutional right to audience with government employee).

Finally, the Court has also immunized government funding decisions, holding that “government would not work”<sup>165</sup> if it couldn’t compel taxpayers to contribute to its projects, even those that “are contrary to the profound beliefs and sincere convictions of some of its citizens.”<sup>166</sup> “It is the very business of government to favor and disfavor points of view,” Justice Antonin Scalia wrote in 1998—whether “by achieving it directly” (having government-employed artists paint pictures), by “advocating it officially” (having the National Endowment for the Arts distribute grants), or “by giving money to others who achieve or advocate it (funding private art classes, for example, or Planned Parenthood).”<sup>167</sup> “How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary?” Justice Stephen Breyer asked in 2015. “How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization?”<sup>168</sup> Today, the Court calls this immunity the “government speech” doctrine, noting that “it is not easy to imagine how government could function” if it couldn’t “say what it wishes” or “select the views that it wants to express.”<sup>169</sup> When

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<sup>165</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005) (holding that there is no First Amendment challenge “not to fund Government speech”); *United States v. Lee*, 455 U.S. 252, 260 (1982) (“The tax system could not function if [religious] denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”).

<sup>166</sup> *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000); see, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (upholding tax-funded subsidies that went to churches).

<sup>167</sup> *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598–99 (1998) (Scalia, J. concurring in the judgment); see *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (finding that there is no unconstitutional discrimination on the basis of viewpoint when government funding choices necessarily discourage alternative positions); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) (prohibiting § 501(c)(3) charities from lobbying does not violate the First Amendment).

<sup>168</sup> *Walker*, 135 S. Ct. at 2246.

<sup>169</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009) (quoting *Johanns*, 544 U.S. at 553); *Southworth*, 529 U.S. at 229; *Finley*, 524 U.S. at 598 (Scalia, J., concurring in the judgment); *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 833 (1995); *Rust*, 500 U.S. at 194; *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring); see also *Walker*, 135 S. Ct. at 2251 (holding that Texas’ license plate manufacturing constituted government speech and that the Texas state government could engage in content discrimination in the production of license plates).



the government “speaks,” it does not “*abridge* the speech of those” who disagree with its spending decisions.<sup>170</sup>

## 2. *The Persistent Public–Private Exception*

The one area where the Court continues to apply the expanded version of *Barnette* is in cases involving compelled subsidies to “private” speakers, especially in the labor-law context.<sup>171</sup> Today, when the Court confronts an *Abood*-type law that compels *A* to pay a fee to *B*, the Court applies exacting First Amendment scrutiny that generally “prevent[s] the government from compelling individuals to express certain views” or “pay subsidies for speech to which they object.”<sup>172</sup> Applying this reasoning, the Court has struck down laws compelling employees to contribute money to labor unions,<sup>173</sup> lawyers to bar associations,<sup>174</sup> and mushroom producers to industry-wide advertising boards.<sup>175</sup>

<sup>170</sup> *Finley*, 524 U.S. at 595–98 (Scalia, J., concurring in the judgment).

<sup>171</sup> See, e.g., *Johanns*, 544 U.S. at 557–59 (2005) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (Powell, J., concurring in the judgment)); *Keller v. State Bar*, 496 U.S. 1, 10–11 (1990) (same).

<sup>172</sup> *United States v. United Foods*, 533 U.S. 405, 410 (2001); see also, e.g., *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (finding that an agency-fee “cannot be tolerated unless it passes ‘exacting First Amendment scrutiny’”). As discussed above, this type of scrutiny requires the government to prove that any compelled subsidy is necessary to serve a compelling governmental interest. In *Abood* and its progeny, the Court has held that “labor peace” and the prevention of “free riders” is a sufficient justification to force employees to subsidize a union’s collective-bargaining activities, but that other union expenses aren’t chargeable unless they are “germane” to those activities. *Abood*, 431 U.S. at 224, 235. See *Locke v. Karass*, 555 U.S. 207, 219–20 (2009); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 520–24 (1991) (plurality opinion); *Ellis v. Ry. Clerks*, 466 U.S. 435, 456 (1984); see also *Comm’ns Workers v. Beck*, 487 U.S. 735, 761–62 (1988) (imposing this interpretation as a statutory requirement). This distinction has not only forced the Court (and unions) to distinguish germane from nongermane expenses, but it has also required the Court to determine appropriate remedies when a union spends an employee’s compelled subsidy on nongermane activities. See *Knox v. Serv. Emps.*, 567 U.S. 298, 309–10 (2012); *Air Line Pilots v. Miller*, 523 U.S. 866, 878 (1998); *Keller*, 496 U.S. at 17; *Teachers v. Hudson*, 475 U.S. 292, 310 (1986).

<sup>173</sup> *Harris*, 134 S. Ct. at 2639; *Knox*, 567 U.S. at 309–12; *Lehnert*, 500 U.S. at 520; *Hudson*, 475 U.S. at 304–06.

<sup>174</sup> *Keller*, 496 U.S. at 17.

<sup>175</sup> *United Foods*, 533 U.S. at 415–16; cf. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 16–17 (1986) (striking down law that required a utility to send a third party’s message to its subscribers); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (striking down a law that required newspaper to publish response to an editorial). The Court has notably failed to apply this reasoning to laws that compel shareholders to contribute to the political spending decisions of corporate executives if they wish to retain their voting rights in the corporation. See Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 Colum. L. Rev. 800, 806–09 (2012).

But when the Court confronts a *Buckley*-type law that *taxes A* and gives the revenue to *B*, the Court applies no First Amendment scrutiny because “government would not work” if “every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed.”<sup>176</sup> As Professor Laurence Tribe wrote in a post-*Abood* appeal defending a city’s political activity, “[t]he essence of rule by temporary majorities, in a system financed by taxation, is that all must share in the costs of government choices—including government-sponsored messages—with which many may disagree.”<sup>177</sup> Applying *this* reasoning, the Court has upheld laws compelling students to contribute money to College Republicans,<sup>178</sup> religious employers to people they regarded as “worse than an infidel,”<sup>179</sup> and beef producers (as opposed to mushroom producers) to industry-wide advertising boards.<sup>180</sup>

Adding to the confusion, the Court in its recent Establishment Clause cases has repudiated “[t]he simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses”—even when the aid is funded by objecting taxpayers.<sup>181</sup> The Court has even overruled *Abood*-era precedent to uphold bonds and school-voucher programs that have the effect of taking money from one person and delivering it to a church or parochial school.<sup>182</sup> It has invalidated only those situations where a reasonable observer familiar with the “history and context” of a program would think state aid “carries with it the imprimatur

<sup>176</sup> *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2246 (2015) (quoting *Keller*, 496 U.S. at 12–13); see, e.g., *Johanns*, 544 U.S. at 562–63.

<sup>177</sup> Jurisdictional Statement at 32–34, *City of Boston v. Anderson*, 439 U.S. 1389 (1979) (No. 78-649).

<sup>178</sup> *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 234–35 (2000).

<sup>179</sup> *United States v. Lee*, 455 U.S. 252, 255 n.3, 258–59 (1982); see also Brief for Appellee at 5, *Lee*, 455 U.S. at 252 (No. 80-767) (arguing that Amish believe that buying into the insurance system in question makes one “worse than an infidel”).

<sup>180</sup> *Johanns*, 544 U.S. at 562–63; see also *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 472 (1997) (“The mere fact that objectors believe their money is not being well spent ‘does not mean [that] they have a First Amendment complaint.’” (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 456 (1984))).

<sup>181</sup> *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (federal grant to religious institutions); see *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993) (grant for sign-language interpreter); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488–89 (1986) (providing vocational assistance to the visually handicapped); *Mueller v. Allen*, 463 U.S. 388, 393–94 (1983) (tax exemption); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 763–64 (1976) (annual subsidy); *Hunt v. McNair*, 413 U.S. 734, 742–43 (1973) (revenue bonds); *Walz v. Tax Comm’n*, 397 U.S. 664, 675 (1970) (tax exemption).

<sup>182</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (school vouchers); *Mitchell v. Helms*, 530 U.S. 793, 835 (2000) (loans); *Agostini v. Felton*, 521 U.S. 203, 225–26 (1997) (grants for public-school teachers).

of government endorsement”<sup>183</sup> or is “an effort to promote religious observance among the public.”<sup>184</sup>

## II. THE GOVERNMENT-COULD-NOT-WORK DOCTRINE

Looking back at the Supreme Court’s approach to compulsory laws, the Court has followed a pretty clear pattern. From the Constitution’s ratification until 1943, the Court saw no inherent problem with a law that compelled someone to do or pay money for something that he or she disagreed with. Instead, it adhered to the “republican principle” that government could not work if a political minority could ordinarily opt out of complying with the wishes of a political majority.<sup>185</sup> Accordingly, it held that objecting states, religious objectors, members of the press, and anti-militarists had no constitutional immunity from generally applicable laws—even if their actions were all motivated by principles guaranteed by the First Amendment. It held that the beneficiaries of government generosity couldn’t complain about the conditions the government attached to accepting its benefits. And it held that the political process was the only recourse for objecting taxpayers, employers, and homeowners who complained about what the government was doing with their money and property. Like Henry David Thoreau, who in 1846 went to jail rather than pay taxes toward the Mexican-American War,<sup>186</sup> the Court assumed that people who conscientiously objected to a general law should either persuade others to change the law or accept the consequences of their civil disobedience.

In 1943, *West Virginia v. Barnette* marked an “overnight shift” in cases involving compelled speech, compulsory conditions, and compelled subsidies.<sup>187</sup> The Court suddenly—and with good reason—prohibited elected legislatures from compelling all citizens to profess their loyalty to a flag that some people regarded as a false idol. The Court then expanded *Barnette*’s premise and applied it to other compulsory laws. It condemned as

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<sup>183</sup> *Zelman*, 536 U.S. at 654–55 (emphasis omitted).

<sup>184</sup> *Town of Greece v. Galloway*, 572 U.S. 565, 588 (2014).

<sup>185</sup> The Federalist No. 10, at 60 (James Madison) (Jacob E. Cooke ed., 1961); see *supra* Sections I.A.1, I.B.1, I.C.1.

<sup>186</sup> Thoreau, *supra* note 4, at 17 (“It is for no particular item in the tax-bill that I refuse to pay it. I simply wish to refuse allegiance to the State, to withdraw and stand aloof from it effectually. I do not wish to trace the course of my dollar, if I could, till it buys a man, or a musket to shoot one with, — the dollar is innocent, — but I am concerned to trace the effects of my allegiance.”).

<sup>187</sup> *Kalven*, *supra* note 18, at 2.

presumptively unconstitutional any law that compelled anyone to take any action that violated his or her strongly held beliefs. It included in this condemnation laws that conditioned benefits on a person's willingness to take an oath, work on Saturdays, or do something else objectionable. And in 1977 in *Abood v. Detroit Board of Education*, the Court held that there was no difference between a law that required a religious objector to take an idolatrous pledge and a law that deducted the wages from public employees and gave the revenue to a union.<sup>188</sup> In other words, had Thoreau been born a century later, he might have sued the tax collector rather than pay taxes or go to jail.

Since 1982, however, the Court has generally returned to its pre-*Barnette* perspective that compulsory laws are a feature, not a bug, of majoritarian rule. It has deferred to legislatures and the political process to craft exemptions from generally applicable laws. It has allowed public employers, proprietors, and other elected bodies to decide when it is appropriate to force participants in public institutions to act in service of the institutions' legitimate objectives. And, with the notable exception of public-sector labor unions, it has permitted governments to tax everyone and give the revenue to anyone—including political candidates, nongovernmental organizations, and religious institutions—so long as the tax is in service of a legislatively defined “public good.”

The common thread weaving through these cases is a single doctrine: government could not work without the ability to compel people to do or pay for things to which they object. Virtually every law in a cosmopolitan, pluralistic society forces people to do things they don't want to do. It would be next to impossible for the government of such a society to enforce ordinary legislation if residents could plead immunity from laws they didn't like. And it would be just as disruptive if judges required governments to justify every form of compulsion in court as absolutely necessary to serve an interest of the highest order. The government-could-not-work doctrine holds that there is nothing inherently unconstitutional about compulsory laws—even laws that force people to do or say things they object to doing.<sup>189</sup>

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<sup>188</sup> 431 U.S. 209 (1977).

<sup>189</sup> Perhaps the four best summaries of the doctrine are Justice Antonin Scalia's opinion for the Court in *Employment Div. v. Smith*, 494 U.S. 872, 885, 888–89 (1990), his opinion for the Court in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 559 (2005), his concurring opinion in *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598–99 (1998), and Justice Sandra Day O'Connor's controlling opinion in *Waters v. Churchill*, 511 U.S. 661, 672 (1994).

At times the Court has attempted to avoid the implications of this doctrine by divining categories of compulsory laws that are presumptively intolerable. But it has always abandoned this project after being unable to articulate a limiting principle that avoids sweeping in all legislation. In the mid-nineteenth century, the Court distinguished taxes that served the “general welfare” (good) from taxes that went to a “private use” (bad). During the same period, the Court distinguished laws that took land for a “public use” (good), from laws that took from *A* for the private use of *B* (bad). In the *Lochner* era, the Court distinguished laws that regulated businesses “clothed in the public interest” (good), from laws that interfered with the “freedom of contract” (bad). And most recently, the Court has attempted to distinguish taxes that compel individuals to support “government speech” (good), from fees that require individuals pay for the speech of “private” speakers (bad). Each of these periods ended with the Court recognizing the functional equivalence of laws on both sides of the dividing line.<sup>190</sup> And in each the Court ultimately deferred to elected bodies to distinguish good laws from bad because all these laws are the inevitable consequence of self-government.<sup>191</sup>

As First Amendment scholar Alexander Meiklejohn has written,

[a]t the bottom of every plan of self-government is a basic agreement, in which all the citizens have joined, that all matters of public policy shall be decided by corporate action, that such decisions shall be equally binding on all citizens, whether they agree with them or not, and that, if need be, they shall, by due legal procedure, be enforced upon anyone who refuses to conform to them.<sup>192</sup>

The government-could-not-work doctrine takes this view of self-government as the baseline for interpreting the First Amendment’s terms.

Textually, the government-could-not-work doctrine is fully compatible with the First Amendment’s language that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.”<sup>193</sup> Even First

<sup>190</sup> Anderson, *supra* note 134, at 5 (“Insisting that [messages] be characterized as either public or private is as foolish as insisting that a mule must be either a horse or a donkey.”).

<sup>191</sup> See, e.g., *Johanns*, 544 U.S. at 563–64 (government speech versus private speech); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–99 (1937) (public interest versus freedom of contract); *Clark v. Nash*, 198 U.S. 361, 370 (1905) (public use versus *A* to *B*); *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 166 (1896) (general welfare versus private use).

<sup>192</sup> Meiklejohn, *supra* note 11, at 8–9, 68.

<sup>193</sup> U.S. Const. amend. I.

Amendment absolutists like Professor Meiklejohn recognize that this text “does not establish an ‘unlimited right to talk’”<sup>194</sup> or an uninhibited “right to disobey” the law.<sup>195</sup> Rather, it protects “free exercise” and “freedom of speech”—two abstract terms that are not necessarily prohibited or abridged every time a law compels a person to do or say something disagreeable.<sup>196</sup> Professor Meiklejohn and other scholars of the First Amendment, such as Thomas Emerson, Cass Sunstein, and Robert Post, define the Amendment’s terms contextually as the sorts of conscience and expression that are essential to and compatible with a religiously tolerant, self-governing society.<sup>197</sup> As a matter of practice, the Court has interpreted the First Amendment along similar lines, applying the government-could-not-work doctrine whenever uninhibited speech or religious exercise would undermine political or religious pluralism or society’s ability to self-govern.

In this respect, the First Amendment is not much different from, say, the Fourteenth Amendment, whose text also includes a categorical instruction: not to “deny to any person . . . the equal protection of the laws.”<sup>198</sup> It is certainly possible to read this text as a requirement that no law can treat two people differently. But such an interpretation would undermine virtually every piece of legislation.<sup>199</sup> Accordingly, with a few important exceptions, the Court does not treat the existence of a classification as, in and of itself, a basis for declaring a law presumptively invalid under the Fourteenth Amendment.<sup>200</sup> The Court has applied the same general approach to laws that compel people to say or do things in violation of First Amendment interests. Applying the government-could-not-work

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<sup>194</sup> Meiklejohn, *supra* note 26, at 245, 246–61.

<sup>195</sup> Meiklejohn, *supra* note 11, at 9.

<sup>196</sup> Meiklejohn, *supra* note 26, at 261.

<sup>197</sup> Emerson, *supra* note 26, at 17–18, 708–717; Meiklejohn, *supra* note 11, at 8–9; Post, *supra* note 26, at 1273–79 (noting that “speech is always situated in real social space”); Sunstein, *supra* note 26, at 258–62; *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 103 (1973) (quoting 2 Chafee, *supra* note 13, at 640–41); see also Robert C. Post, *Subsidized Speech*, 106 *Yale L.J.* 151, 195 (1996) (“[T]hese values are particular to specific social domains, so are First Amendment rights.”).

<sup>198</sup> U.S. Const. amend. XIV.

<sup>199</sup> Cf. Anatole France, *The Red Lily* 95 (Winifred Stephens trans., Frederic Chapman ed. 1910) (1894) (“[T]he majestic equality of the laws . . . forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.”).

<sup>200</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (“[T]he Equal Protection Clause does not require absolute equality or precisely equal advantages.”).

doctrine, the Court does not treat the existence of such compulsion as, in and of itself, a reason for applying strict scrutiny.<sup>201</sup>

The government-could-not-work doctrine, with its contextual definition of laws that abridge free speech and prohibit free exercise, is also consistent with common sense. As Dean Post has written, there are thousands of everyday examples in which governments “compel persons to speak without ever raising a First Amendment eyebrow.”<sup>202</sup> Legislators force experts to testify. Judges force jurors to pronounce verdicts. Insurance commissioners force witnesses to report accidents. Teachers force students to recite poetry. Clerks of court require losing litigants to pay for the attorney’s fees of their opponents. Equal opportunity commissioners require workers to speak respectfully to one another. Officeholders force press secretaries to affirm official positions. Securities and exchange commissioners force corporations to file financial statements. Housing regulators require landlords not to discriminate. Traffic cops force drivers to signal before turning. Census takers require residents to fill out paperwork. The Federal Constitution requires state and federal officers to pledge fidelity to its terms. The list is endless.

The reason these examples are constitutional isn’t because they would pass the exacting level of scrutiny the Supreme Court applies to presumptively unconstitutional laws. That test requires the government to prove that the law at issue is narrowly tailored to serve a compelling state interest. But the Court has recognized that “many” of the above laws would “not meet the test”—which is precisely why it has withheld the test from compulsory laws generally.<sup>203</sup> Any interpretation of the First Amendment that prohibited the government from compelling individuals to say or pay

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<sup>201</sup> Although the Due Process Clause’s language is not as absolute—prohibiting deprivations of “life, liberty, or property” only without the abstract “due process of law”—the Court has been as deferential toward legislatures as with the Equal Protection Clause or First Amendment. During the *Lochner* era, the Court treated any deprivation of liberty or property, no matter how small, as presumptively unconstitutional. See, e.g., *Adkins v. Children’s Hosp.*, 261 U.S. 525, 557–58 (1923); *Adair v. United States*, 208 U.S. 161, 174–76 (1908). Since then, by contrast, the Court has retreated from striking down every piece of legislation and now chalks up ordinary deprivations of liberty or property as products of the political process that it is up to the political process to correct. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–98 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46 (1937).

<sup>202</sup> Post, *supra* note 16, at 216. Many of the following examples come from this text. See also Massaro, *supra* note 15, at 368 (noting several ways in which the government demands speech).

<sup>203</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 885, 888–89 (1990); *Waters v. Churchill*, 511 U.S. 661, 671–75 (1994) (plurality opinion); *id.* at 686 (Scalia, J., concurring in the judgment).

for something objectionable would also undermine these ordinary forms of compulsion. Accordingly, the government-could-not-work doctrine holds that speech and free exercise are not “abridg[ed]” or “prohibit[ed]” just because a compulsory law happens to inhibit political or religious expression.

There are, of course, limits to the doctrine. The primary limit is that some compulsory laws do violate constitutional principles, such as the limits embodied in the Equal Protection Clause, the Due Process Clause, and the Taxing and Spending Clause.<sup>204</sup> When the Court interprets First Amendment challenges to compulsory laws it often applies the same analysis as it would to any other law subject to these provisions. So when a law restricts speech on the basis of its content,<sup>205</sup> when it purposefully targets the press<sup>206</sup> or a religious group,<sup>207</sup> or when it purposefully favors a particular religion,<sup>208</sup> the Court has applied the same level of scrutiny as it would for any other invidious discrimination in violation of the Equal Protection Clause.<sup>209</sup> When a condition of employment or other public

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<sup>204</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009). This is a broader point than the one the Court made in *Smith*, 494 U.S. at 881–82, when it noted that the Court was more protective of “hybrid situation[s]” in which a plaintiff alleged a violation of the Free Exercise Clause and the Free Speech or Free Press Clause. The presence of another constitutional provision is significant because it provides limiting principles that are more consistently applicable than the Court’s formalistic distinction between “private” and “public” speech.

<sup>205</sup> See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (citing *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972)), and cases cited *supra* notes 144 and 147–148.

<sup>206</sup> See, e.g., *Ark. Writers’ Project v. Ragland*, 481 U.S. 221, 229 (1987), and cases cited *supra* note 146.

<sup>207</sup> See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993), and cases cited *supra* note 145.

<sup>208</sup> As written and applied, the Establishment Clause protects against any “establishment of religion,” not the more specific harm of supporting an establishment with tax dollars. See, e.g., *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860–861 (2005) (Establishment Clause case brought by the ACLU of Kentucky, a tax-exempt organization); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (upholding law that had the indirect effect of spending taxpayer dollars on churches); *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968) (holding that all taxpayers, regardless of what they believe, are legally injured by religious establishments).

<sup>209</sup> See *Lukumi*, 508 U.S. at 540 (“In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.”); *Mosley*, 408 U.S. at 96 (“Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”); see also Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293, 1323–24 (1984) (recognizing the equal-protection concerns raised by the government-as-proprietor cases); Kenneth L. Karst, *Equality as a*



benefit compels activity or expression that is unrelated to the benefit or any other legitimate state interest, the Court has considered it as arbitrary as if the employee raised a Due Process Clause violation.<sup>210</sup> And when a tax exemption or subsidy is so coercive that the recipient has no choice but to accept conditions that are unrelated to how the benefit may be used and that Congress otherwise lacks the power to make, the Court has applied the same analysis as in its Taxing and Spending Clause cases.<sup>211</sup>

In each of these examples, the Court has not held that the existence of compulsion is what triggers exacting scrutiny. Accepting that the First Amendment protects against infringements on people's conscience and expression, these other constitutional provisions simply provide text-based, limiting principles between tolerable and intolerable compulsion.

None of this is to say that the First Amendment doesn't do any work or that a case like *Barnette* was wrongly decided. To the contrary, the Court has long been sensitive to the First Amendment's protection of religious and secular expression. Although protecting such expression may not mean that everyone is entitled to say and do whatever they would like, the Court has consistently struck down laws that present a risk of "misattribution": a law that might deceive others into thinking that an unpopular government program has the support of a majority or leave too little room for the compelled speaker to disavow the message. This misattribution concern is even clearer in the context of religious organizations or expressive organizations like the Democratic Party, as it could compromise the organization's ability to articulate its own values if a law compelled it to allow members of competing parties to participate in its internal decision-making.<sup>212</sup> Accordingly, while the Court tolerates most compulsory laws that compel objectionable speech, it still requires such laws to leave open "alternative channels of communication" and permit compelled speakers

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Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 26–28 (1975) (examining the central role of the equality principle in the First Amendment).

<sup>210</sup> See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 141–42 (1951) (striking down the Attorney General's designation of "Communist" organizations as arbitrary in violation of the First and Fifth Amendments), and cases cited supra note 97.

<sup>211</sup> Compare, e.g., *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205, 214 (2013) (First Amendment), with *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–81 (2012) (Taxing and Spending Clause); see also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1428 (1989) (discussing instances in which the Court has suggested that "the problem with unconstitutional conditions is their coercive effect").

<sup>212</sup> See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186–87 (2012); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000); cases cited supra note 94.

to “disavow any connection with the [compelled] message.”<sup>213</sup> Such “alternative channels” might take the form of allowing public-sector employees to support contrarian causes on their own time or ensuring that the recipients of restrictive subsidies can use their own money to do what the subsidies forbid.<sup>214</sup>

### III. APPLICATIONS

I conclude this Article with four examples of how a court might apply the government-could-not-work doctrine to some contemporary debates: government funding of Planned Parenthood and other nongovernmental organizations, agency-fee arrangements that support public-sector unions, partisan political activity by cities, and antidiscrimination laws that require public and private employees to provide services to same-sex couples. In each of these contexts, courts should be skeptical of dissenters who claim a First Amendment right to disrupt governmental programs or to exempt themselves from participating in them.

#### A. *Controversial Recipients*

As a first example, consider a First Amendment challenge to a controversial recipient of a government subsidy such as Planned Parenthood,<sup>215</sup> the Democratic Party,<sup>216</sup> or the Catholic Church.<sup>217</sup> Under the government-could-not-work doctrine, such subsidies should generally survive a minimal form of review unless they are invidiously discriminatory or passed with the purpose of favoring or disfavoring religion.

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<sup>213</sup> *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980); see, e.g., *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 655–56 (1994); *FCC v. League of Women Voters*, 468 U.S. 364, 385 n.16 (1984); *Greene*, *supra* note 30, at 843.

<sup>214</sup> Compare, e.g., *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (upholding grant conditions that allowed grantee to use other money to fund its speech), with *League of Women Voters*, 468 U.S. at 400–01 (striking grant conditions that did not permit this result).

<sup>215</sup> For the sake of this example, imagine the federal government funds Planned Parenthood directly, with a tax exemption or a subsidy, rather than through reimbursements by the Centers for Medicaid & Medicare Services. See Jackie Calmes, *Obama Shields Federal Funds for Planned Parenthood*, *N.Y. Times*, Dec. 15, 2016, at A19 (describing how Planned Parenthood receives federal funds).

<sup>216</sup> 26 U.S.C. § 527 (2012) (providing a tax exemption for political parties); *Buckley v. Valeo*, 424 U.S. 1, 91–93 (1976) (upholding the public financing of political candidates).

<sup>217</sup> 29 U.S.C. § 1002(33) (2012) (exempting church plans from the Employee Retirement Income Security Act of 1974); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

One of the basic assumptions underlying the government-could-not-work doctrine is that courts have little role to play when it comes to evaluating discretionary judgments about where governments spend tax dollars. Since the beginning of American history, legislatures have forced taxpayers to contribute to its collective decisions regarding the general welfare. The first Congress chartered a privately managed bank and provided “bounties” to private merchants and manufacturers.<sup>218</sup> A century later, the Supreme Court began explicitly to defer to the judgments of federal and state legislatures that takings and taxes donated to private parties were also going toward a public use.<sup>219</sup> A century after that, Justice Antonin Scalia wrote that it is “the very business of government to favor and disfavor points of view,” whether by achieving it directly, advocating it officially, or “by giving money to others who achieve or advocate it (funding private art classes, for example, or Planned Parenthood).”<sup>220</sup> “Indeed, it is not easy to imagine how government could function if it lacked this freedom,” Justice Samuel Alito wrote in 2009. “If every citizen were to have a right to insist that no one paid by public funds 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 radically transformed.”<sup>221</sup>

In this light, the government-could-not-work doctrine would block a First Amendment challenge to a legislature’s secular decision to subsidize Planned Parenthood. As Justice Scalia wrote, a legislature’s determination to subsidize a controversial organization to promote the general welfare “does not ‘abridge’ anyone’s freedom of speech.”<sup>222</sup> Accordingly, the Court has declined to “render numerous Government programs constitutionally suspect” by applying First Amendment scrutiny whenever the government funds one activity but not a related one.<sup>223</sup>

As for the Democratic Party, the Court wrote in *Buckley v. Valeo* that authorizing taxpayers to object to the public financing of candidates they

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<sup>218</sup> See supra note 69 and accompanying text.

<sup>219</sup> *Clark v. Nash*, 198 U.S. 361, 369–70 (1905); *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 166 (1896); *Taylor v. City of Ypsilanti*, 105 U.S. 60, 63–65 (1881).

<sup>220</sup> *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598–99 (1998) (Scalia, J. concurring in the judgment).

<sup>221</sup> *Pleasant Grove v. Sumnum*, 555 U.S. 460, 467–68 (2009) (quoting *Keller v. State Bar*, 496 U.S. 1, 12–13 (1990)).

<sup>222</sup> *Finley*, 524 U.S. at 598 (Scalia, J., concurring in the judgment).

<sup>223</sup> *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983).

opposed would risk undermining “every appropriation made by Congress [that] uses public money in a manner to which some taxpayers object.”<sup>224</sup> Accordingly, the Court has immunized government funding decisions from taxpayers who object to contributing to projects that “are contrary to the profound beliefs and sincere convictions of some of its citizens,” including to funding political candidates.<sup>225</sup>

The Catholic Church is the most difficult of these examples because of the Establishment Clause’s relatively clear intolerance for religious favoritism. But as with the others, the Court has not struck down a law merely because it delivers a financial benefit to a religious entity that some taxpayers may object to funding.<sup>226</sup> The Court would invalidate the grant only if it “carrie[d] with it the *imprimatur* of government endorsement”<sup>227</sup> or was “an effort to promote religious observance among the public.”<sup>228</sup>

That said, a legislature could not fund these organizations without limit. Laws that grant subsidies might raise an Equal Protection Clause issue—especially when they are based on a “suspect” classification<sup>229</sup> or when they risk permanently entrenching the temporary winners of the political process.<sup>230</sup> (For example, a law using state funds to facilitate a Democratic primary in which only white people could vote.<sup>231</sup>) The Taxing and Spending Clause and the Due Process Clause, which require subsidies to reasonably serve a legitimate public interest, also provide valuable limits on preventing arbitrary subsidies.<sup>232</sup> And the political process provides an important safeguard.<sup>233</sup>

<sup>224</sup> *Buckley v. Valeo*, 424 U.S. 1, 91–92 (1976).

<sup>225</sup> *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000).

<sup>226</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 489 (1986); *Mueller v. Allen*, 463 U.S. 388, 400 (1983).

<sup>227</sup> *Zelman*, 536 U.S. at 654–55.

<sup>228</sup> *Town of Greece v. Galloway*, 573 U.S. 565, 588 (2014).

<sup>229</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214 (1995) (discussing the history of equal protection jurisprudence with respect to the Fifth and Fourteenth Amendments).

<sup>230</sup> See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); John Hart Ely, *Democracy and Distrust* 75–104 (1980); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *Yale L.J.* 400, 411 (2015).

<sup>231</sup> See *Smith v. Allwright*, 321 U.S. 649, 660 (1944).

<sup>232</sup> See, e.g., *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958).

<sup>233</sup> See *Pleasant Grove v. Sumnum*, 555 U.S. 460, 468–69 (2009) (“This does not mean that there are no restraints on government speech. . . . The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is

*B. Agency-Fee Arrangements*

As a second example, consider a First Amendment challenge to a law that compelled public-sector employees to contribute part of their wages to a labor union. As with the first example, the government-could-not-work doctrine would uphold this law after applying minimal scrutiny—at least so long as there isn't a risk of misattribution.

As discussed in the previous example, the Court has repeatedly stated that government could not work unless it could provide subsidies to the recipients of its choice, including nongovernmental organizations. By implication, government also could not work if it couldn't make taxpayers pay for these subsidies, regardless of their political or religious beliefs. Accordingly, since before the Constitutional Convention, jurists and legal scholars have invoked the government-could-not-work doctrine to emphasize that Congress and other workable legislatures must have the power to compel political minorities to subsidize the legislature's vision of the general welfare.<sup>234</sup> James Madison called this elementary power the “republican principle.”<sup>235</sup>

When it comes to compelled subsidies that look like traditional taxes, the Court has continued to declare that “[t]he tax system could not function if [individuals] were allowed to challenge the tax system because tax payments were spent in a manner that violates their [strongly held] belief.”<sup>236</sup> This is true even though paying taxes takes away money that could go toward a taxpayer's own political advocacy<sup>237</sup> and even though

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ultimately ‘accountable to the electorate and the political process for its advocacy.’” (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

<sup>234</sup> Letter from James Madison to James Monroe (Apr. 9, 1786), in 9 *The Papers of James Madison*, supra note 10, at 25–26 (“A Government cannot long stand which is obliged in the ordinary course of its administration to court a compliance with its *constitutional* acts, from a member not of the most powerful order.”).

<sup>235</sup> *The Federalist* No. 10, at 60 (James Madison) (Jacob E. Cooke ed., 1961); see supra notes 43–46 and accompanying text.

<sup>236</sup> *United States v. Lee*, 455 U.S. 252, 260 (1982); see, e.g., *Southworth*, 529 U.S. at 229; *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990); *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 699–700 (1989); *Tex. Monthly v. Bullock*, 489 U.S. 1, 24–25 (1989); *Frothingham v. Mellon*, 262 U.S. 447, 486–88 (1923).

<sup>237</sup> *Jimmy Swaggart*, 493 U.S. at 391; *Hernandez*, 490 U.S. at 699; *Tex. Monthly*, 489 U.S. at 24–25; *Lee*, 455 U.S. at 259–60; see also *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) (noting that statute was not intended to suppress ideas); *Lyng v. Automobile Workers*, 485 U.S. 360, 369 (1988) (finding that statute did not abridge right to expression); *Cammarano v. United States*, 358 U.S. 498, 512–13 (1959) (rejecting argument that requiring payment in the form of taxes is not equivalent to being denied a tax deduction for constitutionally protected activities).

the taxpayer might regard the recipients of his or her taxes as “worse than an infidel.”<sup>238</sup> A contrary rule would threaten not only the beneficiaries of ordinary government spending, but also taxpayer-financed legislative committees, judicial opinions, public-service announcements, and other routine spending decisions that taxpayers might strongly object to funding. It would essentially permit a “heckler’s veto of any forced contribution” that a majority thought was appropriate.<sup>239</sup>

Nothing about this government-could-not-work conclusion depends on whether the recipient of a tax is a governmental or nongovernmental organization. As the Court has expressly affirmed since the late-19th century, it is legitimate for a legislature to spend tax revenue in support of any “public purpose,” including on nongovernmental recipients who will serve that purpose.<sup>240</sup> It would be both antidemocratic and unwarranted for courts to compel legislatures to spend taxpayers’ revenue only on uncontroversial projects—as the First Amendment “is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from government.”<sup>241</sup> Accordingly, legislatures can compel taxpayers to fund political candidates,<sup>242</sup> legal services organizations,<sup>243</sup> religious entities,<sup>244</sup> and other nongovernmental organizations<sup>245</sup>—even when they express political opinions that some taxpayers oppose.

Similarly, nothing about this government-could-not-work conclusion depends on how many people pay the tax. “Taxes” can take all sorts of forms (from income taxes to license taxes to sales taxes) and they can go by all sorts of names (from “fees” to “licenses” to “penalties”).<sup>246</sup> For example, the Court has upheld license taxes that members of a certain

<sup>238</sup> Brief for Appellee at 5, *Lee*, 455 U.S. 252 (No. 80-767).

<sup>239</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (quoting *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting)).

<sup>240</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947); see *Kelo v. City of New London*, 545 U.S. 469, 482–83 (2005); *Taylor v. Ypsilanti*, 105 U.S. 60, 63–65 (1881).

<sup>241</sup> *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

<sup>242</sup> *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (per curiam).

<sup>243</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541–42 (2001).

<sup>244</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002).

<sup>245</sup> *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 213–14 (2013).

<sup>246</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564–65 (2012).

profession must pay in order to work.<sup>247</sup> The Court has also upheld tariffs—the country’s traditional method of taxation—even though they are inherently discriminatory and paid only by people exchanging certain goods.<sup>248</sup> When interpreting the First Amendment, the Court’s compelled subsidy cases accordingly have not turned on whether a payment is paid “by general taxes or through a targeted assessment.”<sup>249</sup> The Court gives legislatures “especially broad latitude in creating classifications and distinctions in tax statutes.”<sup>250</sup>

Finally, nothing about this government-could-not-work conclusion depends on whether the government taxes *A* and pays *B* or whether the government makes *A* pay a tax directly to *B*. The Court has long upheld laws that authorize private individuals to collect taxes. Sales taxes are an obvious example, but the Court has also upheld the Social Security Act’s requirement that employers withhold taxes on behalf of employees.<sup>251</sup> And at least since *Lochner*, it has upheld laws that essentially tax employers and make them pay employees they might ideologically disagree with;<sup>252</sup> make them pay higher wages than they ideologically think permissible;<sup>253</sup> or make them charge prices different from what they would otherwise choose.<sup>254</sup> Because all of these tax-like subsidies are ordinary exercises of legislative power, the Court has told objecting employers to “resort to the polls, not to the courts.”<sup>255</sup>

The government-could-not-work doctrine would therefore subject laws withholding the wages of government employees to minimal scrutiny—regardless of whether the revenue were spent on schools, hospitals, or labor unions. As the Court has recognized, such “agency-fee” arrangements

<sup>247</sup> See, e.g., *United States v. Sanchez*, 340 U.S. 42, 43–45 (1950); *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 41–43 (1934); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 145–46 (1911); *License Tax Cases*, 72 U.S. 462, 471–72 (1866).

<sup>248</sup> *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551–52 (1870).

<sup>249</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562–63 (2005).

<sup>250</sup> *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547–48 (1983); see, e.g., *Cammarano v. United States*, 358 U.S. 498, 512–13 (1959); *Madden v. Kentucky*, 309 U.S. 83, 87–88 (1940).

<sup>251</sup> *United States v. Lee*, 455 U.S. 252, 261 (1982); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 579–80 (1937); *Sonzinsky v. United States*, 300 U.S. 506, 512–13 (1937).

<sup>252</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46 (1937).

<sup>253</sup> *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 298–99 (1985); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–98 (1937).

<sup>254</sup> *Hernandez v. Comm’r*, 490 U.S. 680, 699–700 (1989); *Nebbia v. New York*, 291 U.S. 502, 536–37 (1934).

<sup>255</sup> *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

exercise “the power, in essence, to tax government employees.”<sup>256</sup> So long as the arrangement serves a public purpose and a legislature “retains oversight authority,” it shouldn’t matter that a recipient of this tax is a politically active, nongovernmental organization.<sup>257</sup> It similarly shouldn’t matter that only certain employees pay this tax, as the Court’s “compelled-subsidy analysis is altogether unaffected by whether the [objected-to] funds . . . are raised by general taxes or through a targeted assessment.”<sup>258</sup> And it finally shouldn’t matter that the tax is paid directly to the recipient, as “[t]he First Amendment does not confer a right to pay one’s taxes into the general fund.”<sup>259</sup> When this issue came up in last year’s *Janus v. American Federation*<sup>260</sup> case, the Court therefore should have treated such compelled subsidies like taxes whose revenue funds political candidates or other nongovernmental organizations—ordinary legislation that makes people pay subsidies for speech to which they might object. Unfortunately, neither the majority nor the dissent cited the only amicus brief to raise this point.<sup>261</sup>

This conclusion is supported by the dozens of cases regarding public-sector employees. To see why, imagine that a troubled police department hired a diversity consultant to interview officers and provide policy recommendations. Any officer who wanted to opt out of the interviews or who disagreed with the recommendations would receive no First Amendment protection from the Supreme Court. The Court has held that a workable government needs the discretion to compel its employees to comply with conditions rationally related to its interests as an employer. If an

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<sup>256</sup> *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 184 (2007); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 541–42, 550 (1991) (Marshall, J., concurring in part and dissenting in part) (controlling opinion).

<sup>257</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 563–64 (2005) (upholding a law that compelled a select group of beef producers to fund an advertising board of private citizens). The *Johanns* Court took note of other political safeguards present in that case, including that the board was “authorized and the basic message prescribed by federal statute” and it was overseen by “a politically accountable official.” *Id.*

<sup>258</sup> *Id.* at 562 (emphasis omitted).

<sup>259</sup> *Id.* at 562–63.

<sup>260</sup> 585 U.S. \_\_\_\_ (2018).

<sup>261</sup> See Brief of Professors Eugene Volokh and William Baude as Amici Curiae in Support of Respondents at 6, *Janus v. Am. Fed’n of State, Cty & Mun. Emp. Council 31*, 585 U.S. \_\_\_\_ (2018) (“Many people undoubtedly disagree with a great deal of public and private speech funded by taxes or other compulsory payments. There is, however, no First Amendment interest in avoiding those subsidies.”).



employer can limit employees' political activity,<sup>262</sup> make them abide by codes of conduct,<sup>263</sup> and force them to file grievances with exclusive representatives,<sup>264</sup> then surely it can ask employees to assist a private consultant with developing workplace policy.

Now imagine the department told the employees that it paid the consultant with money it had planned to use for payroll or end-of-year bonuses. If the Court applied the government-could-not-work doctrine consistently, its treatment of the employees wouldn't change. The First Amendment "does not afford an individual a right to dictate the conduct of the Government's internal procedures."<sup>265</sup> The amendment's protections "do[] not stem from the Government's mode of accounting."<sup>266</sup>

The Court, of course, does not apply the government-could-not-work doctrine consistently; it has instead declared it presumptively unconstitutional for a law to compel "certain individuals to pay subsidies" to private organizations "to which they object."<sup>267</sup> And it consistently applies this statement in the specific context of "private" labor unions even when the union is highly regulated and even when the state pays the union by withholding employees' wages before they receive them.<sup>268</sup>

The Court first drew its distinction between "private" speech and "government" speech in *Abood v. Detroit Board of Education*, when Justice Lewis Powell wrote that "compelled support of a private association is fundamentally different from compelled support of government" because

<sup>262</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 606–07 (1973); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 566–67 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100 (1947).

<sup>263</sup> *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 389–92 (2011); *City of San Diego v. Roe*, 543 U.S. 77, 81 (2004) (per curiam); *Waters v. Churchill*, 511 U.S. 661, 672 (1994) (plurality opinion).

<sup>264</sup> *Guarnieri*, 564 U.S. at 390–92; *Garcetti v. Ceballos*, 547 U.S. 410, 421–23 (2006); *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291–92 (1984); *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46–47 (1983); *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 464–65 (1979) (per curiam).

<sup>265</sup> *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562–63 (2005) (quoting *Bowen v. Roy*, 476 U.S. 693, 700 (1986)).

<sup>266</sup> *Id.*

<sup>267</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); Post, *supra* note 16, at 210–11. Post cites at least one brief in which a pro se litigant raised exactly this sort of First Amendment challenge to paying attorney's fees. See Appellant's Opening Brief at 15, *Banning v. Newdow*, 119 Cal. App. 4th 438 (2004) (Nos. C040840 & C042384). The court rejected this argument. *Banning*, 119 Cal. App. 4th at 448–49.

<sup>268</sup> *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309–10 (2012)).

only the government is “representative of the people.”<sup>269</sup> Later Justices have expanded Justice Powell’s cursory explanation into a theory that objecting taxpayers are always entitled to “insist upon certain safeguards with respect to the expressive activities which they are required to support.”<sup>270</sup> With government speech, the Court has held that democratic accountability and “traditional political controls” are the only safeguards needed.<sup>271</sup> For example, when a local school board spends a taxpayer’s money, “it is, in the end, accountable to the electorate and the political process . . . . If the citizenry objects, newly elected officials later could [support] some different or contrary position.”<sup>272</sup> The Court has implied that unions and other private organizations, by contrast, are less accountable to the political process and are therefore safeguarded only by the First Amendment.

The Court’s distinction between private speech and government speech doesn’t make sense, however, for at least two reasons. First, as just discussed, government could not work if it couldn’t tax people and spend the money on a political majority’s vision of the general welfare, including on private organizations like Planned Parenthood, the Democratic Party, legal-services providers, churches, nongovernmental organizations, and publicly financed political candidates. Governments regularly do this with laws that tax the general public; laws that tax only a select group of people; and laws that tax or regulate individuals and force them to pay other individuals directly.<sup>273</sup> As Robert Post has discussed, if *Abood* were taken literally it would also invalidate hundreds of ordinary and uncontroversial laws that compel individuals to pay for the objectionable speech of others.<sup>274</sup> One particularly on-point example he raises are laws requiring losing litigants to pay attorney’s fees to their opponents.<sup>275</sup>

Second, the “political process” appears to provide just as effective a safeguard when the government compels an individual to subsidize private organizations as when it compels an individual to subsidize public organizations. Indeed, this is exactly what the Court has said after

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<sup>269</sup> 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring in the judgment).

<sup>270</sup> *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229–30 (2000).

<sup>271</sup> *Id.* at 229, 235.

<sup>272</sup> *Id.* at 234–35.

<sup>273</sup> Tang, *supra* note 32 at 220–23 (discussing the functional similarities between agency-fee arrangements and arrangements in which a state subsidizes a union)

<sup>274</sup> Post, *supra* note 16, at 210–11.

<sup>275</sup> *Id.* See *supra* note 267.

deferring to legislative judgments regarding a tax's public purpose,<sup>276</sup> a taking's "public use,"<sup>277</sup> or a regulation's "public good." When Congress passes a fuel tax and spends the revenue on grants to legal-services organizations, it is compelling drivers to support lawyers. But rather than evaluate whether the lawyers' speech is public or private, the Court has deferred to Congress while instructing taxpayers: "resort to the polls, not to the courts."<sup>278</sup>

The political process has been particularly active in safeguarding public-sector employees. In the past decade alone, many state legislatures have responded to these employees' objections by prohibiting unions from collecting fees or by enacting comprehensive restrictions on a union's ability to use them.<sup>279</sup> When unions have challenged these restrictions, the Court has responded that compelled fees "are in the union's possession only because [a state legislature] and its union-contracting government agencies have compelled their employees to pay those fees."<sup>280</sup> Therefore, any restriction "is not fairly described as a restriction on how the union can spend 'its' money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money."<sup>281</sup> In other words, legislatures are in the same position relative to public-sector unions as they are to any other recipient of taxpayer dollars.<sup>282</sup> And as Professor Laurence Tribe has observed, "since the authority of the public employees' union to compel support is derived from the legislature, the [Court's] cases seem hard to distinguish on any private-public ground."<sup>283</sup>

<sup>276</sup> *Madden v. Kentucky*, 309 U.S. 83, 87–88 (1940); *Taylor v. Ypsilanti*, 105 U.S. 60, 63–65 (1881).

<sup>277</sup> *Kelo v. City of New London*, 545 U.S. 469, 482–83 (2005).

<sup>278</sup> *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

<sup>279</sup> See, e.g., 2012 Mich. Legis. Serv. P.A. 348 (West); 2011 Wis. Legis. Serv. Act 10 (West).

<sup>280</sup> *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 187 (2007); see also *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358–59 (2009) (upholding a state's decision not to impose payroll deductions to fund unions).

<sup>281</sup> *Davenport*, 551 U.S. at 187; see also *Comm'ns Workers v. Beck*, 487 U.S. 735, 761–62 (1988) (interpreting the National Labor Relations Act of 1935 to limit union political spending); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 750 (1961) (interpreting the Railway Labor Act of 1926 to limit union political spending).

<sup>282</sup> See *Ysursa*, 555 U.S. at 358–59 (calling "Idaho's decision to limit public employer payroll deductions" a decision "not to subsidize" the political speech of labor unions (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983))).

<sup>283</sup> Tribe, *American Constitutional Law*, supra note 134, at 590 n.8.

In sum, the government-could-not-work doctrine implies that agency-fee agreements and other compelled subsidies should be presumptively *constitutional*, no matter what the recipient spends the fees on. The Court's distinction between "public" speech and "private" speech seems as indefensibly formalistic as its previous distinctions between "public use" and "private use," or organizations "clothed in a public interest" and those entitled to "freedom of contract." In light of cases like *Johanns v. Livestock Marketing Association*,<sup>284</sup> in which the Court has expressly upheld targeted assessments that fund union-like boards of private individuals, there is hope that the Court will one day reconcile its union cases with the rest of the government-could-not-work doctrine.

That said, this doctrine is, again, not without limits. A law that required all government employees to directly subsidize Planned Parenthood, the Democratic Party, or the Catholic Church could violate principles protected by the First Amendment and the Due Process Clause (as an arbitrary condition of employment) or the Equal Protection Clause (as favoring or disfavoring religion). Such a law could also theoretically raise the same sort of misattribution concern as was at issue in *West Virginia v. Barnette* if, for example, it compelled only a handful of employees to publicly support the controversial program or political candidate.<sup>285</sup> Neither limit seems applicable in the typical public-sector union case, however, where objecting employees retain "full freedom to think their own thoughts, speak their own minds, support their own causes and wholeheartedly fight whatever they are against."<sup>286</sup> As Justice John Marshall Harlan II wrote in 1961, the

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

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<sup>284</sup> 544 U.S. 550 (2005).

<sup>285</sup> Cf. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013) ("A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime."); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 385 n.16 (1984) (distinguishing the compelled subsidy at issue from "a case in which an individual taxpayer is forced in his daily life to identify with particular views expressed by educational broadcasting stations").

<sup>286</sup> *Lathrop v. Donohue*, 367 U.S. 820, 861 (1961) (Harlan, J., concurring in the judgment) (quoting Black, J., dissenting); cf. *Davenport*, 551 U.S. at 190 ("Quite obviously, no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission.").

compelled to contribute dues to a [private organization] 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) . . . is so great as to amount to a difference in substance.<sup>287</sup>

### *C. Municipal Speech*

As a third example, consider a municipality that used taxpayer dollars to fund its own political advocacy.

This situation is derivative of the first two examples, so I won't spend long on it. In the first example, if a legislature spent money in support of a nongovernmental organization, the Supreme Court would likely declare that "government could not work" if taxpayers or competing organizations could challenge the spending decision. In the second example, if a legislature engaged in "government" speech by expressing its own opinions or engaging in public advocacy, the Court would also likely allow it to compel taxpayers or private individuals to subsidize its programs.<sup>288</sup> So in this example, if a city used taxpayer dollars on partisan issues or in support of its own programs, one would expect the Court to immunize the spending decision from any First Amendment challenge. "Were the Free Speech Clause interpreted otherwise, government would not work."<sup>289</sup>

This sort of municipal advocacy is not unusual. Municipal officials regularly spend taxpayer dollars on press conferences, legislative committees, judicial opinions, educational programs, school curricula, statehouse lobbying, and other forms of political expression.<sup>290</sup> Such expression also

takes the form of oral communications, such as speeches, statements, press conferences, and fireside chats, as well as written communications, such as pamphlets, books, periodicals, and other publications. It utilizes all available media, including printing presses, radio and television, motion pictures, and still pictures, and it achieves its dramatic effects through confrontations in hearings, investigations, and debates. The government has developed special organizations to assist it as communicator, such as public relations departments, the wartime Office of

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<sup>287</sup> *Lathrop*, 367 U.S. at 858 (Harlan, J., concurring in the judgement).

<sup>288</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009); *Johanns*, 544 U.S. at 562–63.

<sup>289</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015).

<sup>290</sup> See Jurisdictional Statement at 32–34, *City of Boston v. Anderson*, 439 U.S. 1060 (1979) (No. 78-649).

War Information, and the current United States Information Agency; and techniques to assist it as listener, such as intelligence services and public opinion polls. It also operates certain opinion-forming institutions, of which the most prominent is in public education.<sup>291</sup>

Accordingly, First Amendment scholars from Thomas Emerson to Laurence Tribe have recognized that “a satisfactory theory of free speech must prove adequate to the challenge of the affirmative state.”<sup>292</sup> As Emerson put it, “[t]he government is indeed not just another voice in the system. Government expression is a dominant characteristic of the system.”<sup>293</sup>

It’s perhaps surprising, therefore, that the only time the Supreme Court has considered the question of municipal speech, it appears to have gone the other way. In 1978, a few months after the Supreme Court struck down a ban on the political expenditures of *business* corporations,<sup>294</sup> the City of Boston, a *municipal* corporation, appropriated millions of taxpayer dollars to advocate for one side of a statewide property-tax referendum.<sup>295</sup> The Supreme Judicial Court of Massachusetts ruled that, under *Barnette* and *Abood*, it violated the First Amendment for a city to compel taxpayers to contribute money to its own partisan advocacy.<sup>296</sup> Professor Tribe represented the city in its appeal to the Supreme Court, and it was his brief that I block-quoted in subsection I.C.3. He argued that the city had to be able to spend money on political campaigns and he pointed out several examples in which democratic governments ordinarily compel taxpayers to pay for a political majority’s vision of the public good.<sup>297</sup>

The Supreme Court ultimately dismissed Tribe’s appeal.<sup>298</sup> Although the Court’s decision was ambiguous<sup>299</sup> and did not give a reasoned

<sup>291</sup> Emerson, *supra* note 26, at 697–98.

<sup>292</sup> Laurence H. Tribe, *Toward a Metatheory of Free Speech*, 10 Sw. U. L. Rev. 237, 245 (1978); see also Tribe, *American Constitutional Law*, *supra* note 134, at 588–91 (*Barnette* does not mean “that government cannot add its own voice to the many that it must tolerate, provided it does not drown out private communication.”).

<sup>293</sup> Emerson, *supra* note 26, at 698.

<sup>294</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794–95 (1978).

<sup>295</sup> *Anderson v. City of Boston*, 380 N.E.2d 628, 628–38 (Mass. 1978).

<sup>296</sup> *Id.* at 638–40.

<sup>297</sup> Jurisdictional Statement at 32–34, *City of Boston v. Anderson*, 439 U.S. 1060 (1979) (No. 78-649).

<sup>298</sup> *City of Boston v. Anderson*, 439 U.S. 1389, 1060 (1978).

<sup>299</sup> In October 1978, three months before the Court dismissed the appeal, the Court granted Boston’s motion to stay the state court’s decision. See *Anderson*, 439 U.S. at 1390 (1978) (in chambers opinion of Brennan, J.). This had the effect of allowing Boston to spend taxpayer

opinion, scholars interpreting the decision have generally been hostile to the idea that municipal speech should be immune from First Amendment challenges by taxpayers.<sup>300</sup> As Professor Mark Yudof wrote in his 1979 article *When Governments Speak*, “the power of governments to communicate is also the power to destroy the underpinnings of government by consent” as well as “the power to indoctrinate, distort judgment, and perpetuate the current regime.”<sup>301</sup> Other scholars have echoed this concern. “[A] characteristic distinguishing democratic from totalitarian government is that while a democracy attempts to facilitate and ascertain public opinion and establish policy in accordance therewith, an autocracy attempts to engineer public opinion in support of its decisions,” wrote Edward Ziegler in the *Boston College Law Review*.<sup>302</sup>

In the forty years since *City of Boston v. Anderson*, two things have changed. First, the Court has embraced its “government speech” doctrine, observing that “[i]t is not easy to imagine how government could function if it lacked th[e] freedom’ to select the messages it wishes to

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money during the last month of the referendum campaign. It is not obvious why the Court didn’t note probable jurisdiction and hear the appeal after the campaign ended; it likely considered the issue moot.

<sup>300</sup> See generally, e.g., Nelson Tebbe, Government Nonendorsement, 98 Minn. L. Rev. 648 (2013) (arguing that there are limits on government’s ability to endorse secular ideas just like there are for religious ones); Steven J. Andre, Government Election Advocacy: Implications of Recent Supreme Court Analysis, 64 Admin. L. Rev. 835, 842 (2012) (arguing that governments are limited in their right to “manipulate the consent of the governed”); Helen Norton, Campaign Speech Law with a Twist: When the Government Is the Speaker, Not the Regulator, 61 Emory L. J. 209 (2011); Leigh Contreras, Contemplating the Dilemma of Government as Speaker: Judicially Identified Limits on Government Speech in the Context of *Carter v. City of Las Cruces*, 27 N.M. L. Rev. 517 (1997); David P. Haberman, Note, Governmental Speech in the Democratic Process, 65 Wash. U. L. Q. 209 (1987); David Morgan, Note, The Use of Public Funds for Legislative Lobbying and Electoral Campaigning, 37 Vand. L. Rev. 433 (1984); Daniel H. Lowenstein, Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment, 29 UCLA L. Rev. 505 (1982); Carol F. Lee, Federal Courts and the Status of Municipalities: A Conceptual Challenge, 62 B.U. L. Rev. 1 (1982); Edward H. Ziegler, Jr., Government Speech and the Constitution: The Limits of Official Partisanship, 21 B.C. L. Rev. 578 (1980); Steven Shiffrin, Government Speech, 27 UCLA L. Rev. 565 (1980); Note, The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns, 93 Harv. L. Rev. 535, 543–544 & n.48 (1980); Gerald T. Anglin, Note, Governmental Referendum Advocacy: An Emerging Free Speech Problem, 29 Case W. Res. L. Rev. 886 (1979); Robert D. Kamenshine, The First Amendment’s Implied Political Establishment Clause, 67 Calif. L. Rev. 1104 (1979); Charles E. Ryan, Note, Municipal Free Speech: Banned in Boston?, 47 Fordham L. Rev. 1111 (1979); Mark G. Yudof, When Governments Speak: Toward a Theory of Government Expression and the First Amendment, 57 Tex. L. Rev. 863, 870 (1979).

<sup>301</sup> Yudof, *supra* note 300, at 865.

<sup>302</sup> Ziegler, *supra* note 300, at 579–80.

convey.”<sup>303</sup> Second, numerous cities have engaged in political advocacy similar to Boston’s, and a split has developed among state supreme courts and federal courts of appeals over whether this sort of advocacy violates the First Amendment in light of this “recently minted” doctrine.<sup>304</sup> One group of courts has treated the situation like *Abood*, holding that taxpayer subsidies in support of one side of an election are antidemocratic and presumptively unconstitutional.<sup>305</sup> The other has treated the situation like *Johanns*, holding that compelled support of government speech is immune from First Amendment scrutiny.<sup>306</sup>

The government-could-not-work doctrine should resolve this debate: compelled subsidies, on their own, should not trigger exacting First Amendment scrutiny no matter what programs a municipality spends money on. The First Amendment simply provides no basis for drawing a distinction between ordinary political advocacy, like a press conference or statehouse lobbying, and unconstitutional advocacy. Activism and democratic accountability, by contrast, do provide an often-exercised

<sup>303</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015) (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 468 (2009)).

<sup>304</sup> See *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275 (4th Cir. 2008); *Kidwell v. City of Union*, 462 F.3d 620 (6th Cir. 2006); *Cook v. Baca*, 12 F. App’x 640 (10th Cir. 2001); *D.C. Common Cause v. District of Columbia*, 858 F.2d 1 (D.C. Cir. 1988); *Campbell v. Joint Dist. 28-J*, 704 F.2d 501 (10th Cir. 1983); *Adams v. Maine Mun. Ass’n*, No. 1:10-CV-00258-JAW, 2013 WL 9246553 (D. Me. Feb. 14, 2013); *Ala. Libertarian Party v. City of Birmingham*, 694 F. Supp. 814 (N.D. Ala. 1988); *Mountain States Legal Found. v. Denver Sch. Dist. #1*, 459 F. Supp. 357 (D. Colo. 1978); *Daims v. Town of Brattleboro*, 148 A.3d 185 (Vt. 2016); *Fraternal Order of Police v. Montgomery Cty.*, 132 A.3d 311 (Md. 2016); *Burt v. Blumenauer*, 699 P.2d 168 (Or. 1985); *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784 (Del. Ch. 2015); *Peraica v. Riverside-Brookfield High Sch. Dist. No. 208*, 999 N.E.2d 399 (Ill. App. Ct. 2013); *Kromko v. City of Tucson*, 47 P.3d 1137 (Ariz. Ct. App. 2002); *Carter v. City of Las Cruces*, 915 P.2d 336 (N.M. Ct. App. 1996). Many cases also preceded the Supreme Court’s 1979 decision. See *Anderson v. City of Boston*, 380 N.E.2d 628 (Mass. 1978); *Stanson v. Mott*, 551 P.2d 1 (Cal. 1976); *Citizens to Protect Pub. Funds v. Bd. of Educ.*, 98 A.2d 673 (N.J. 1953) (Brennan, J.); *City Affairs Comm. v. Bd. of Comm’rs*, 46 A.2d 425 (N.J. 1946); *Sims v. Moeur*, 19 P.2d 679 (Ariz. 1933); *Elsenau v. City of Chicago*, 165 N.E. 129 (Ill. 1929); *Mines v. Del Valle*, 257 P. 530 (Cal. 1927); *State ex rel. Port of Seattle v. Superior Court*, 160 P. 755 (Wash. 1916); *Stern v. Kramarsky*, 84 Misc. 2d 447 (N.Y. Sup. Ct. 1975); *Porter v. Tiffany*, 502 P.2d 1385 (Or. Ct. App. 1972).

<sup>305</sup> *Campbell*, 704 F.2d at 504; *Mountain States Legal Found.*, 459 F. Supp. at 361; *Burt*, 699 P.2d at 176–77; *Anderson*, 380 N.E.2d at 638–39; *Carter*, 915 P.2d at 338–39; *Stern*, 84 Misc. 2d at 452–53; *Porter*, 502 P.2d at 1388–89.

<sup>306</sup> *Page*, 531 F.3d at 282; *Kidwell*, 462 F.3d at 623–24; *Cook*, 12 F. App’x at 641; *Adams*, 2013 WL 9246553, at \*23; *Ala. Libertarian Party*, 694 F. Supp. at 821; *Fraternal Order of Police*, 132 A.3d at 326–27; *Young*, 122 A.3d at 809; *Peraica*, 999 N.E.2d at 407–08; *Kromko*, 47 P.3d at 1141; see also *Daims*, 148 A.3d at 189 (deciding on state-law grounds); *City Affairs Comm.*, 46 A.2d at 428–29 (deciding expenditure was for a “public purpose”).



check on controversial spending campaigns.<sup>307</sup> As the *Boston Globe* editorialized in the months after Boston's attempt to spend taxpayer dollars on a political campaign, "[v]oters who don't like the city administration's spending . . . will have a clear opportunity to say so in the elections next year."<sup>308</sup>

That's not to say that municipalities should have free rein to spend taxpayer dollars on their own reelection. First of all, "[t]he involvement of public officials in advocacy may be limited by law, regulation, or practice."<sup>309</sup> Indeed, many states have already banned their cities from spending money on one side of an election.<sup>310</sup> Second, the Court has often interpreted the Equal Protection and Due Process Clauses in a manner that is suspicious of laws that serve to entrench temporary political majorities.<sup>311</sup> A state or municipal law that contributed taxpayer dollars to an identifiable candidate for President might also be one of the "rare instances" in which "the purpose for which tax-raised funds were to be expended was not a public one."<sup>312</sup> Then again, it might not.<sup>313</sup> Either way it is these clauses, not the First Amendment on its own, that provides guidance for protecting against similar concerns.

<sup>307</sup> See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 234–35 (2000); cf. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 361–62 (2010) (declaring that the First Amendment does not permit the government to protect shareholders who object to the political spending decisions of corporate executives because there is "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy'" (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794 (1978))).

<sup>308</sup> Editorial, *The Costs of Free Speech*, *Bos. Globe*, Oct. 24, 1978, at 18.

<sup>309</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009); see *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

<sup>310</sup> *D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 11 (D.C. Cir. 1988); *Stanson v. Mott*, 551 P.2d 1, 3–4 (Cal. 1976); *Citizens to Protect Pub. Funds v. Bd. of Educ.*, 98 A.2d 673, 676 (N.J. 1953) (Brennan, J.); *Sims v. Moeur*, 19 P.2d 679, 683–85 (Ariz. 1933); *Elsenu v. City of Chicago*, 165 N.E. 129, 130–31 (Ill. 1929); *Mines v. Del Valle*, 257 P. 530, 536 (Cal. 1927); *State ex rel. Port of Seattle v. Superior Court*, 160 P. 755, 756 (Wash. 1916).

<sup>311</sup> See *Young*, 122 A.3d at 809 ("[T]he government speech doctrine responds to Free Speech Clause claims. It 'does not mean that there are no restraints on government speech.' The questions posed by this case are whether Red Clay has violated (i) federal limitations imposed by the Due Process and Equal Protection Clauses or (ii) state limitations imposed by the Elections Clause." (quoting *Summum*, 555 U.S. at 468)). At least one court has suggested that municipal speech might also violate the Guaranty Clause of Article IV. See *Mountain States Legal Found. v. Denver Sch. Dist. #1*, 459 F. Supp. 357, 361 (D. Colo. 1978).

<sup>312</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 6–7 (1947).

<sup>313</sup> *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (per curiam).

*D. Antidiscrimination Laws*

As a final example, consider a First Amendment challenge to an anti-discrimination law that compelled an individual or organization to cater to same-sex couples—the same sort of challenge that the Supreme Court ducked in last year’s *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.<sup>314</sup>

For the hypothetical individual, this example requires a straightforward application of the government-could-not-work doctrine. The Supreme Court’s post-1982 shift away from *Barnette* began with cases decided under the Free Exercise Clause. One of the forms of “compulsion” the Court faced when deciding these cases were laws that prohibited organizations from discriminating on the basis of sex, race, religion, and other categories.<sup>315</sup> Accordingly, if a private baker conscientiously objected to a law that required him or her to cater to same-sex couples, the claim would go to the heart of the government-could-not-work doctrine. The Court would have an easy time rejecting it.<sup>316</sup>

The Court would have an even easier time rejecting the First Amendment claim of a government official like Kim Davis, the Kentucky county clerk who refused to sign the marriage certificates of same-sex couples in the summer of 2015.<sup>317</sup> If similar compulsion could be required of private citizens, there is no reason why it couldn’t also be tolerated to ensure that government organizations fulfill their legitimate objectives.<sup>318</sup>

But the government-could-not-work doctrine would likely not provide clear guidance for the First Amendment claim of a religious organization like the Catholic Church or an expressive organization like the National Organization for Marriage, an anti-same-sex marriage group. The harm of misattribution recognized in *Barnette* appears to be greater among organizations than among individuals, as compelled admissions of

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<sup>314</sup> See 584 U.S. \_\_\_\_ (2018) (slip op. at 18) (“The outcome of cases like this in other circumstances must await further elaboration in the courts . . .”).

<sup>315</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); see also *N.Y. State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13–14 (1988); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

<sup>316</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 885, 888–89 (1990).

<sup>317</sup> *Davis v. Miller*, 136 S. Ct. 23 (2015); *Miller v. Davis*, No. 15-5880, 2015 WL 10692640, at \*1 (6th Cir. Aug. 26, 2015).

<sup>318</sup> *Branti v. Finkel*, 445 U.S. 507, 518 (1980) (authorizing firing when an employee’s ideological beliefs are inconsistent with “the effective performance of the public office involved”).

unwanted members present the risk that the government could undermine an organization's *raison d'être*.<sup>319</sup> With religious organizations in particular, the Court has attempted to steer clear of involving civil magistrates in theological disputes about internal governance.<sup>320</sup> The Court's treatment of this example would therefore depend on whether the antidiscrimination law leaves the organization room to express its core principles or otherwise disavow the compulsion. For example, a law requiring a religiously motivated restaurant to serve same-sex couples would likely be upheld,<sup>321</sup> whereas a law requiring a church to admit gay or lesbian ministers would not.<sup>322</sup>

The doctrine would also likely be of little assistance to claims brought under the Religious Freedom Restoration Act of 1993<sup>323</sup> or the Religious Land Use and Institutionalized Persons Act of 2000<sup>324</sup> (a full analysis of which is beyond the scope of this Article). There are two reasons why. First, Congress passed the Acts with the express purpose of rejecting the Supreme Court's invocation of the government-could-not-work doctrine in religious-liberty cases.<sup>325</sup> The Court has therefore been highly skeptical of claims that "government could not work" if the Acts required Congress to provide exemptions whenever it burdened a person's religious exercise.<sup>326</sup> But this disregard for the government-could-not-work doctrine

<sup>319</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 573–74 (1995).

<sup>320</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186–87 (2012); *Serbian E. Orthodox Diocese for U.S. & Canada v. Milivojevich*, 426 U.S. 696, 708 (1976); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 96–97 (1952); *United States v. Ballard*, 322 U.S. 78, 86–87 (1944); see also *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) (upholding a religious exemption under the Establishment Clause).

<sup>321</sup> See, e.g., *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

<sup>322</sup> *Hosanna-Tabor*, 565 U.S. at 186.

<sup>323</sup> 42 U.S.C. § 2000bb-1(b) (2012) (“[Congress] may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).

<sup>324</sup> *Id.* § 2000cc (same with land use or prison regulations by state governments that receive federal financial assistance).

<sup>325</sup> *Id.* § 2000bb(b).

<sup>326</sup> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006) (“We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause.”); see also *Zubik*

makes sense in light of the second reason: The Acts are statutes, not constitutional provisions. As Professor Eugene Volokh has written, this is significant because the Acts create a “common-law exemption model” in which Congress is free to decide whether to abide by their terms.<sup>327</sup> And, as the Acts are two statutes among many, courts have no reason to side with the statutory rights of the Acts’ beneficiaries (conscientious objectors) when they run up against the statutory rights of other people who might be harmed by an exemption.<sup>328</sup> Accordingly, although the government-could-not-work doctrine as discussed in this Article doesn’t apply to the Acts, neither Act should impose an insuperable problem for ordinary legislation.

#### IV. CONCLUSION

I began this Article by invoking the universal dilemma of deciding what to do in the face of an objectionable law. Do you abide by it without objection? Do you try to change it? Or do you defy it and risk the consequences? For thousands of years, people have turned to faith, meditation, conversations, and other sources of wisdom to figure out an answer.

It is comforting to imagine that the First Amendment, with its prohibition on laws that prohibit the free exercise of religion or that abridge the freedom of speech, provides a solution. And the interests protected by the amendment—conscience and expression—are undoubtedly central to our nation’s identity. They signal a commitment to creating a nation that is open-minded and tolerant; cosmopolitan and respectful; devoted to both reason and faith.

But the price of such a nation is that people will, inevitably, disagree with one another. People of different faiths, different cultures, and different political backgrounds will argue; and not everyone will be able to

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v. *Burwell*, 136 S. Ct. 1557, 1559–60 (2016); *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772–74 (2014); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

<sup>327</sup> Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 *UCLA L. Rev.* 1465, 1469 (1999) (emphasis omitted).

<sup>328</sup> *Cutter*, 544 U.S. at 720 (“Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, and they must be satisfied that the Act’s prescriptions are and will be administered neutrally among different faiths.” (citing *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985))); see also *Zubik*, 136 S. Ct. at 1560–61 (balancing the statutory rights of religious groups against the statutory rights of women to receive seamless contraceptive coverage).

2019]      *The Government-Could-Not-Work Doctrine*      61

persuade a majority of fellow citizens to vote a particular way. Were the amendment to eliminate all forms of compulsion, it would undermine this democratic project of self-government.

We cannot always be in every political majority. Deciding what to do in that situation remains one of life's fundamental challenges.