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## ‘Not in My Name’ Claims of Constitutional Right

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## ARTICLES

### “NOT IN MY NAME” CLAIMS OF CONSTITUTIONAL RIGHT

ABNER S. GREENE\*

#### ABSTRACT

*We have a constitutional right against the state forcing us to be associated with expression with which we do not wish to be associated. The freedom of expressive association is not stated in our Constitution’s text. Rather, it is derived from various provisions of the First Amendment. As the freedom of speech protects, among other things, our right to shape how we present ourselves to the world, so does the freedom of expressive association protect us from the state shaping us by connecting us to ideas not of our choosing. Our freedom of expressive association allows us to claim an idea as our own, and to say “that idea is not mine . . . and you may not say it in my name.” This “not in my name” conception of constitutional right has iterations in several areas of First Amendment law: compelled speech, compelled subsidies for speech, and the Establishment Clause. Compelled support for government speech, though, is valid, because the state speaks in the name of its citizens. The understanding of expressive association as undergirding “not in my name” claims of constitutional right allows us to solve two lingering problems of misattribution in the compelled subsidies for speech and Establishment Clause case law. But whether or not misattribution is present, we maintain a broad presumptive right against the state’s advancing ideas in our name.*

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\* Leonard F. Manning Professor of Law, Fordham Law School. Many thanks for helpful comments to workshop participants at Fordham Law School and at the Annual Law and Religion Roundtable, hosted in 2017 by Notre Dame Law School (in Chicago). I also would like to thank, for helpful comments, Nathan Chapman, Jae Lee, John Nagle, Robert Post, Amy Sepinwall, Steve Shiffrin, Jed Shugerman, and Ben Zipursky.

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INTRODUCTION

In *Johanns v. Livestock Marketing Ass’n*<sup>1</sup> and *Capitol Square Review & Advisory Board v. Pinette*,<sup>2</sup> the United States Supreme Court left open two questions regarding misattribution. In *Johanns*, the federal government imposed a targeted assessment on beef producers to pay for generic marketing, specifically, the “Beef. It’s What’s for Dinner” advertisements.<sup>3</sup> Some of the producers objected, raising a claim seemingly permitted after *Abood v. Detroit Board of Education*,<sup>4</sup> *Keller v. State Bar of California*,<sup>5</sup> and *United States v. United Foods, Inc.*<sup>6</sup> In those cases, the Court had held it a violation of the First Amendment for the government to compel funding of another’s speech. In *Johanns*, Justice Scalia explained that the Court had not previously considered a government speech defense (which was available in *United Foods*, although not in *Abood* and *Keller*), and held that there is no First Amendment right against compelled exactions for state speech.<sup>7</sup> Since the generic beef ads were formally those of the U.S. Department of Agriculture (“USDA”), plaintiffs had no First Amendment claim.<sup>8</sup> The problem, though, was that a reasonable viewer might not have appreciated the fact that the ads were those of the U.S. government, and might have misattributed them to the beef producers. This was enough for Justice Souter to dissent, maintaining that the government speech defense should hold only when the governmental source of the speech is transparent.<sup>9</sup> Justice Scalia admitted that if a reasonable viewer would misattribute the speech to the private parties, a First Amendment claim might be available, but wasn’t ready to so hold on the record.<sup>10</sup>

In *Pinette*, the State of Ohio allowed some unattended displays in a public park surrounding the state capitol in Columbus.<sup>11</sup> It refused to allow a KKK-sponsored Latin cross, on the ground that this would violate the Establishment Clause.<sup>12</sup> Following a clear line of precedent, the Court stated that rejecting the cross would violate the KKK’s free speech rights and that permitting religious as well as other private speech in this forum would not violate the Establishment

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<sup>1</sup> 544 U.S. 550 (2005).

<sup>2</sup> 515 U.S. 753 (1995).

<sup>3</sup> *Johanns*, 544 U.S. at 554.

<sup>4</sup> 431 U.S. 209 (1977). The part of *Abood* discussed here involved public employee union expenditures on ideological speech not related to collective bargaining, to which non-union members (who nonetheless had to pay a service fee in lieu of union dues) objected. For more on *Abood*, see *infra* text accompanying notes 112-42.

<sup>5</sup> 496 U.S. 1 (1990).

<sup>6</sup> 533 U.S. 405 (2001).

<sup>7</sup> *Johanns*, 544 U.S. at 559.

<sup>8</sup> *Id.* at 560, 562-67.

<sup>9</sup> *Id.* at 571-72, 578-79 (Souter, J., dissenting).

<sup>10</sup> *Id.* at 564-66 (majority opinion).

<sup>11</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

<sup>12</sup> *Id.* at 758.

Clause.<sup>13</sup> There were several concurring and dissenting opinions, and one issue discussed was whether it would violate the Establishment Clause if a reasonable observer would mistakenly attribute the cross to the State of Ohio. The plurality said no, at least where the state has not fostered or encouraged the mistake.<sup>14</sup> The other five Justices, in various ways, said yes.<sup>15</sup>

*Johanns* and *Pinette* raise related, converse questions: When, if ever, may speech that is formally that of the state ground a First Amendment claim in the compelled subsidy setting if a reasonable viewer would think it is the speech of a private party? When if ever may speech that is formally that of a private party ground an Establishment Clause claim if a reasonable viewer would think it is the speech of the state? To answer these questions, we need to know more about the nature of the claims involved—what is the nature of the right, and the claimed harm, in compelled subsidy and Establishment Clause cases of the types involved here? Is there a relationship between the two kinds of claims?

I contend that there is, and that digging more deeply into that relationship helps us not only to answer the questions regarding misattribution raised above. We can see as well that compelled subsidy and Establishment Clause claims, and also compelled speech claims, involve (at times) persons objecting to speech being made in their name, or associated with their name. “Not in my name” turns out to be an apt way of describing a set of First Amendment claims that are not often talked about together, and for which other types of harm are often advanced as the justification for protecting the right. “Not in my name” claims of constitutional right are, at heart, a type of expressive association problem—one could describe the right as the freedom of disassociation. My contention that there is a familial resemblance among various types of First Amendment claims is not meant to reduce such claims to freedom of expressive association. Some compelled speech, compelled subsidy, and Establishment Clause claims (even just focusing on Establishment Clause claims involving government expression) may properly be thought to turn on harm different from the associational harm I discuss here.<sup>16</sup> Furthermore, some decisions rest upon expressive association itself, but are best understood as implicating a different concern about expressive

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<sup>13</sup> *Id.* at 760-63.

<sup>14</sup> *See id.* at 766 (plurality opinion).

<sup>15</sup> *See id.* at 776-78 (O’Connor, J., concurring in part and concurring in the judgment, joined by Souter and Breyer, JJ.); *id.* at 785-86 (Souter, J., concurring in part and concurring in the judgment, joined by O’Connor and Breyer, JJ.); *id.* at 799-812 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting).

<sup>16</sup> In particular, Micah Schwartzman offers an account of the compelled subsidy problem that tracks and expands on Jefferson’s concern with freedom of conscience. Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317 (2011). Although we both end up rejecting state speech advancing a contested view of religious truth, we get there through different paths. At the end of Part IV, I will summarize Schwartzman’s argument and explain the differences in our approaches.

association than discussed here.<sup>17</sup> Thus, my argument can be seen as addressing the overlapping center circle of a three-circle Venn diagram (compelled speech, compelled subsidies for speech, Establishment Clause), elucidating the nature of otherwise disparate First Amendment rights and harms through a conception of expressive association that turns on a “not in my name” assertion.<sup>18</sup>

In June of 2018, the Court decided three cases involving such claims: public sector non-union members who say they have been unconstitutionally compelled to pay fees (in lieu of union dues) that support collective-bargaining efforts; anti-abortion medical and non-medical facilities that deem unconstitutional certain state notice and disclosure requirements; and a baker who believes the state unconstitutionally compelled him to endorse same-sex marriage by requiring

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<sup>17</sup> Consider two definitions of “associate”: a corporeal, intransitive sense, “[t]o join in or form a league, union, or association,” *Associate*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011) [hereinafter AMERICAN HERITAGE DICTIONARY], and a mental, transitive sense, “[t]o connect in the mind or imagination,” “[t]o connect or involve with a cause, group, or partner,” *id.* The former sense is at stake in cases pitting laws that prohibit certain types of discrimination in places of public accommodation against group interests in physically associating with—and developing ideas and messages with—persons of their choosing. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). Although I will touch on these cases in Part III, and although the Court in *Dale* intermingled the two types of expressive association concern, these cases are not my principal subject. For an argument that rights of corporeal association are better viewed through the First Amendment’s right of assembly, see generally JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012). The latter sense is at stake in cases involving compelled subsidies for the expression of others, as well as, I will claim, in some compelled speech and Establishment Clause cases. *See infra* Part I (discussing compelled speech cases); *infra* Part IV (discussing Establishment Clause cases).

The freedom of association is also front and center in decisions protecting anonymity for political speech and group membership. *See, e.g.,* *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342, 357 (1995) (holding that right to distribute anonymous campaign literature is protected by First Amendment); *Brown v. Socialist Workers ‘74 Campaign Comm.*, 459 U.S. 87, 101-02 (1982) (holding that political campaign disclosure requirements were unconstitutional as applied to Socialist Workers Party because of history of harassment); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-66 (1958) (holding unconstitutional, on freedom of association grounds, effort to compel NAACP to reveal names of all Alabama members and agents).

<sup>18</sup> The Constitution does not explicitly protect any right of association. The Supreme Court has interpreted the First Amendment as providing some protection for rights of intimate and expressive association. *See infra* Part III; *see also supra* note 17 (regarding freedom of association and anonymity). A primary goal of this Article is to flesh out how the right of expressive association might work when the government associates us with messages with which we prefer to remain disassociated. As I was completing edits on this Article, I became aware of an argument by William Baude and Eugene Volokh that compelled subsidies for expression raise no First Amendment problem, of speech or association. William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171 (2018). I hope to respond to their claim in future work.

him to make a wedding cake for a gay couple.<sup>19</sup> The Court avoided the compelled speech issue in the baker's case, resolving it instead on fact-specific Free Exercise Clause grounds.<sup>20</sup> In the other two cases, the claimants prevailed on Free Speech Clause grounds.<sup>21</sup> These cases will be discussed below.<sup>22</sup> Each fits with the other cases discussed here; each involves a "not in my name" claim of constitutional right, i.e., a type of expressive association claim.

Understood as a "not in my name" claim, the expressive association right in these cases, and the harm from its deprivation, is unusual. It is not a right focused on choice—it is not best seen as a right of choosing to do X or not to do X. That is how we approach much free speech, and right not to speak, case law.<sup>23</sup> You have a right to speak, and a right to refrain from speaking. Restriction of either is a prima facie violation of the right. The same could be said of compelled subsidies—you have a right to support expression with dollars, or not to do so, and restriction of either is a prima facie violation of the right.<sup>24</sup> This standard way of seeing things is not wrong; it is often the best way to see things, or one way. But in many of the cases at issue in this Article, there is a different way of understanding the right and harm at stake. Perhaps Establishment Clause doctrine is closer to recognizing this, because, unlike the Free Exercise Clause, which is more commonly seen as a choice right (i.e., to worship or not to worship), the Establishment Clause may often best be seen as a structural limitation on state action, and in the expressive setting, as a type of citizenship rule. After all, the endorsement test, developed for and best suited to state speech cases,<sup>25</sup> is not about a choice right but about a right to be free of a certain type

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<sup>19</sup> See *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

<sup>20</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1723-24.

<sup>21</sup> *Janus*, 138 S. Ct. at 2460; *Becerra*, 138 S. Ct. at 2378.

<sup>22</sup> For discussion of *Masterpiece Cakeshop*, see *infra* note 68. For discussion of *Janus*, see *infra* note 124. For discussion of *Becerra*, see *infra* text accompanying notes 102-09.

<sup>23</sup> For a valuable exploration of constitutional rights that do (and do not) involve choices to and not to do something, see generally Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761 (2012).

<sup>24</sup> The alleged violation is prima facie, or presumptive, rather than conclusive, in both of the preceding textual sentences, because the state may prevail by showing a sufficiently strong interest and a close enough means-ends fit.

<sup>25</sup> Justices occasionally use "endorsement" to discuss other types of Establishment Clause cases. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 247 (1997) (Souter, J., dissenting) (discussing use of public funds for public school teachers to teach secular remedial courses in religious school); *Lee v. Weisman*, 505 U.S. 577, 609, 618-19 (1992) (Souter, J., concurring) (discussing officially sponsored prayer at public middle and high school graduation ceremonies); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-17 (1989) (plurality opinion) (discussing sales tax exemption for religious publications only); *Wallace v. Jaffree*, 472 U.S. 38, 59-61 (1985) (discussing minute of silence for meditation or voluntary prayer in public school); *id.* at 67 (O'Connor, J., concurring in the judgment). However, I will discuss

of denigration or stigma. But even there, the Court has focused more on first-versus second-class citizenship concerns—a close relation, one might say, to Equal Protection Clause harm—and not on the “not in my name” expressive association concern I am developing here.

At the center circle of the Venn diagram is a right to be free from the state’s connecting one with expression that is not one’s own.<sup>26</sup> It is a right to avoid being tagged with the messages of others. I borrow the phrase “not in my name” from everyday politics. For example, when President George W. Bush sent troops into Iraq, and dissenters said “not in our name,”<sup>27</sup> this had an immediate salience. The claim was that such action implicated all Americans, and, the dissenters said, improperly so, as they did not authorize it, did not desire it, and believed it to be wrongful.<sup>28</sup> Some state action connects all citizens (or some subset thereof) not to action but to expression, of the state or other citizens, and even when we all know what’s going on—when there is no misattribution and when we have transparency regarding speaker, funding, and message—the state action sometimes unconstitutionally implicates the claimant in the expression. Part of the problem is that the expression wasn’t our choice, but the harm is not

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“endorsement” in this Article only regarding cases involving religious symbols sponsored in whole or in part by the state.

<sup>26</sup> Challenges to compelled speech and compelled subsidies for speech may sometimes best be understood as claims for exemption, not for facial invalidation. One could, thus, situate at least some of the compelled speech and compelled subsidies for speech cases within the larger debate about whether and when exemptions from generally applicable law should be ordered by a court or awarded by a legislature. There is a voluminous debate about this issue; I have contributed arguments in favor of (prima facie) exemptions for religious claimants, Abner S. Greene, *Is Religion Special? A Rejoinder to Scott Idleman*, 1994 U. ILL. L. REV. 535 [hereinafter Greene, *Is Religion Special?*]; Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993) [hereinafter Greene, *Political Balance*], or for claimants more generally who back their positions in a source of normative authority other than that of the state, ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012) [hereinafter GREENE, *AGAINST OBLIGATION*]. On the other side of the debate are, for example, Brian Barry and Richard Arneson, who believe that once the state has made a good case for the benefits of a particular law, exemptions claims involve a kind of parochial unfair dealing. BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001); Richard J. Arneson, *Against Freedom of Conscience*, 47 SAN DIEGO L. REV. 1015, 1018, 1024 (2010). In this Article, I am assuming that in the compelled speech and compelled subsidies for speech settings the more general case for exemptions is satisfied, and I focus instead on the expressive association nature of the claim of right involved in these cases (and on the types of state interest that might override the claims of right). Note that the Establishment Clause claims I discuss are not claims for exemption but rather facial claims to invalidate state religious expression.

<sup>27</sup> See Michael Wilson, *Thousands at Central Park Rally Oppose an Iraq War*, N.Y. TIMES, Oct. 7, 2002, at B3 (noting that the protest was organized by a group called “Not in Our Name”).

<sup>28</sup> For my approach to how we should construe such “not in our (or my) name” claims, and specifically whether it is proper for citizens to abjure responsibility for the actions of government officials, see *infra* text accompanying notes 138-55.



only the deprivation of agency. In addition, and perhaps foremost, it is the unwanted connection. I construct my self—both subjectively and in my presentation to others—in part through expression, through what is said and what is left unsaid. Compelled association with messages risks cheapening or muddying that expressive presentation, distorting the messages or views with which I want to be connected by expanding them or contradicting them with other messages. This distortion may occur when the state interferes with our actively disseminating messages (such as in the St. Patrick’s Day parade in *Hurley v. Irish-American Gay, Lesbian, and Bi-Sexual Group of Boston, Inc.*),<sup>29</sup> but it may also occur more persistently and pervasively by interfering with how we construct and present our identities in less active or focused ways.<sup>30</sup> The harm is broad but weak—it can easily occur, as we’ll see throughout this Article with the various types of state action that cause it, but it need not be deep or profound. Since the harm can exist without misattribution, the distortion need not be that others misperceive what I stand for, but rather that they see me in a web of messages or ideas that include compelled ones, that have to be seen as such and bracketed. And it can exist without going to conscience—my displeasure with the connection need not be because of a concern about the moral wrong of the idea involved. “Broad but weak,” therefore, seems the right way to describe the harm of unwanted association with a message or idea. This will allow us to track the various ways the harm occurs and to accept the various ways in which state interests are strong enough to trump or outweigh the prima facie harm.

To appreciate the way in which I am claiming unwanted expressive association is a broad yet weak harm in our constitutional order, let’s consider the relationship between endorsement, attribution, and association. Endorsement is a strong connection. To endorse, in the sense relevant here, is “[t]o express approval of or give support to, especially by public statement.”<sup>31</sup> A compelled connection cannot be an endorsement. Misattribution could lead to a mistaken impression of an endorsement, but misattribution aside, in none of the compelled speech or compelled subsidization of speech cases discussed in this Article is it appropriate to say the subject is endorsing the message. Attribution is the trickiest term of the three. To attribute, in the sense relevant here, is “[t]o regard (a work, for example) as belonging to or produced by a specified agent.”<sup>32</sup> This is close to endorsement, and thus a strong sense of association, but we might attribute a “work” (say, a painting) to someone without that person engaging in the kind of knowing claim that endorsement involves. The same is true for a message—if you are a member of a group with knowledge of that group’s ends, and you may leave the group but choose to stay, it is appropriate to attribute the group’s message to you, even if we wouldn’t say you have endorsed the message. Association is at the opposite end of the spectrum of connection from

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<sup>29</sup> 515 U.S. 557 (1995).

<sup>30</sup> Thanks to Amy Sepinwall for helping with this formulation of the idea.

<sup>31</sup> *Endorse*, AMERICAN HERITAGE DICTIONARY, *supra* note 17.

<sup>32</sup> *Attribute*, AMERICAN HERITAGE DICTIONARY, *supra* note 17.

endorsement. We may associate someone with a message for all sorts of reasons, from endorsement (strong association) to a state motto stamped on someone’s license plate (not an endorsement, yet maybe more than mere association because of the use of the personal property, but even attribution seems too strong here) to the use of one’s compelled tax or fee to pay for a message that one has not chosen (a fairly weak, but real, associative connection, I will argue)<sup>33</sup> to

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<sup>33</sup> Amy Sepinwall and Nomi Stolzenberg have advanced views of complicity, in the setting of compelled money for actions that one deems immoral, that have some affinity with my view of associative harm in the message-sending setting. See Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 U. CHI. L. REV. 1897, 1908 (2015); Nomi Maya Stolzenberg, *It’s About Money: The Fundamental Contradiction of Hobby Lobby*, 88 S. CAL. L. REV. 727, 742-44 (2015). Sepinwall maintains that “we should treat complicity claims with great deference: I hope to show that we are, in many cases, without the moral clarity or authority to challenge someone’s belief that the conduct legally required of him would make him complicit in what he perceives as a wrong.” Sepinwall, *supra*, at 1908. She adds that “one can bear responsibility for another’s act independent of whether one took part in the decision to pursue that act.” *Id.* at 1916. Furthermore, she argues that “we should treat first person assessments of complicity with solicitude—at least presumptively.” *Id.* at 1958. Although Sepinwall concludes that *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014), was correctly decided—a conclusion with which I disagree, see *infra* note 38—her theory of complicity can be characterized as broad yet weak: the former because it focuses on the claimant’s view of harm from compelled connection to conduct deemed immoral, a view that can be idiosyncratic and not in accordance with standard views of proximity; the latter because later in the article, Sepinwall advances ways that we should account for harm to third parties before granting conscientious objection claimants exemptions from generally applicable law. See Sepinwall, *supra*, at 1959-79.

Stolzenberg also advances a capacious view of when the law should accept claims of complicity in down-the-line harm from compelled financial exactions. She writes that “courts must be prepared to recognize the existence of the same burden in every case where an act of payment is involved (be it the payment of taxes, wages, benefits, or donations) that enters into the circulatory system through which money that will pay for ‘sinful’ services flows.” Stolzenberg, *supra*, at 735-36. In other words, from the point of view of those claiming harm from compelled subsidies:

Any act of payment, be it a charitable donation, the payment of wages, benefits, or taxes or a payment to purchase goods, is an act of transferring money *qua* material value into the hand of a recipient (who may or may not use it in ways deemed immoral or sinful).

And that is just what financial facilitation is.

*Id.* at 744. Unlike Sepinwall, Stolzenberg pivots from this broad view of complicity to an argument opposing the result in *Hobby Lobby*. See *infra* note 38.

The threshold view of complicity advanced by both scholars—of how our compelled dollars might facilitate what we believe to be harm—is analogous to my point that we might deem harmful via mere association any message/idea with which the state connects us through compelled speech or subsidy.

For a lucid and scholarly treatment of complicity, but focused on intentional participation in joint or group activity (even absent but-for causation of harm or control over outcome), see CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 113-45 (2000). Similar to my account of the harm from compelled expressive association, Kutz’s theory of accountability is “broad but thin.” *Id.* at 144.

membership in a polity<sup>34</sup> that speaks for all of us (also a fairly weak, but real, associative connection, as I will expand on below).<sup>35</sup>

The “not in my name” approach can help us see how compelled speech and compelled subsidies of others’ speech may be presumptively problematic.<sup>36</sup> In earlier work, I questioned the part of *Abood* that invalidated state action, that held unconstitutional compulsory fees in lieu of union dues when such fees went to ideological speech of the public employees’ union.<sup>37</sup> My concern was that there was no compelled speech involved, that misattribution was unlikely, and that therefore the grounding of the claim was unclear. To the extent it was properly seen as an associational harm (which I questioned), how would we be able to distinguish compelled taxation when used for government speech? Now, however, I see another approach. It is indeed presumptively unconstitutional for the state to compel me to fund the expression of others.<sup>38</sup> Such expression is, at

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<sup>34</sup> Such membership is best seen as involuntary; you were born here without a say in the matter. That you have not left doesn’t make your membership voluntary enough to render your connection to state speech anything more than weakly associative. See GREENE, AGAINST OBLIGATION, *supra* note 26, at 39.

<sup>35</sup> See *infra* text accompanying notes 138-55.

<sup>36</sup> Part of my discussion of how a “not in my name” characterization grounds a presumptive right against compelled speech or subsidy of others’ speech will be to critique Robert Post’s thinner view of these rights. See *infra* text accompanying notes 156-71.

<sup>37</sup> Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 12-18 (2000).

<sup>38</sup> Although in this Article I am focusing on compelled association with messages or ideas, claimants sometimes argue that the state has compelled them to contribute to immoral or otherwise improper ends, but not in an expressive way. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014), is an important recent example of this. The Court held that the federal Religious Freedom Restoration Act (“RFRA”) required an exemption for a small for-profit corporation from federal law requiring contribution to group health insurance for its employees, because the corporation claimed that the insurance could be used to produce abortions, against the religious beliefs of the corporate owners. See *id.* at 2785. The claim was, in other words, that the federally mandated insurance payments would render the corporation complicit in the down-the-line harm of abortion. There are many issues involved in this controversial case, among them whether such a company should have had standing to assert a RFRA claim, whether it suffered the statutorily required “substantial burden” on its religious exercise, and whether if it did, the state interest in requiring compliance was compelling. I have argued that the plaintiffs did not suffer the statutorily required “substantial burden.” Abner S. Greene, *A Secular Test for a Secular Statute*, 2016 U. ILL. L. REV. ONLINE 34; Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL’Y REV. 161 (2015) [hereinafter Greene, *Religious Freedom*]. This position is not inconsistent with my willingness to accept a broad (but weak) view of complicity regarding the harm from compelled expressive association—as the name implies, “substantial burden” is a statutory threshold that requires showing something substantially more than a mere “burden.” As I have argued, there are reasons of the proximate cause variety suggesting that the *Hobby Lobby* plaintiffs did not suffer such a burden. See *id.* at 185-90. Nomi Stolzenberg agrees that *Hobby Lobby* was incorrectly decided, but for different reasons. See Stolzenberg, *supra* note 33. She says we should accept the plaintiffs’ claim of substantial burden, *id.* at 731, 733, 744, but then yield to the government’s “general interest in being able to determine how public funds will be spent and how the revenue to support that spending

least in part, in my name, and my freedom of expressive association should extend (presumptively) to resisting expression being made in my name by government compulsion. We can then see the ways in which this presumptive right may be overcome by state interests—either in government speech generally (as *Johanns* properly held, without much analysis),<sup>39</sup> but not in state religious speech (as a few cases hold);<sup>40</sup> or in promoting nonideological common interests (such as avoiding free-riding in a system of exclusive bargaining/fair representation, as in *Abood*;<sup>41</sup> providing legal services to the poor, as in *Keller*;<sup>42</sup> or when generic advertising is germane to a larger collective economic interest, as in *Glickman v. Wileman Bros. & Elliot, Inc.*).<sup>43</sup> As I will develop below, the presumptive right is overcome when the compelled subsidy funds state speech because the individual may not make the “not in my name” claim—the state properly speaks in the name of its citizens (as a matter of constitutional law, even as some resist sometimes as a matter of policy).<sup>44</sup> By contrast, we should understand the Establishment Clause as an exception to this rule—state religious speech is not properly in the name of the citizens, and thus when the state engages in such speech we may understand Establishment Clause harm as an instance of harm to the freedom of expressive association.

After discussing the expressive association/not-in-my-name approach to compelled speech in Part I, compelled subsidies in Part II, and the Establishment Clause in Part IV (as well as the few cases that turn on the right of expressive association itself in Part III), this Article will return in Part V to the animating problem of whether and when misattribution as to speaker identity may ground a constitutional claim. A “not in my name” grounding for a First Amendment claim does not require a showing of misattribution, and often the claimed harm will be broader but weaker, turning on undesired association with expression not of my choosing. Misattribution as to speaker identity, in the *Johanns* and *Pinette* settings, also implicates a harm of the expressive association/not-in-my-name sort, but narrower and deeper than when misattribution does not exist. If a reasonable observer would erroneously think the government’s ads are mine,

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will be collected,” *id.* at 733. Amy Sepinwall, on the other hand, pushes the broad view of complicity to the conclusion of accepting the *Hobby Lobby* plaintiffs’ claim of substantial burden and requiring the exemption from insurance payments. *See* Sepinwall, *supra* note 33, at 1977-79.

<sup>39</sup> *See* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005).

<sup>40</sup> *See infra* text accompanying notes 184-86.

<sup>41</sup> *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), overruled this part of *Abood*, deeming the state interest insufficient to overcome any hit to the expressive association interest. I agree with Justice Kagan that *Janus* was not only wrongly decided but also poorly reasoned. *See infra* note 124.

<sup>42</sup> *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

<sup>43</sup> *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

<sup>44</sup> *See infra* text accompanying notes 138-55 (discussing state speech in name of all citizens).

then to that observer the expression is being made in my name (and my expressive association right is violated). If a reasonable observer would erroneously think a private party's religious speech is the state's, then to that observer the expression is being made in all of our names (and the expressive association right of the Establishment Clause variety is violated). If I have a right not to foster another's expression against my will, even when everyone knows who is compelling whom and who is in fact speaking, then I have a similar right when being improperly tagged with the expression's content.

### I. COMPELLED SPEECH

The Court has interpreted the First Amendment as offering robust protection for a right not to speak, as well as for the right to speak. There are some exceptions to this strong protection for compelled speech, however. First, I will sort through the case law, then I will explore the justifications or groundings for the generally strong protection. I will argue that we can see the protection as grounded in a right of expressive association of the "not in my name" variety. Some of the other groundings for a right against compelled speech work only some of the time, but the one I will defend works in all of the cases.

The key cases invalidating state action as unconstitutionally compelling speech are *West Virginia State Board of Education v. Barnette*,<sup>45</sup> *Wooley v. Maynard*,<sup>46</sup> *Miami Herald Publishing Co. v. Tornillo*,<sup>47</sup> *Pacific Gas & Electric Co. v. Public Utilities Commission*,<sup>48</sup> *Hurley v. Irish-American Gay, Lesbian, and Bi-Sexual Group of Boston, Inc.*, and *National Institute of Family & Life Advocates v. Becerra*.<sup>49</sup> In *Barnette*, the Court considered a state requirement that school children recite the pledge of allegiance in public schools.<sup>50</sup> The State had expelled some Jehovah's Witnesses children for failing to say the pledge, had threatened to send some such children to reformatories for juvenile delinquents, and had prosecuted and threatened to prosecute some parents.<sup>51</sup> The Court invalidated the requirement, referring generally several times to the First Amendment.<sup>52</sup> This is the only one of the six cases that involved speech-as-utterance.

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<sup>45</sup> 319 U.S. 624 (1943).

<sup>46</sup> 430 U.S. 705 (1977).

<sup>47</sup> 418 U.S. 241 (1974).

<sup>48</sup> 475 U.S. 1 (1986).

<sup>49</sup> 138 S. Ct. 2361 (2018).

<sup>50</sup> *Barnette*, 319 U.S. at 629.

<sup>51</sup> *See id.* at 630.

<sup>52</sup> *Id.* at 634, 639, 641-42. The decision did not forbid public schools from asking children to recite the pledge, just from requiring its recitation. In other words, so long as students may opt out, that is satisfactory. *See supra* note 26. *But see* Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451 (1995) (questioning sufficiency of an opt-out after *Lee v. Weisman*, 505 U.S. 577 (1992)).

In *Wooley*, the Court confronted New Hampshire’s insistence that noncommercial motor vehicles registered in the state bear license plates containing the state motto, “Live Free or Die.”<sup>53</sup> In response to claimed injury from a Jehovah’s Witnesses couple, the Court invalidated the requirement under the First Amendment.<sup>54</sup> The Court referred to a “right to refrain from speaking at all,”<sup>55</sup> a “right . . . to refuse to foster . . . an idea they find morally objectionable,”<sup>56</sup> and a “right to avoid becoming the courier for such message.”<sup>57</sup>

In *Tornillo*, the Court invalidated a right of reply, or compelled access/must carry statute, which provided that “if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper’s charges.”<sup>58</sup> The Court held that the law violated the First Amendment’s free press guarantee because it would affect editorial decisions *ex ante* (some newspapers might not critique a candidate for fear they would have to run a reply) and *ex post* (the effect of the law is to alter newspaper content).<sup>59</sup>

In *Pacific Gas*, the question was “whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees.”<sup>60</sup> A plurality of the Court deemed the case similar to *Tornillo*<sup>61</sup>—the requirement affected the company’s speech *ex ante* (detering it from engaging in speech that would trigger the right of reply)<sup>62</sup> and *ex post* (affecting the company’s editorial control of what goes into the billing envelopes).<sup>63</sup> The plurality held that the requirement violated the First Amendment, “because it forces appellant to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints.”<sup>64</sup>

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<sup>53</sup> *Wooley v. Maynard*, 430 U.S. 705, 706-07 (1977).

<sup>54</sup> As with *Barnette*, *Wooley* does not forbid the general practice—here, the State’s placing the motto on license plates. Rather, it requires an opt-out for objecting motor vehicle owners. For the Maynards, the holding provided a defense to their covering up the motto. *See supra* note 26.

<sup>55</sup> *Wooley*, 430 U.S. at 714.

<sup>56</sup> *Id.* at 715.

<sup>57</sup> *Id.* at 717.

<sup>58</sup> *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 244 (1974).

<sup>59</sup> *Id.* at 256-58.

<sup>60</sup> *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 4 (1986) (plurality opinion).

<sup>61</sup> *Id.* at 9-11.

<sup>62</sup> *See id.* at 14.

<sup>63</sup> *See id.* at 14-15.

<sup>64</sup> *Id.* at 20-21. Justice Marshall concurred in the judgment, for reasons substantially similar to those of the plurality, although he took care to note that he did not deem corporate speech rights coextensive with individuals’ speech rights. *Id.* at 25-26 (Marshall, J. concurring in the judgment).

In *Hurley*, the private sponsors of the annual St. Patrick's Day parade in Boston wanted to exclude a gay, lesbian, and bisexual Irish-American group from marching in the parade with a banner proclaiming its identity.<sup>65</sup> Massachusetts state courts determined that state public accommodations anti-discrimination law applied, and barred the exclusion.<sup>66</sup> The Court unanimously held that this application of state law "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."<sup>67</sup>

Last Term, in *Becerra*, the Court added a sixth<sup>68</sup> compelled speech invalidation to the list when it held as likely unconstitutional, in the context of a

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<sup>65</sup> *Hurley v. Irish-American Gay, Lesbian, & Bi-Sexual Grp. of Bos., Inc.*, 515 U.S. 557, 561 (1995).

<sup>66</sup> *Id.* at 561-66.

<sup>67</sup> *Id.* at 573.

<sup>68</sup> The Court had another opportunity to develop its compelled speech doctrine last Term in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), in which Colorado's generally applicable public accommodations anti-discrimination law—including protection for sexual orientation—ran up against a baker's religiously based objection to making a cake for a same-sex couple's marriage celebration. At first blush, one might think that the baker was primarily concerned about compelled complicity in what he believes to be sinful, and thus that he was raising a Free Exercise Clause exemptions claim. However, under *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990), that claim would fail because the state can show a rational basis for insisting on uniform application of the public accommodations law. Because of this doctrinal impediment, the baker litigated the case primarily on compelled speech grounds. But the Court deemed the free speech claim "difficult," *Masterpiece Cakeshop*, 138 S. Ct. at 1723, and did not resolve it. Instead, it held that the state civil rights commission exhibited hostility toward the baker's religious faith, and accordingly, on this narrow free exercise ground (narrow as opposed to reconsidering *Smith*), reversed the commission's order that had required the baker to comply with the law. *Id.* at 1723-24, 1729, 1732

Resolving the baker's compelled speech claim would indeed have been difficult, for several reasons. First, the state action is not specific to expression, as it was in *Barnette*, *Wooley*, *Tornillo*, *Pacific Gas*, and *Becerra*, but is rather a law of general applicability. That was true too in *Hurley*, though, so there's some precedent for the baker's claim. Second, for the Free Speech Clause to be triggered at all, the claimant has to believe he is engaged in expression (met here) and the reasonable observer has to see the act in question as expressing a message or idea (less clear here—this depends on whether the average wedding guest appreciates that some kind of expressive artistry has gone into the making of the wedding cake and that some kind of message or idea is being conveyed thereby). See *Texas v. Johnson*, 491 U.S. 397, 404 (1989). The baker may present a prima facie expressive association claim of the compelled speech variety—by demanding that he make the cake for the couple in question, the state (arguably) compels him to be associated with a message with which he does not wish to be associated. That leaves the question whether the state interest in providing an open, nondiscriminatory market for goods and services, plus the state interest in protecting gay persons from the dignity harm of exclusion from such market, should trump the expressive association claim. Justice Kennedy's majority opinion says some powerful things about the equal rights of gay persons in the marketplace, see *Masterpiece Cakeshop*, 138 S. Ct. at 1727-29, but does not resolve the compelled speech question. In a concurrence in part and in the judgment joined by Justice Gorsuch, Justice Thomas concluded that the state violated the

motion for a preliminary injunction, two provisions of a California law imposing notice requirements “on facilities that provide pregnancy-related services.”<sup>69</sup> The first provision applies to “licensed covered facilit[ies],”<sup>70</sup> which “must have the ‘primary purpose’ of ‘providing family planning or pregnancy-related services,’” and which satisfy at least two of six requirements in terms of services provided.<sup>71</sup> The notice, which “must be posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in,” states: “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].”<sup>72</sup> The Court held that this licensed notice requirement alters speech content, requiring petitioners “to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option.”<sup>73</sup> Even under intermediate scrutiny,<sup>74</sup> the State could not justify the law either as a regulation of professional conduct that only incidentally burdens speech or as a required disclosure of purely factual and uncontroversial information.<sup>75</sup> Instead, the law “regulates speech as speech”<sup>76</sup> and requires disclosure of information about an abortion option, which is “anything but an ‘uncontroversial’ topic.”<sup>77</sup> California may engage in government speech to inform women about the abortion option, but it “cannot co-opt the licensed facilities to deliver its message for it.”<sup>78</sup>

The second statutory provision in *Becerra* applies to “unlicensed covered facilit[ies],”<sup>79</sup> which have “the ‘primary purpose’ of ‘providing pregnancy-related services,’” do “not have a licensed medical provider on staff or under contract,” and satisfy at least two of four requirements, which include offering

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baker’s free speech rights (as a prima facie matter) and that strict scrutiny should apply, but because the state court had not addressed who would prevail under strict scrutiny, Justice Thomas stepped back from doing so “in the first instance.” *Id.* at 1746 (Thomas, J., concurring in part and concurring in the judgment, joined by Gorsuch, J.). In a dissent joined by Justice Sotomayor, Justice Ginsburg rejected the compelled speech claim. *Id.* at 1748 n.1 (Ginsburg, J., dissenting, joined by Sotomayor, J.). For more on *Masterpiece Cakeshop*, see Abner S. Greene, *Barnette and Masterpiece Cakeshop: Some Unanswered Questions*, 13 FIU L. REV. (forthcoming 2019).

<sup>69</sup> Nat’l Inst. of Family & Life Advocates v. *Becerra*, 138 S. Ct. 2361, 2368 (2018).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2369.

<sup>72</sup> *Id.* (alteration in original).

<sup>73</sup> *Id.* at 2371.

<sup>74</sup> *Id.* at 2375.

<sup>75</sup> *Id.* at 2372-74.

<sup>76</sup> *Id.* at 2374.

<sup>77</sup> *Id.* at 2372.

<sup>78</sup> *Id.* at 2376.

<sup>79</sup> *Id.* at 2369.



“obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women” and offering “pregnancy testing or pregnancy diagnosis.”<sup>80</sup> The notice, which must be prominently displayed on site and in advertising materials, states: “[T]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.”<sup>81</sup> The Court held that the State had yet to provide a sufficient justification for this unlicensed notice requirement and that the provision “unduly burdens protected speech,” in part because of the requirement that the notice be prominently displayed.<sup>82</sup>

The Court has upheld compelled speech/access rules in three types of setting. The first is where the state is compelling private property to function as a type of public forum for various views (and accordingly where there is little risk of misattribution and where it is easy enough for the property owner to issue appropriate disclaimers).<sup>83</sup> The second is where the federal government is compelling over-the-air television broadcasters or cable television companies to carry some content they might not otherwise carry (because of the monopolistic aspect of these industries, the government’s regulatory licensing role, and thus the quasi-public nature of the media).<sup>84</sup> The third is where the government is compelling disclosure of consumer-protecting information that is meant to prevent deception or at least that is purely factual and uncontroversial.<sup>85</sup> I will return to some of these cases when exploring the grounds for the right against compelled speech as developed in the first six cases.

Although there are various ways of unpacking the grounds for the invalidation holdings,<sup>86</sup> I will suggest six: the first four appear in some but not all of the

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<sup>80</sup> *Id.* at 2370.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 2377.

<sup>83</sup> See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). Note, though, a few things about disclaimers. First, in the cases I discuss in this Article, it is inappropriate for the state to insist on disclaimers to cure constitutional harms. See *infra* note 100. Second, we shouldn’t assume that someone’s failure to disclaim connection to compelled speech means the person endorses the message. Maybe she just wants to remain silent. The flip-side is true, too—after being given an opt-out right (such as in *Wooley*), a person’s failure to opt out doesn’t mean she endorses the message in question (there, “Live Free or Die”). For suggestions that we should make more of failure to disclaim or failure to opt out, see *PruneYard*, 447 U.S. at 99 (Powell, J., concurring in part and in the judgment) (highlighting failure to disclaim), and Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 644 (2001) (highlighting failure to opt out).

<sup>84</sup> See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

<sup>85</sup> See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). The Court mentioned both grounds in the opinion and has not since clarified whether either alone suffices to uphold a compelled disclosure rule.

<sup>86</sup> See Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 900 (2011) (“With *Barnette*’s lone holding subject to such varied construction, it is not surprising that the larger body of cases touching negative speech rights has resisted coherent

holdings; the fifth appears sometimes in the Court’s rhetoric, and is a gateway to a sixth ground, which, I will argue, justifies all the holdings.

One ground for deeming compelled speech unconstitutional is misattribution. If the state required me to speak, or carry another’s speech, in a way that would mislead a reasonable person into thinking I was endorsing the message, that would seem the true converse case to the standard free speech violation.<sup>87</sup> Just as I have the freedom to express messages I believe, so should I have the freedom not to endorse—or be perceived as endorsing—messages I do not believe. But only one of the key six cases even arguably turns on this. In most settings the reasonable observer should appreciate that the compelled message is just that: compelled—or the observer at least shouldn’t assume that the speaker/platform is endorsing the message. In *Barnette*, are schoolchildren in the classroom really thinking “oh gosh, Jimmy or Jenny is *so* patriotic!”? They all know, at some level, that this is a ritual, enforced from above. In *Wooley*, it seems unlikely that people think drivers with New Hampshire “Live Free or Die” plates are endorsing that message. We understand that drivers must display state-issued license plates, and that the state slaps its motto on such plates. In *Tornillo* and *Pacific Gas*, the compelled messages are antithetical to the host’s speech—that is why the messages were compelled—so it is hard to see the reasonable observer mistaking them for the newspaper’s or utility’s own expression.<sup>88</sup> I am assuming that the licensed notice in *Becerra* could include a reference to the California Code number that compels it, significantly reducing the chance of misattribution. A disclaimer would also be easy in this setting; the point of my suggesting it is not to overcome the ultimate claim of constitutional right, but to suggest a way to ameliorate misattribution risk.<sup>89</sup> *Hurley* is the one case of the six in which misattribution might be part of the problem, and the only case of the six in which the Court discussed it as a ground for invalidation:

Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow “any identity of viewpoint” between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving parade. Without deciding on the precise significance of the

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exposition.”); see also Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 147 (2006) (“[F]iguring out just when governmentally compelled speech is problematic requires understanding how those compelled to speak are harmed by being so compelled. And that turns out not to be such an easy task.”).

<sup>87</sup> The misattribution issue in *Johanns* and *Pinette* is different from the one here. See *infra* Section V.A.

<sup>88</sup> In a footnote in *Pacific Gas*, in commenting on the possibility that the utility could enclose a disclaimer, the plurality said that “[t]he disclaimer serves only to avoid giving readers the mistaken impression that TURN’s words are really those of appellant.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 15 n.11 (1986) (plurality opinion). But the grounding for the holding was not concern about such mistake.

<sup>89</sup> For more on disclaimers, see *supra* note 83 and *infra* note 100.

likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.<sup>90</sup>

A second possible ground for a right against compelled speech is control over one's body. In *Barnette*, the state was forcing the schoolchildren to say something—to use their bodies against (possibly) their will.<sup>91</sup> Perhaps there is a (presumptive, and often dispositive) right against state interference with our bodies—consider the abortion rights cases, the contraceptive rights cases, and a case involving unconsented stomach-pumping.<sup>92</sup> *Barnette*, but not the other five cases on our list, would fit here.

Seana Shiffrin has suggested a third possible set of grounds for a rule against compelled speech—concerns about belief alteration and insincerity.<sup>93</sup> These are not identical grounds, and Shiffrin states them separately. I am grouping them here, for they seem strongest in the utterance setting, that is, *Barnette* and other similar compulsion. Perhaps it is the case that when we are forced to say the same thing over and over again, the repetition might lead us to believe it. And perhaps even though we and others know we are acting under compulsion, the mere fact of saying something we do not sincerely believe contributes to a culture and/or habit of insincerity. These are important arguments, but they do not hold nearly as well, if at all, in non-utterance settings.

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<sup>90</sup> *Hurley v. Irish-American Gay, Lesbian, & Bi-Sexual Grp. of Bos., Inc.*, 515 U.S. 557, 576-77 (1995) (citation omitted). For a discussion of misattribution in the compelled speech cases, see Abner S. Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833, 839-44 (2010).

<sup>91</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626-30 (1943).

<sup>92</sup> See Greene, *supra* note 52, at 481-82 (discussing these cases). Steve Shiffrin casts this concern as an assault on human dignity, and says it might be present in *Barnette* and *Wooley*. Steven H. Shiffrin, *What Is Wrong with Compelled Speech?*, 29 J.L. & POL. 499, 506 (2014). He adds, “At a minimum, the compelled speech doctrine in cases like these prohibits actions of government that force individuals to be couriers of messages to which they are ideologically opposed.” *Id.* As I set forth below in discussing the “anti-fostering” rationale, the “couriers” argument captures a problem in all of the compelled speech cases. The assault on human dignity rationale, though, is narrower, and perhaps should be limited to settings such as that in *Barnette*. Forcing one to say words is arguably an assault on human dignity; that language seems too strong for conditioning driving a car on using a state-issued license plate with an objectionable motto. I am willing to concede some added insult from the connection of the motto with one's motor vehicle, but it seems a different order of magnitude from being compelled to actually speak, and we should reserve personhood/dignity language for more corporeal insults. This would still be true even if one hypothesized a more objectionable state motto—the concern would still be best cashed out as an objection to being a courier for the state's message, that is, an expressive association/not-in-my-name concern, as developed below.

<sup>93</sup> See Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 854 (2005); see also SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 94-97 (2014).

Fourth, one concern in *Tornillo* and *Pacific Gas* is that specific speech content triggers the right of reply, thus perhaps improperly deterring the speakers (the newspaper or the utility) from saying what they want to say in the first place.<sup>94</sup> This problem is not present in the other cases, and it’s not clear whether this is a ground for the compelled speech holdings or just another way of describing the problem in certain settings.

Fifth, there is a broader anti-fostering concern, perhaps present in all the cases, that gets us closer to the expressive association/not in my name approach for which I will ultimately argue. This is perhaps best seen in the *Wooley* holding. Even if everyone knows (or should know) that the car owner is not endorsing “Live Free or Die,” even if there is no injury to personhood/dignity as with utterances, even if driving around with that motto is not likely to alter one’s beliefs or contribute to insincerity, and even if this is not a case of speech-content-triggering-right of reply, we can still say that the state is compelling one to help it advertise or foster its message.<sup>95</sup> We can see all six of the invalidation holdings through an anti-fostering lens—in each setting, the government is compelling the regulated person or company not just to support the speech in question but also to utter it or carry/host it physically. Perhaps we can ground the invalidations in a free speech theory that, at least presumptively, grants one the liberty to use one’s body or property (broadly conceived, to cover not only *Barnette* but also the car in *Wooley*, the newspaper in *Tornillo*, the billing envelope in *Pacific Gas*, the parade in *Hurley*, and the family planning centers in *Becerra*) to foster or disseminate one’s chosen messages and not those of others.<sup>96</sup>

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<sup>94</sup> See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 14 (1986) (plurality opinion); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

<sup>95</sup> That’s true with government speech, as well; our funds are helping the government foster its message, with which one doesn’t always agree. As we learn from *Johanns*, see *infra* text accompanying notes 138-55, we have no general First Amendment right not to contribute to state speech. I have two points here. First, as I will explain more in Part II, it is best to think of all compelled subsidies for the speech of another as presumptively needing justification; in the government speech setting, we have such justification. Second, in *Wooley*, because the individual motorist is compelled to carry the state’s message on his or her car, it’s best to see the case as compelled speech, rather than compelled subsidy. Here’s one way to think about this: The harm to the Maynards is the same whether or not they are paying tax dollars that support the state speech in question (here, the motto on each state-issued license plate). The harm is from their being forced to carry another’s message (here, the state’s) on their property, and that is best seen not as subsidizing the state’s speech, but as speaking it in the sense of displaying it.

<sup>96</sup> For a mostly similar approach, see Tribe, *supra* note 83, at 645 (“The right that all of these cases affirm is better understood as a right not to be *used or commandeered* to do the state’s ideological bidding by having to mouth, convey, embody, or sponsor a message, especially the *state’s* message, with one’s voice or body or resources, on one’s personal possessions, through the composition of the associations one joins or forms, or in their selection of teachers, exemplars, and leaders”); *id.* at 647 (stating one has a “right not to be used as a *vehicle* for speech”).

Although the core six decisions finding a compelled speech violation can be grounded in a right not to foster another's message (even the state's, through one's body or property), the anti-fostering rationale could use further justificatory grounding. What is it about being compelled to foster another's message that is harmful, if we put aside misattribution, bodily integrity, belief alteration/sincerity, and the deterrent effect of specific speech content triggering specific rights of reply? I suggest that we may see anti-fostering through a freedom of expressive association lens. Compelling me to speak or host another's speech compels me to associate with—or perhaps be associated with—such speech. This is so even if no one is mistaking the message as mine. The speech is still being made, in part, in my name. I might want no speech made in my name, or speech only of my choosing. Connecting or associating me with unwanted messages is a harm to my ability to construct my self in part through my expressive acts. It affects both how the world sees me and how I see myself. So there is a relationship here to misattribution theory and to Seana Shiffrin's belief alteration argument, but my expressive association argument is different. The connection to both is the concern that my expression is being muddled. But the "not in my name" grounding holds even if it is clear that the expression is being made or hosted under compulsion, and even if there is no or little risk that the speaking or hosting of speech will alter my beliefs.

The six cases barely mention this type of grounding.<sup>97</sup> In *Pacific Gas*, the plurality noted that "[t]he Commission's access order also impermissibly requires appellant to associate with speech with which appellant may disagree."<sup>98</sup> And here is that case's final statement of the holding: "We conclude that the Commission's order impermissibly burdens appellant's First Amendment rights because it forces appellant to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints."<sup>99</sup> Part of the association concern, though, was that if the utility did not respond to the message forced into its billing envelope, people might mistakenly think it was the utility's message, and thus the utility was effectively compelled to speak to disclaim that association.<sup>100</sup> I'm not sure the reasonable

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<sup>97</sup> In my first article on compelled speech, I did not discuss this expressive association/not-in-my-name theory. See Greene, *supra* note 52. The principal doctrinal difference between my conclusions there and here is my greater willingness now to accept *Wooley* as correctly decided. See *id.* at 483 (describing *Wooley* as the "most clearly wrong" of the compelled speech and compelled subsidies for speech cases).

<sup>98</sup> *Pac. Gas & Elec. Co.*, 475 U.S. at 15; see also *id.* at 18.

<sup>99</sup> *Id.* at 20-21.

<sup>100</sup> See *id.* at 18. It is insufficient for the state to compel speech—or compel a subsidy supporting speech—and attempt to overcome the presumptive constitutional harm by saying the private speaker can disclaim connection to the message. That forces the speaker to speak when she might choose to remain silent. See Greene, *supra* note 90, at 837, 844, 850; see also *supra* note 83. Note also that things are different when it comes to the Establishment Clause, where it is not improper to demand that the state (or a private party acting with state approval) disclaim religious speech when it is providing an opportunity for private speech and speaker

person would see the public interest group’s billing envelope insert as the utility’s—it was clearly marked as the public interest group’s speech, and clearly opposed to some of the utility’s positions. Moreover, the expressive association argument holds even absent this misattribution/effectively-forcing-disclaimer concern.

In a footnote in *Wooley*, the Court wrote:

It has been suggested that today’s holding will be read as sanctioning the obliteration of the national motto, “In God We Trust” from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.<sup>101</sup>

“Readily associated with its operator” could be thought to imply a point about misattribution, which is wrong in the *Wooley* setting. But it could be another way of making the anti-fostering point that the majority opinion emphasizes.

Before closing this discussion of compelled speech and turning to compelled subsidies for speech, it’s worth spending some time on the Court’s latest compelled speech invalidation, *Becerra*, which presents a difficult problem regarding when a “not in my name” claim should prevail over a state argument that it is compelling the provision of consumer-protecting information. Anti-abortion advocates maintained that the state is unconstitutionally requiring them to provide notice of a state-provided abortion option.<sup>102</sup> Although the existence of such an option is purely factual, and is in some sense uncontroversial (as a pure fact), in the setting of the highly controversial abortion debate the law requires someone advocating one method of exercising a right (“carry the fetus to term”) to provide information about another method of exercising that right (“here is how to locate an abortion provider”). Take a few other examples of where this might be problematic. First, assume optometrists offer service *X* and oppose service *Y*, while ophthalmologists offer service *Y* and oppose service *X*. Assume both *X* and *Y* are legal options. Now assume that the state requires optometrists offering service *X* also to post a notice about the availability of service *Y*, and vice versa for ophthalmologists. Assume that the difference of

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identity might become confusing. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 782-83 (1995) (O’Connor, J., concurring in part and concurring in the judgment) (noting importance of possible disclaimer); *id.* at 784 (Souter, J., concurring in part and concurring in the judgment) (same); *id.* at 817-18 (Ginsburg, J., dissenting) (recognizing absence of disclaimer as important); Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 ALA. L. REV. 337, 371-72 (2016) (arguing that the state should or must issue appropriate disclaimers in certain settings).

<sup>101</sup> *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977).

<sup>102</sup> *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2368-69 (2018). The Court’s invalidation of the unlicensed notice provision seems overly persnickety to me, even at a preliminary stage of litigation, and I won’t address it further.

opinion cuts to the core of how these different medical providers believe good vision is properly attained. Whatever justification there might be for the state to use its own speech to make people aware of both options (or even to push for one option over another), what is the rationale behind the law in question here? Even if the state deems it good for people to know their legal options, the means to that end under this hypothetical law require the service providers to engage in expression that fosters ideas with which they disagree. For a second example, assume a law requiring all pre-K-12 schools to post notices about the availability of other school options. Now assume there is a private school whose founders and administration strongly believe the public schools are failing children or even, perhaps, that the government shouldn't be in the business of educating children. My hypothetical notice law requires the private school to foster the government's message regarding the gamut of educational options, and in so doing interferes with the private school's strongly held ideological beliefs.

In so arguing, I agree with the part of Justice Breyer's *Becerra* dissent<sup>103</sup> that suggests the holding is in some tension with the part of *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>104</sup> that upheld a compelled speech requirement in the abortion setting.<sup>105</sup> As Breyer notes:

That law required the doctor to tell the woman about the nature of the abortion procedure, the health risks of abortion and of childbirth, the "probable gestational age of the unborn child," and the availability of printed materials describing the fetus, medical assistance for childbirth, potential child support, and the agencies that would provide adoption services (or other alternatives to abortion).<sup>106</sup>

*Casey* upheld this requirement as an informed-consent provision, part of the regulation of healthcare, and thus as a legitimate, merely incidental, regulation of expression.<sup>107</sup> Breyer cogently argues that if the state may "tell a woman seeking an abortion about adoption services," it should be permitted to "require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services[.]"<sup>108</sup> But the answer should

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<sup>103</sup> *Id.* at 2384-86 (Breyer, J., dissenting).

<sup>104</sup> 505 U.S. 833 (1992) (plurality opinion).

<sup>105</sup> *Id.* at 883.

<sup>106</sup> *Becerra*, 138 S. Ct. at 2384 (Breyer, J., dissenting) (quoting *Casey*, 505 U.S. at 881).

<sup>107</sup> *Id.* at 2384-85; *see also id.* at 2373 (majority opinion).

<sup>108</sup> *Id.* at 2385 (Breyer, J., dissenting). In discussing the tension between the majority's holding regarding the licensed notice provision in *Becerra* and the compelled speech holding in *Casey*, Justice Breyer also discusses compelled speech provisions that the Court had struck down prior to *Casey*. *Id.* at 2383-84. In *Akron v. Akron Center for Reproductive Health, Inc. (Akron I)*, 462 U.S. 416, 442-49 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 758-71 (1986), the Court invalidated statutory provisions that required doctors to inform women seeking abortions about alternatives to that rights choice (as well as, in *Akron I*, information better understood as of the standard informed consent variety). Breyer notes that in *Casey*, the Court wrote:

not be to uphold the licensed notice in *Becerra*. Rather, the answer should be the majority’s holding on licensed notice in *Becerra*, combined with a revision of the *Casey* compelled speech holding, to invalidate the portion of the compelled speech that goes beyond informed consent about the abortion procedure and extends to providing information about alternatives. The state may use its own speech powers to provide notice of a diversity of options regarding the exercise of a right (or even to push for one of those options), but the Constitution does not permit it to require a private party to advertise rights alternatives with which the private party disagrees.

The difficulty with this argument is that when the state compels speech of the public health and safety variety, either to prevent deception or to provide purely factual and uncontroversial information, sometimes the compelled speaker (often a business that has to post a notice) objects, deeming the matter controversial. Courts have to draw lines between when the required notice is sufficiently nonideological and uncontroversial, and sufficiently backed by widely accepted science, to overcome the objections of those compelled to speak. Despite the difficulty in drawing this line, in some instances we should see the notice requirements as not sufficiently based on widely accepted science,

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To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus, those cases go too far, are inconsistent with *Roe*’s acknowledgment of an important interest in potential life, and are overruled.

*Becerra*, 138 S. Ct. at 2384 (quoting *Casey*, 505 U.S. at 882). One has to be careful when interpreting this passage. The words “[t]o the extent” suggest that there might be aspects of the *Akron I* and *Thornburgh* compelled speech holdings that survive *Casey*. The way to synchronize *Akron I*, *Thornburgh*, and *Casey*, and to make sense of *Becerra*, is to distinguish mere informed consent about the medical procedure being sought—constitutional even if compelled speech—from the state unconstitutionally using a private actor to advertise rights-choice alternatives that the actor wishes not to advertise, promote, or foster.

Note that the Court in *Akron I* and *Thornburgh* was concerned not so much about compelled speech regarding available rights-choice alternatives, but more narrowly about the state compelling speech to persuade women not to have abortions. See *Thornburgh*, 476 U.S. at 762; *Akron I*, 462 U.S. at 444. The latter should be deemed unconstitutional under any plausible not-in-my-name/expressive association theory. My argument here is more expansive, also deeming unconstitutional the state’s compelling a private actor to advertise a diversity of rights-choice alternatives when the matter at hand is controversial/ideological and the compelled speaker’s view is that some of the alternatives are improper, wrong, or sinful.

Note finally this passage from *Casey*:

[W]e depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.

*Casey*, 505 U.S. at 883. On the argument I am presenting here, the state may express a preference for childbirth over abortion via state speech generally, but not through compelling the speech of a private party, even a doctor under the guise of simply regulating the practice of medicine. *But see id.* at 884.



and instead as going to matters of ideological social contest. I have argued in previous work that the state may take positions on controversial as well as uncontroversial matters.<sup>109</sup> But the state should not be permitted to compel private actors to push the state's, or anyone else's, view on controversial/ideological matters.

## II. COMPELLED SUBSIDIES FOR SPEECH

When the state takes money from us for the speech of others, it presumptively violates a constitutional right. But of what sort?<sup>110</sup> And how may this presumption be overcome? In this Part, I will first make the case for a presumptive violation, sounding in the right of expressive association, understood as a “not in my name” harm. Next, I will explain how the presumption is overcome in three different settings, including (most importantly) compelled funding for government speech. Finally, I will describe and rebut Robert Post's thinner view of how the Constitution is implicated in compelled subsidies for speech cases (with reference to his parallel view regarding compelled speech cases and the Free Speech Clause of the First Amendment more generally).<sup>111</sup>

Let's start with the generative case in this line, *Abood*, in which the Court considered an agency shop arrangement between the city of Detroit and the public school teachers' union.<sup>112</sup> Teachers who did not join the union were required to pay fees in lieu of union dues.<sup>113</sup> The union used some of the funds for collective-bargaining activities over wages, benefits, and working conditions, and spent some of the funds on ideological speech, for political candidates or political views.<sup>114</sup> The Court stated this general proposition: “To compel employees financially to support their collective-bargaining

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<sup>109</sup> Abner S. Greene, *Government Endorsement: A Reply to Nelson Tebbe's Government Nonendorsement*, 98 MINN. L. REV. HEADNOTES 87 (2013); Greene, *supra* note 37, at 7-26; Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667 (2001); Abner S. Greene, *State Speech and Political Liberalism*, 28 CONST. COMMENT. 421 (2013).

<sup>110</sup> For a concern about finding proper grounding for these cases, see Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1116 (2005) (arguing that paying a mandatory fee “has too little moral content,” and that compelled subsidization of speech “does not interfere with freedom of belief,” because there is “semantic gulf between the act of paying and the speech it helps fund”). Klass ultimately backs a conception of the right that would apply strongly in a somewhat narrow set of cases: “The compelled subsidization of the speech of others violates the First Amendment only when the funds collected are used to promote the message of an identifiable viewpoint or interest in debate on a controversial political issue.” *Id.* at 1130 (emphasis omitted). As will be clear from my discussion below, the associational/not-in-my-name approach applies to a broader set of cases, although more weakly than Klass's approach.

<sup>111</sup> See *infra* notes 156-71 and accompanying text.

<sup>112</sup> *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

<sup>113</sup> See *id.* at 212.

<sup>114</sup> See *id.* at 212-13.

representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative.”<sup>115</sup> Borrowing from earlier private-sector labor cases, the Court concluded that the state interest in having one authorized representative engage in collective bargaining on behalf of all employees (union members and not) trumped any First Amendment interest.<sup>116</sup> Justice Powell penned a stinging opinion on this point, focusing on the fact that in the public-sector setting, most (if not all) issues can be seen as implicating ideology and not merely the pocketbook.<sup>117</sup> He saw the interest in having an exclusive bargaining representative and free-rider concerns if non-union members do not have to pay fees as insufficient to trump the First Amendment interests in free speech and association.<sup>118</sup> In *Janus*, the Court overruled this part of *Abood*, vindicating Powell’s dissent.<sup>119</sup>

As to the ideological union speech not part of the collective-bargaining process argument, *Abood* unanimously came out the other way:

Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. . . . The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union’s spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.<sup>120</sup>

That the state was compelling funds rather than speech itself (via utterance or displaying/hosting) made no difference to the Court. My treatment of *Abood* throughout the rest of this Article is to this part of the holding (except for a few footnote discussions of *Janus*).

Although *Abood* mentions the freedom of (expressive) association, the opinion does not dig deeply into how compelled subsidies infringe that freedom.<sup>121</sup> These are not instances of corporeal association, where (say) the

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<sup>115</sup> *Id.* at 222.

<sup>116</sup> *Id.* at 222-23, 227-32.

<sup>117</sup> *See id.* at 257-58 (Powell, J., concurring in the judgment).

<sup>118</sup> *See id.* at 255, 259-64.

<sup>119</sup> *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). The Court had been heading in this direction. *See Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083, 1083 (2016) (appellate court ruling following collective-bargaining part of *Abood* affirmed by an equally divided Court); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. Serv. Emps.*, 567 U.S. 298 (2012).

<sup>120</sup> *Abood*, 431 U.S. at 233-34 (citations omitted).

<sup>121</sup> *Id. Janus* relies in part on the freedom of expressive association. *See Janus*, 138 S. Ct. at 2463, 2466, 2468. In *Johanns*, Justice Scalia offered a few possible groundings for the right

state compels a group to admit members or permit leaders it would prefer to refuse. And there is no sense in the *Abood* opinions that the problem is misattribution—that a reasonable observer would trace the union speech in question to all funders of such speech and thereby assume all funders share the union’s views. The best grounding for the associational argument in *Abood* is an anti-fostering, “not in my name” concern. The state was compelling the non-union members to help foster and promote union speech; the non-union members either had specific objections to the speech in question or simply did not want to support the speech (it makes no difference doctrinally which is the case). The not-in-my-name associational concern is either that the non-union member does not wish others to associate her name with the speech (even if others are under no illusion that she supports it) or that she objects to being compelled to seeing herself as associated with the speech, or both. She wants to chart her own expressive path, either by supporting causes with which she agrees, or by remaining silent, or a combination of the two. Even if others do not mistakenly believe she is endorsing the supported messages, there is a distorting, a cheapening, of what she does choose to support. So there is some connection between this way of putting the *Abood* problem and Seana Shiffrin’s concern that compelled speech can be productive of insincerity. But the concern about cheapening the messages one does support through compelling association with other messages can exist even without the deeper or more profound harm of rendering our expression insincere. Furthermore, one might see the harm as one of complicity with the funded message, even without a sense that the complicity has violated moral norms. The complicity entailed in connecting my money to your message is a special sort of complicity; we can capture the nature of the harm by saying that the compelled funders object to speech being made in their name.<sup>122</sup>

The right of expressive association in the compelled subsidies for speech setting is not absolute, and may be trumped by sufficiently strong state interests. I will discuss how the cases have cashed this out (again by going beyond the

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at issue in *Abood*. He wrote, “The reasoning of these compelled-speech cases has been carried over to certain instances in which individuals are compelled not to speak, but to subsidize a private message with which they disagree.” *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557 (2005). And he maintained, “being forced to fund someone else’s private speech unconnected to any legitimate government purpose violates personal autonomy.” *Id.* at 565 n.8. Regarding his first point, as we have seen above, the reasoning of the compelled speech cases is varied, with different concerns animating the different holdings. *See supra* notes 86-101 and accompanying text. The common thread among the compelled speech cases, and *Abood*, is a right of expressive association understood in “not in my name” terms. Regarding Justice Scalia’s second point, “personal autonomy” is too capacious an idea to capture what is going on in the compelled subsidy cases; our constitutional order does not recognize personal autonomy per se as presumptively protected. Perhaps a version or aspect of personal autonomy is in play in compelled subsidy cases, but then we have to figure out the version or aspect in question.

<sup>122</sup> For more on the connection of complicity with the expressive association arguments advanced here, see *supra* notes 33 and 38 and *infra* text accompanying notes 242-43.

Court’s limited statements). Then, I will describe and respond to Robert Post’s different way of examining the material.<sup>123</sup>

Three types of state interest may justify overriding the expressive association right implicated by compelled subsidies for speech: when the funded speech is germane to a nonideological state goal (or otherwise advances a strong enough state interest to outweigh the harm to the associational right), when the funded speech is best understood as a public forum for speakers of various ideologies, and when the subsidy is funding state rather than private speech.

Regarding the first category: This is the justification for *Abood*’s upholding the compelled fees from non-union members for collective-bargaining activity. Wages, benefits, and working conditions are in the common interest of all represented members of the agency shop, and the speech of the funded union (the exclusive bargaining representative) is germane to those common ends. *Janus* overruled this part of *Abood*, discounting the distinctive nature of the exclusive bargaining model and the free-riding concerns from allowing non-union members to be represented by the elected union, without paying anything

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<sup>123</sup> See *infra* notes 156-71 and accompanying text.

for it.<sup>124</sup> *Keller* reached a bifurcated result similar to that in *Abood*.<sup>125</sup> California requires attorneys admitted to practice to join and pay dues to the state bar

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<sup>124</sup> *Janus*, 138 S. Ct. at 2466-69. Public sector collective bargaining necessarily involves matters of public concern, where various workers in the same unit, represented by the designated union, may differ on various issues. *Abood* recognized this, but held that the state interest in securing a stable labor-management bargaining relationship outweighed any First Amendment harm. *See Abood*, 431 U.S. at 217-32. *Janus* flips that conclusion, holding that the agency fee requirement, even for collective bargaining, “violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.” *Janus*, 138 S. Ct. at 2460. In the core doctrinal section of his majority opinion, Justice Alito refers to the First Amendment generally, to free speech, and to the freedom of expressive association. *Id.* at 2463-65.

I agree there is a prima facie First Amendment violation with even the collective-bargaining portion of public employee agency fee arrangements, but believe the state interest sufficient to outweigh the First Amendment harm. That there is a prima facie violation fits with my general argument in this Article—even if freedom of speech is not exactly what is at stake here (there is no misattribution, non-union members may dissent all they want, and the state is not forcing them to say anything or host any message), there is still a presumptive violation of the right of expressive association. This is because the arrangement associates the non-union members with the positions taken by the union, in the broad and weak sense that compelled subsidies make fee payers complicit in the positions taken by fee recipients. Some of the positions the union is advancing in public-sector collective bargaining are on contested ideological matters, and the union is advancing them in the name of all represented employees, union members and non-union members alike.

*Janus* gives short shrift, however, to the key argument backing the agency fee arrangement for collective bargaining. The law makes the elected union the exclusive bargaining representative for all unit employees, union members and non-union members alike. In that capacity, the union must represent all employees fairly, equally, without discriminating between members and non-members. To permit non-union members the benefits of such representation without having to pay anything permits a classic form of free-riding, shifts the financial burden to the union members, and risks drying up sources of funds for the elected union. So long as the system of exclusive bargaining/fair representation is in place, the state interest in ensuring a fairly balanced funding stream is strong. Justice Kagan makes this case well in her dissent, *id.* at 2488-91 (Kagan, J., dissenting), and Justice Alito’s response downplays the core virtues of the exclusive bargaining model and the free-rider concerns, *id.* at 2466-69 (majority opinion). (Indeed, the *Janus* majority seems unhappy about the premise of exclusive bargaining. *See id.* at 2478 (deeming the exclusive bargaining model a “significant impingement on associational freedoms that would not be tolerated in other contexts”). Perhaps this libertarian concern (what else might we call it?) undergirds the First Amendment analysis.) We should see the countervailing harm to a non-union member’s First Amendment rights as real but fairly weak. It is not as strong as in the compelled speech setting, where one is forced to say, display, or host a message. It is best seen as a hit to the freedom of expressive association, but of the weakest sort, not like the *Roberts/Dale* setting (which involves admitting unwanted members to a group) or the *Hurley* setting (which involves admitting a banner display contrary to the affected party’s beliefs). Rather, it requires us to trace an associative connection through money, from compelled payer to speaker. The “not in my name” claim is still present, but we should see it as outweighed by the agency shop system of exclusive and fair bargaining representation.

<sup>125</sup> *Keller v. State Bar of Cal.*, 496 U.S. 1, 15-17 (1990).

association.<sup>126</sup> As in *Abood*, the Court required an opt-out for dissenting members regarding the portion of their dues that goes to ideological activity.<sup>127</sup> But the Court permitted dues to go to regulation of the legal profession and provision of legal services.<sup>128</sup> Even though such activities involve expression, they are seen as a nonideological end.<sup>129</sup> Finally, in *Glickman*, the Court upheld compelled assessments levied on producers of tree fruits (nectarines, peaches, and plums) as part of a collective marketing arrangement; the money was used for, inter alia, generic advertising to which plaintiffs objected.<sup>130</sup> After *Johanns*, which I will discuss soon, *Glickman* can be understood as a government speech case (the USDA was running the program), but bracketing that, it can also be understood as a case involving a presumptive right of expressive association trumped by a state interest in ensuring a robust industry sector (here, tree fruit production and sales).

Regarding the second category: The University of Wisconsin requires students to pay fees to support various student activities; some of the funds support ideological expression of student groups.<sup>131</sup> In *Board of Regents v. Southworth*,<sup>132</sup> the Court upheld the program, distinguishing *Abood* and *Keller*: in those cases the compelled money was subsidizing (in part) the ideological speech of one entity; here the compelled funds are subsidizing a wide array of expression, not benefiting any particular viewpoint(s).<sup>133</sup> The Court held that the proper analogy is to the public forum (and designated public forum) cases.<sup>134</sup> Although the issue in those cases is denial of access and here it is compelled subsidies, the state here is opening a kind of forum for speech (through funds), and neither the state (in the public forum setting) nor the student funders of speech (here) should be deemed connected to or associated with any particular message. *PruneYard Shopping Center v. Robins*<sup>135</sup> is the most important analogous case. The Court upheld a state constitutional requirement that private shopping center owners permit speech activity of various groups, even if the owners object to some of the messages or would prefer not to host expressive activities at all.<sup>136</sup> The Court saw the requirement as opening a kind of (private) public forum, where the likelihood of misattribution is low,<sup>137</sup> and (I add, as a gloss) any “not in my name” claim is attenuated by the multitude of expression

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<sup>126</sup> See *id.* at 4-5.

<sup>127</sup> *Id.* at 16-17.

<sup>128</sup> *Id.* at 15-16.

<sup>129</sup> I assume this bifurcated *Keller* holding survives *Janus*, but we will see.

<sup>130</sup> *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 467-77 (1997).

<sup>131</sup> *Bd. of Regents v. Southworth*, 529 U.S. 217, 222 (2000).

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

<sup>133</sup> *Id.* at 230-34.

<sup>134</sup> *Id.* at 229-31.

<sup>135</sup> 447 U.S. 74 (1980).

<sup>136</sup> *Id.* at 74-75.

<sup>137</sup> *Id.* at 87.

being ushered in by the state mandate. Similarly, in *Southworth*, the objecting students might have a presumptive claim not to fund speech with which they disagree, but because their money is funding many student groups, the connection of any student to any message, either in the minds of others or in the minds of objecting students, is weak, overridden by the state interest in providing seed money for all manner of expression.

Regarding the third category: In *Johanns*, the Court held that there is no constitutional right blocking compelled subsidies for government speech.<sup>138</sup> The Court confronted its third case of a targeted subsidy for a specific food industry—here, beef producers.<sup>139</sup> Here is the core of the *Johanns* holding:

“Compelled support of government”—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. . . . We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.<sup>140</sup>

The Court proceeded to so hold.<sup>141</sup> But there’s not much reasoning in Justice Scalia’s majority opinion. Here’s the way I suggest we should see it: Any compelled subsidy for expression presumptively violates one’s expressive associational rights, of the not-in-my-name variety. But when the funded expression is that of the state, the rights claim vanishes, because government speech is properly deemed to be in one’s name, that is, in the name of the citizens who fund the speech and whom the government represents.<sup>142</sup> Viewing the

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<sup>138</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557-67 (2005).

<sup>139</sup> In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), involving mushrooms, the Court distinguished *Glickman* by holding that when generic advertising alone is at stake, without the connection to a broader collective marketing scheme, the expressive association right of dissenting producers is violated. The Court could have come out the other way by understanding that the program, and the ads, were that of the federal government, but it did not reach the government speech argument because it had not been raised below. *See id.* at 416-17.

<sup>140</sup> *Johanns*, 544 U.S. at 559 (citation omitted).

<sup>141</sup> *See id.* at 560, 562. One slightly odd thing about *Johanns* is that there is no canonical statement of this sort: “there is no First Amendment right to challenge funds exacted for government speech.” But there is no other way to understand Justice Scalia’s majority opinion.

<sup>142</sup> Although he rejects the presumptive invalidity of compelled subsidies for expression, *see infra* text accompanying notes 156-71, Robert Post offers some support for my conclusion here. *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, 581 n.124 (2006).

This connection of citizen with state speech is consistent with my treatment, in earlier writing, of the various ways First Amendment doctrine recognizes a disconnect between actor and message when conditions of generality and intervening act are present. *See* Greene, *Religious Freedom*, *supra* note 38, at 185-90. Thus, in the line of cases involving a state-created forum for speech, we don’t attribute resulting private religious speech to the state,

*Aboud* right through a “not in my name” lens sets up the distinction *Johanns* later draws.

The argument that the state speaks for its citizens follows from how we understand the state to have legitimacy in a republican form of democratic governance. By legitimacy I do not mean to refer to the justifiability of the state’s demanding our obedience to law.<sup>143</sup> Here, I refer to legitimacy in the representational sense—at least in the United States, and in similar nations, our elected and appointed legislative, executive, and judicial representatives and officers hold office for us, as properly elected by us or appointed by those we elect. Thus we have the commonplace (and correct) understanding that citizens are sovereign authors and that government office-holders are agents. The harder question is whether we can say that citizen-authors are accountable or responsible for the actions of office-holder agents. For purposes of this Article, the question is about the expressive acts of such agents. The issue is not whether citizens could be held liable for monetary or equitable relief, but rather whether it is appropriate to blame citizens for state speech and whether it is appropriate for citizens to regret in a self-critical way state speech with which they disagree. For example, assume the Environmental Protection Agency issues an official document denying a human role in climate change. That is the official statement

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because the forum allows many to speak on various issues, and thus the attribution is to those private speakers only. *See, e.g.,* *Widmar v. Vincent*, 454 U.S. 263 (1981). In a few compelled speech and compelled subsidy cases, *see supra* text accompanying notes 83, 131-37, we allow the state to compel one to host or fund what is essentially a forum for many speakers. Again, because of the wide variety of resulting speech from other actors, we see a disconnect from, and thus no attribution to, the compelled party. And in some cases raising Establishment Clause challenges to state funding, the Court upholds programs largely because they are general (they don’t fund religious recipients only) and because individuals make the decisions regarding where to spend the money. *See, e.g.,* *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding, on these grounds of generality and private choice, state-funded vouchers program used substantially for private religious schools). One might argue, based on these lines of case law, that we should similarly see citizens as disconnected from state speech, because there is so much of it, on so many topics, and because government office-holders, and not the citizens, are disseminating the messages. This misses the main point that follows in the text, however: as a conceptual matter of republican form of government, at least in the U.S. system, there is no disconnect of this sort, but rather we properly see governmental agents as speaking for the authorizing citizens as a general, wholesale matter.

In the alternative, if one were not inclined to accept my argument that the state speaks in the name of its citizens, one could use the fact that taxpayer dollars are funding a wide array of state expressive activities to help break the link between funder and speech and thus weaken the expressive association rights claim. If, in the setting of compelled funding for private speech this public forum analogue is enough to overcome the expressive association claim, *see Southworth*, 529 U.S. at 229-31, then this argument could work as well in the setting of compelled funding for state speech. This is so, though, if (and only if) one first rejects my primary argument, holding citizens responsible for the expression of their governmental agents.

<sup>143</sup> I will say more below on that issue, and on the connected question of whether we have a moral duty to obey the state’s law (the question of political obligation).



on the matter of the executive branch of the federal government. My claim is that it would be, therefore, also the official statement on the matter of the citizens of the United States, as citizens. If one of us were then to say “Not in my name!,” that should be understood to mean “you have spoken for me in your role as my agent, I regret the statement and think it wrong, and I am expressing displeasure in part because this statement is now associated with me as principal/author.” It should not be understood to mean “this is wrong and I disagree with it and never would have authorized it—therefore it can’t properly be said to be in my name.” One agency cost of a republican form of government is that there will be periods of time (perhaps long ones) during which our authorized agents will be acting for us in ways with which we disagree.<sup>144</sup> But, at such times, they still are *acting for us and in our name*. The connection of a citizen to the expression of her agents is broad and weak, similarly to how the expressive association harms discussed throughout this Article are broad and (possibly) weak (i.e., not necessarily deep and profound)—broad in that it can arise in various settings, in various ways; weak in that if we appreciate the agency costs aspect of the state speaking for its citizens, the connection of any state message to the citizens will properly be understood as attenuated, as not true endorsement, but rather as *association* of message with citizen-as-authorizing-principal.

In his book, *In Our Name*, Eric Beerbohm offers a rich account of the responsibilities of citizens in a democratic state.<sup>145</sup> Throughout, he seeks a middle ground between a merely associative account, which he says would lead to too much citizen responsibility for state action, and an account that would render us responsible for a narrow set of intentional joint actions only. For Beerbohm, citizens are responsible for state action to the extent of their “role and causal impact.”<sup>146</sup> He adds, “to say that a state acts unjustly in my name is to make a claim about my individual moral responsibility. It is to say something meaningful about my causal contribution to the state’s action.”<sup>147</sup> Mere membership in the polity/association with the state as a citizen is insufficient for citizens to be responsible for state action.<sup>148</sup> My view about citizen obligation is in many ways similar, though cashed out in the debate about the moral duty to obey the law (more about that in a moment). If we are focused, though, on whether citizens properly bear some responsibility for the expressive acts of their governmental agents, I argue that a conceptual account of the agency relationship in a republican form of government properly links citizen to state message. Beerbohm is in part concerned about the harms the state can cause with

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<sup>144</sup> See ERIC BEERBOHM, *IN OUR NAME: THE ETHICS OF DEMOCRACY* 193-94, 200-01 (2012) (discussing the continuous authority and responsibility that citizens have regarding acts of their governmental agents).

<sup>145</sup> *Id.* at 1-24.

<sup>146</sup> *Id.* at 282.

<sup>147</sup> *Id.* at 281.

<sup>148</sup> *Id.* at 63, 226, 279-80.

action rather than with expression,<sup>149</sup> and wants a strong sense of citizen responsibility but not from our mere membership in the polity as citizens. His account of democratic complicity is this: “x is liable for causally contributing [and it is clear this is meant to extend beyond but-for causation] y to political injustice through democratic role z.”<sup>150</sup> But our causal footprints are unequal; “[o]ur relation to injustice as citizens can range from coprincipals to active and then passive accessories.”<sup>151</sup> Perhaps my view of citizen responsibility for state speech can be synched with Beerbohm’s variegated, contribution-specific view, if one accepts the claim that mere citizenship is sufficient for holding the authorizing citizen-principals accountable for state messaging. We could still require more than mere membership/association to hold citizens accountable for harms from not merely expressive state action, as Beerbohm wants to do.

To close out this discussion of the state speaking for its citizens, I need to distinguish the arguments about political obligation and legitimacy made in my book *Against Obligation*.<sup>152</sup> There, I maintained that we don’t have a general moral duty to obey the law (the political obligation issue), that the sources of authority to which some adhere are multiple, and that the state should therefore accommodate such sources (often, but not necessarily, religious).<sup>153</sup> I argued as well that if we view “political legitimacy” as requiring the state to justify generally its claims that we all obey the law all of the time (at least as a prima facie matter), then the state lacks such legitimacy, correlatively to there being no general moral duty to obey the law.<sup>154</sup> These arguments might suggest I would take a more skeptical view of citizen connection to state expression. But, consistent with Beerbohm’s helpful approach that sees citizen accountability as variegated, my positions are consistent. To demand that we all obey the law all of the time (even merely presumptively) is a significant demand, conflicting at times with other norms that we hold dear and impinging in serious ways on what we may and may not do. To say we are accountable for state expression is also demanding, but less so. Conceptually, I am adopting a type of associative obligation account for citizen responsibility for state speech, although I reject an associative obligation account backing a moral duty to obey the law.<sup>155</sup> These two positions make sense if one views the nature of the citizen’s association with

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<sup>149</sup> *Id.* at 63, 226-51.

<sup>150</sup> *Id.* at 240.

<sup>151</sup> *Id.* at 242.

<sup>152</sup> GREENE, *AGAINST OBLIGATION*, *supra* note 26.

<sup>153</sup> *Id.* at 135-60.

<sup>154</sup> *Id.* at 24-34.

<sup>155</sup> *Id.* at 63-94. In rejecting the associative obligation argument for political obligation, I suggested that when citizens use “we” as in “we are at war,” they are not necessarily jointly committed to that end and indeed often “keep a wary eye out for assertions of state power that misunderstand our nation’s heritage or that claim shared goals.” *Id.* at 89. I was not at that point discussing whether the state should be understood conceptually to be speaking for the citizens. My claim here is that it should be, and that citizen critiques of state speech are best understood as concerns about what the agent is saying in the name of the principal.

the state as authorizing governmental officials to speak in the citizen's name, but not as necessarily placing demands of obedience on the citizen.

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In several articles, Robert Post has challenged the view that compelled speech and compelled subsidies for speech presumptively trigger First Amendment scrutiny.<sup>156</sup> Referring to his free speech theory writings, Post maintains that “First Amendment concerns are not automatically activated whenever expression is restricted,” but only when “communication is regulated in a manner that implicates specific First Amendment values,” most importantly, “democratic self-governance and participation in the construction of public opinion.”<sup>157</sup> The same is true, argues Post, for compelled speech. Thus, according to Post, compulsory jury service, compelled testimony, reporting requirements, securities disclosures, and labeling requirements are examples of state action that do not trigger First Amendment scrutiny merely by compelling speech (or by compelling activities that might include compelling speech).<sup>158</sup> The same is true, he contends, for compelled subsidies for speech.<sup>159</sup> Similarly, Post maintains that “only those associations dedicated to the kind of speech that is protected by the First Amendment can come within the umbrella of the First Amendment right of association.”<sup>160</sup>

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<sup>156</sup> See Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015) [hereinafter Post, *Compelled Commercial Speech*]; Post, *supra* note 142; Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195 [hereinafter Post, *Compelled Subsidization of Speech*]; Kathleen M. Sullivan & Robert C. Post, *It's What's for Lunch: Nectarines, Mushrooms, and Beef—The First Amendment and Compelled Commercial Speech*, 41 LOY. L.A. L. REV. 359 (2007) (reporting here on Post's contributions alone).

<sup>157</sup> Post, *Compelled Subsidization of Speech*, *supra* note 156, at 213; see also Post, *Compelled Commercial Speech*, *supra* note 156, at 873.

<sup>158</sup> See Post, *Compelled Subsidization of Speech*, *supra* note 156, at 213; see also Post, *Compelled Commercial Speech*, *supra* note 156, at 913; Sullivan & Post, *supra* note 156, at 369.

<sup>159</sup> See Post, *supra* note 142, at 575.

<sup>160</sup> Sullivan & Post, *supra* note 156, at 375. For a related argument about the narrowness of First Amendment coverage, see Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 86 n.27; Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. FORUM 346, 347-49 (2015) [hereinafter Schauer, *Out of Range*]; *id.* at 347 n.6 (citing Schauer's prior writings on this subject). Schauer says that “[s]peech and communication are at the center of contract law, for example, but it is laughable to suppose that all, most, or even much of contract law in any way implicates the First Amendment.” Schauer, *Out of Range*, *supra*, at 347. We must initially demarcate the jurisdictional boundary, as it were, of any rule, before getting into how to apply it. The First Amendment, says Schauer, is no different. *Id.* at 348. The gist of my response to Post's similar argument is that when we claim, for example, that the First Amendment has nothing to do with possible regulatory matters involving contract language, we obscure the preliminary work we're doing in ruling contract law out of bounds from First Amendment coverage. The better way of seeing it is

There is a better way to see this, both normatively and descriptively. We will always have to balance the value of the individual expression right or interest (which may include the value of expression to society as a whole, but may not) against the state’s reasons for regulating. Sometimes the doctrine does this fairly openly. For example, the familiar categories in which speech may (sometimes) be regulated based on content involve a kind of categorical balancing of value versus harm. The resulting doctrinal tests represent the cashing out of the balance. We see this with *Brandenburg v. Ohio*<sup>161</sup> (incitement), *Chaplinsky v. New Hampshire*<sup>162</sup> (fighting words), *Miller v. California*<sup>163</sup> (obscenity), *New York Times Co. v. Sullivan*<sup>164</sup> and *Gertz v. Robert Welch, Inc.*<sup>165</sup> (libel), and *Central Hudson Gas & Electric Corp. v. Public Service Commission*<sup>166</sup> (commercial speech). We engage in such balancing as well when the government regulates based on content outside of the categories; then courts engage in a kind of ad hoc strict scrutiny (very tough, but not impossible, for the state to win).<sup>167</sup> And we balance in cases involving content-neutral regulation, whether the regulation of speech is “incidental” to the regulation of conduct

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that there are always/usually sufficient state interests to trump any free speech claim regarding contracts. My critique of Schauer here is similar to my critique of his theory of “literal” or “plain” meaning in statutory interpretation. See Abner S. Greene, *The Work of Knowledge*, 72 NOTRE DAME L. REV. 1479, 1484-92 (1997).

Some scholars and Justices are increasingly concerned about the “Lochnerizing” or “weaponizing” of the First Amendment to achieve what we might call libertarian or anti-regulatory ends. See, e.g., *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (accusing the Court of “weaponizing” First Amendment); *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2380-83 (2018) (Breyer, J., dissenting) (warning that majority’s approach in using First Amendment in *Lochner*-like fashion to strike down regulation “threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation”); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133. See generally Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016). As with my response to Post and Schauer, my reaction to these opinions and scholarship is that we will do better by acknowledging the varied First Amendment interests at stake in many of these cases, including cases that seem to involve garden-variety commercial regulation, and appreciating that there’s no avoiding a balancing of some kind. We can be confident that state interests will often be sufficient to overcome broad, thin speech or expressive association claims. I plan to work through some of this in future writing.

<sup>161</sup> 395 U.S. 444 (1969).

<sup>162</sup> 315 U.S. 568 (1942).

<sup>163</sup> 413 U.S. 15 (1973).

<sup>164</sup> 376 U.S. 254 (1964).

<sup>165</sup> 418 U.S. 323 (1974).

<sup>166</sup> 447 U.S. 557 (1980).

<sup>167</sup> See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 3 (2015) (upholding ban on, inter alia, “expert advice or assistance” as part of material support for terrorism statute); *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) (upholding restriction on political speech in public forum to prevent voter intimidation and election fraud).

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(*United States v. O'Brien*),<sup>168</sup> or if it is direct regulation of the time, place, and/or manner of speech.<sup>169</sup> That we easily permit regulation of perjury, bribery, and blackmail, and that we generally see no problem with disclosure requirements in various regulated industries or in commercial transactions (one could mention other instances of forbidding or compelling speech), is not because the expression at issue in these examples is invisible to the First Amendment. We only know that a case is easy—that the individual interest is weak and that the state interest is strong (or strong enough)—after we have determined that, though the state has regulated expression, it has done so in a way with which we are comfortable. In doing this kind of balancing, we take into account the values on which Post has been focused (democratic self-governance and construction of public opinion) as well as other values. For example, unless one is committed to a thin First Amendment or an unrealistic grounding, we protect artistic expression for personhood reasons that are not necessarily connected to democratic self-governance or construction of public opinion. To conclude that some speech regulation is invisible to the First Amendment is to place in the background, or beneath the surface, the justificatory work we are necessarily doing in making our value and harm assessments. In our constitutional culture, expression has distinctive value, and any regulation of it requires us to be alert to distinctive kinds of risks. So, I would agree with Post that, for example, bribery laws and laws compelling certain boilerplate disclosures in real estate deals are (almost always) constitutional. But on my approach, we would acknowledge that expression is being regulated, our First Amendment antennae would go up, and then we would see that the state interests easily trump whatever individual interest might be present in avoiding regulation.

I make the same claim regarding compelled subsidies of speech. When the state takes my money for the speech of private actors, I have a presumptive “not in my name” claim of associational right, which is often hard for the state to overcome.<sup>170</sup> When the state takes my money to pay for a public service advertisement to ask people to do something (for example, stop smoking or promote energy conservation), I similarly may invoke a presumptive “not in my name” claim of associational right. I might enjoy smoking or think it’s none of the state’s business, and I might think we would be better off with more energy consumption. We do better by acknowledging that at a sufficiently broad level of generality—i.e., “the state has taken my money for expression not my own”—there is a need for justification. The (correct, in my view) holding of *Johanns* is that when compelled subsidies go for state speech, my presumptive claim of right is trumped by the state’s properly speaking for all citizens, whether I agree or disagree with the particular message (or whether I agree or disagree with the state’s using taxpayer dollars for any expression, or for any controversial

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<sup>168</sup> 391 U.S. 367 (1968).

<sup>169</sup> See, e.g., *Lee v. Int’l Soc’y for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992) (invalidating literature distribution ban in nonsecure areas of public airport terminals).

<sup>170</sup> But see *supra* text accompanying notes 124-55.

expression). The *Johanns* conclusion (no First Amendment right when compelled subsidies fund state speech)<sup>171</sup> requires an argument, to be sure, but the discussion starts at the right point—with the presumption of coercive infringement of liberty that needs justification if it is to stand.

### III. *ROBERTS, DALE, AND THE RIGHT OF EXPRESSIVE ASSOCIATION ITSELF*

I have characterized “not in my name” claims of constitutional right in terms of the right of expressive association. The Court’s development of the right of expressive association *simpliciter*—without clear instances of compelled speech or subsidy—has occurred primarily in cases about compelled membership in which there is concern that such compulsion would distort the expression of the groups in question. In *Roberts v. United States Jaycees*,<sup>172</sup> the Court explained that the Constitution offers some protection for the rights of intimate and expressive association. Regarding the latter, the Court explained, “we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>173</sup> The Court upheld the application of Minnesota’s public accommodations anti-discrimination law to the Jaycees, concluding that requiring the Jaycees to admit women as full members would not impede the Jaycees’ freedom of expressive association,<sup>174</sup> or that if it would, such a harm was outweighed by the state interest in assuring equal access to places of public accommodation on the basis of sex.<sup>175</sup> Two similar decisions followed.<sup>176</sup>

Then, in *Boy Scouts of America v. Dale*,<sup>177</sup> the Court went the other way, ruling unconstitutional an application of New Jersey’s public accommodations anti-discrimination law that would have required the Boy Scouts to accept an openly gay man as an assistant scoutmaster, against the Boy Scouts’ assertion that “homosexual conduct is inconsistent with the values it seeks to instill.”<sup>178</sup> Although the New Jersey Supreme Court had held that applying the law would not impede the Boy Scouts’ message and that the law wasn’t compelling the Boy

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<sup>171</sup> There are at least two constitutional restrictions on state speech. As I discuss in Part IV, the Establishment Clause places some limits on the state’s speaking in our name. And the Equal Protection Clause is probably best understood as a bar to state speech that denigrates persons on the basis of race and perhaps other protected characteristics. See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 124-28 (2007); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 658-65 (2013). I am not addressing who should have standing to bring such claims.

<sup>172</sup> 468 U.S. 609 (1984).

<sup>173</sup> *Id.* at 622.

<sup>174</sup> *Id.* at 626-28.

<sup>175</sup> *Id.* at 628-29.

<sup>176</sup> See *N.Y. State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1 (1988); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

<sup>177</sup> 530 U.S. 640 (2000).

<sup>178</sup> *Id.* at 644.

Scouts to express anything,<sup>179</sup> the Court took a different view of the matter. Here were the key conclusions: “The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”<sup>180</sup> And this: “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”<sup>181</sup> But Dale was an exemplary scoutmaster—there was no evidence that he was using that position to advance anything about the rights of gay persons—and how employing Dale as a scoutmaster under compulsion of state law would “send a message” that the Boy Scouts “accepts” homosexual conduct is a bit of a mystery. Some, though, support *Dale* on different reasoning: the case is about intimate association (or the substantive due process rights of parents), and is thus about parental choices regarding child-rearing;<sup>182</sup> or the case is about expressive association but of the corporeal rather than messaging kind, that is, about restricting the state’s ability to insist that a private group must accept certain persons as leaders or members.<sup>183</sup> That kind of expressive association is not the topic of this Article. To the extent we accept Chief Justice Rehnquist’s reasoning, *Dale* is the one time the Court has relied on expressive association itself, in the messaging setting, to invalidate state action. On the Court’s reasoning, the State was compelling the Boy Scouts to associate in a way that would send a message that was not properly in its name. We can sort it with the compelled speech and compelled subsidies for speech cases.

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<sup>179</sup> *Id.* at 646-47.

<sup>180</sup> *Id.* at 648.

<sup>181</sup> *Id.* at 653.

<sup>182</sup> See Laura Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 862-63 (2007).

<sup>183</sup> See *supra* note 17; see also ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 128-30 (2010) (supporting *Dale* as a right to exclude case); Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 825, 834-36 (2002) (supporting a right of organizational autonomy generally; discussing *Dale* in various places without firmly supporting or defending its holding); Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women’s Blue Water Fishing Club) Can Discriminate*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 77, 85 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016) (discussing “right of close association” without coming down either way regarding *Dale*’s holding). For general support for a right to exclude for private associations, see George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION 35, 59 (Amy Gutmann ed., 1998) (asserting that *Roberts* was wrongly decided); Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in FREEDOM OF ASSOCIATION, *supra*, at 75, 79 (contending that *Roberts* unsettled a public/private line regarding where state may regulate). See generally Randall P. Bezanson, Sheila A. Bentzen & C. Michael Judd, *Mapping the Forms of Expressive Association*, 40 PEPP. L. REV. 23 (2012) (giving overview of corporeal aspect of right of expressive association).

#### IV. ESTABLISHMENT CLAUSE

The Court has thrice held that a state-sponsored religious display violates the Establishment Clause. In *Stone v. Graham*,<sup>184</sup> without much analysis, it invalidated the posting of the Ten Commandments on public school classroom walls. In *McCreary County v. ACLU*,<sup>185</sup> it invalidated the display of the Ten Commandments on a county courthouse wall. And in *County of Allegheny v. ACLU*,<sup>186</sup> it invalidated a crèche (nativity scene) placed atop county courthouse steps. The Court has also upheld a crèche that was part of a larger holiday display in a public park (*Lynch v. Donnelly*);<sup>187</sup> a menorah that was placed next to a Christmas tree and a sign promoting liberty (the other half of *Allegheny*);<sup>188</sup> and a Ten Commandments monument that was included among many secular monuments on state capitol grounds (*Van Orden v. Perry*).<sup>189</sup> Since Justice O’Connor announced the “endorsement” test in her concurring opinion in *Lynch*, the center of the Court has adopted and applied that test.<sup>190</sup> It focuses on the expressive harm from state-sponsored religious displays, with a concern for the equal citizenship status of minority religious groups (or people with no religion at all). I will describe how the endorsement test appears to work and summarize some of the scholarship about that test. Although I am generally sympathetic to O’Connor’s approach, there is another way of looking at the problem in these cases—through the expressive association/not-in-my-name lens I have developed in this Article.

In *Lynch*, Justice O’Connor wrote, “[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”<sup>191</sup> Government “endorsement or disapproval of religion” is a prime example of this problem, she continued.<sup>192</sup> “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”<sup>193</sup> Justice Brennan disagreed with O’Connor’s willingness to uphold the crèche in *Lynch*, taking the concerns of her endorsement test to a different conclusion: “[T]he City means to express solidarity with the Christian message of the crèche and to dismiss other faiths as

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<sup>184</sup> 449 U.S. 39, 42-43 (1980) (per curiam).

<sup>185</sup> 545 U.S. 844, 881 (2005).

<sup>186</sup> 492 U.S. 573, 579 (1989).

<sup>187</sup> 465 U.S. 668, 687 (1984).

<sup>188</sup> *Cty. of Allegheny*, 492 U.S. at 579.

<sup>189</sup> 545 U.S. 677, 681 (2005) (plurality opinion).

<sup>190</sup> Despite the Court’s personnel changes since Justice O’Connor retired in early 2006, no case has discarded the endorsement test in the setting of state-sponsored religious symbols, at least not as of this writing.

<sup>191</sup> *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring).

<sup>192</sup> *Id.* at 688.

<sup>193</sup> *Id.*



unworthy of similar attention and support.”<sup>194</sup> Over the course of several opinions discussing the endorsement test, O’Connor clarified that we should apply the test from the point of view of a reasonable observer who is aware of the history and context of the symbol in question.<sup>195</sup> Other Justices have adopted the endorsement test, with some variations.<sup>196</sup> And in his opinion for the Court in *McCreary*, Justice Souter relied on the “no predominant, express religious purpose test”<sup>197</sup> to similar effect as the endorsement test. His concern was the divisiveness and strife that get stirred up when a religious majority advances its religious interests openly through state action, and the way such action turns nonadherents into outsiders.<sup>198</sup>

Some scholars have supported the endorsement test, focusing on the concern with religious effect and on the way in which a clearly sectarian, state-sponsored, religious symbol expresses a message that nonadherents are second-class citizens, or if that seems too strong, at least that they are outsiders regarding not only the polity’s preferred religion, but also its preferred religion as refracted through state power.<sup>199</sup> There is pushback, too, from different quarters. Matthew Adler has advanced a general critique of expressive theories of law.<sup>200</sup> Steven

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<sup>194</sup> *Id.* at 713 (Brennan, J., dissenting).

<sup>195</sup> See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 773, 779-80 (1995) (O’Connor, J., concurring in part and concurring in the judgment); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 631 (1989) (O’Connor, J., concurring in part and concurring in the judgment); *Lynch*, 465 U.S. at 690-92 (O’Connor, J., concurring); B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407, 1412-23 (2014) (setting forth brief history of the reasonable observer standard in the endorsement test setting).

<sup>196</sup> See *Van Orden v. Perry*, 545 U.S. 677, 707-36 (2005) (Stevens, J., dissenting); *Pinette*, 515 U.S. at 797-816 (Stevens, J., dissenting); *Cty. of Allegheny*, 492 U.S. at 592-94 (majority opinion); *id.* at 650 (Stevens, J., concurring in part and dissenting in part).

<sup>197</sup> See *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005). For my discussion of this test, see Greene, *Political Balance*, *supra* note 26, at 1614-33.

<sup>198</sup> See *McCreary Cty.*, 545 U.S. at 860-61, 863.

<sup>199</sup> See Thomas C. Berg, *What’s Right and Wrong with “No Endorsement,”* 21 WASH. U. J.L. & POL’Y 307, 320-21 (2006) (focusing on “voluntarism” concept, would require state to “stay out of inherently religious matters”); Hill, *supra* note 195; B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 539-44 (2005) (arguing, despite some critique of the test, for a rebuttable presumption that religious symbols on government property violate the Establishment Clause); Kenneth L. Karst, *The First Amendment, The Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503 (1992); Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 148-56 (1992) (after both supporting and critiquing endorsement test, proposing a formulation of it that would invalidate state symbolic speech that prefers one religion over others).

<sup>200</sup> Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000). For some pushback to Adler, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000). Adler responded. See Matthew D. Adler, *Linguistic Meaning, Nonlinguistic “Expression,”*

Smith has argued that the endorsement test is too murky to apply consistently, that the reasonable observer test is a cover for smuggling in judicial views, and more fundamentally, that expressive harm is insufficient for an Establishment Clause violation.<sup>201</sup> On this last point, Noah Feldman agrees and would, generally speaking, uphold state-sponsored religious symbols.<sup>202</sup>

There is another way of looking at the problem of state-sponsored religious symbols. When the state speaks, it speaks in the name of all of its citizens, not just some. When it places a Christian nativity scene atop its county courthouse steps (as in *Allegheny*), it is saying, among other things: “We are celebrating the birth of Jesus Christ, our Lord and Savior.” But who is this “we?” The state cannot purport to speak for non-Christians (and some Christians have a concern with the state speaking for them in the way suggested here). To such blatantly foregrounded state-sponsored religious symbols, a nonbeliever may rightly respond, “not in my name.”<sup>203</sup> This is so whether the person is objecting as taxpayer, and thus she is associated with the religious state speech through her tax dollars, or as citizen, and thus she is associated with the religious state speech through being part of the implicit “we.” There are potential federal court standing issues with this theory, as the Court has developed its Article III standing concepts.<sup>204</sup> I put those aside for this discussion. My taxpayer or citizen

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*and the Multiple Variants of Expressivism: A Reply to Professors Anderson and Pildes*, 148 U. PA. L. REV. 1577 (2000).

<sup>201</sup> Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266 (1987).

<sup>202</sup> NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 15-16, 238-44 (2005).

<sup>203</sup> Two responses come to mind. One is that when it places the crèche atop the courthouse steps, the state is not speaking for all citizens, but just the Christian citizens. Generalized across various areas of government speech, this is not a very attractive view of the state as representing the people. My arguments favoring a robust role for secular state speech, *see infra* text accompanying notes 222-23, and adopting a version of republican form of government theory that claims the state speaks in the name of the citizens, *see supra* text accompanying notes 138-55, do not easily coexist with the view that on some matters the state is speaking for only a portion of the represented people. The other response is that religion should not be seen as distinctive, and thus that the state may speak for all the people regarding who is Lord and Savior just as it may on other matters. I address this later in this Article. *See infra* text accompanying notes 206 and 218-21.

<sup>204</sup> The Court has generally rejected citizen standing in federal court. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571-78 (1992). To the extent the concern is absence of injury in fact, this would be a jurisdictional bar. To the extent the concern is that citizen suits present generalized grievances—real, but shared by all citizens—the bar is prudential, meaning Congress could overcome the hurdle through appropriately tailored statutory authorization. *See id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment) (“Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”); *Allen v. Wright*, 468 U.S. 737, 750-51 (1984) (discussing prudential versus constitutional or jurisdictional bars to standing). States may permit lawsuits in state court without meeting the strictures of federal Article III standing

injury idea could be adopted in state courts, could be adopted by the Supreme Court for the federal courts if it adjusted its thinking, and in any event is meant as a substantive ideal theory of Establishment Clause harm that the state should follow regardless of whether the courts are willing to recognize a properly injured person.

This expressive association way of seeing the harm from state-sponsored religious symbols requires us to follow the case law that views religion as distinctive, at least some of the time. Recall the line of argument in the discussion of compelled subsidies for speech. There is a presumptive constitutional violation from such subsidies, overcome in the setting of state speech because such speech is properly in the name of the citizens.<sup>205</sup> This could apply as well to state-sponsored religious speech. But as I just argued, such expression is *not* properly in the name of the citizens. So we need to distinguish not only private speech from state speech (as in the compelled subsidies section), but also state secular speech (properly deemed in the name of the citizens) from state religious speech (not properly in the name of the citizens, because of its sectarian nature, and because we properly deem state sponsorship of religion distinctive). For those who think state religious speech is no different from state secular speech, my position won't work, but neither will Justice O'Connor's. I have elsewhere discussed the distinctiveness of religion in our constitutional order for both the Establishment and Free Exercise Clauses, and refer the reader to those writings in the margin.<sup>206</sup> I also summarize the position below in my discussion of Schwartzman.

This way of approaching state-sponsored religious symbols allows us to move away from the complexities of the endorsement test and its focus on what some refer to as mere feelings of exclusion.<sup>207</sup> Rather, we can analogize to other areas of First Amendment doctrine in which the concern is with the state's taking action that associates citizens with ideas with which they do not wish to be associated. Compelling me to say "Jesus is Lord" or compelling me to fund a private speaker who says that are obvious constitutional violations; they are

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rules; in particular, they may authorize advisory opinions and citizen suits. *See, e.g., ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

The Court has permitted a limited amount of taxpayer standing to raise Establishment Clause challenges in federal court. *See Flast v. Cohen*, 392 U.S. 83 (1968). The Court has since whittled back on *Flast*. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

<sup>205</sup> *See supra* text accompanying notes 138-55.

<sup>206</sup> GREENE, AGAINST OBLIGATION, *supra* note 26, at 139-57; Greene, *Is Religion Special?*, *supra* note 26, at 537; Abner S. Greene, *The Incommensurability of Religion*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* 226, 226 (Stephen M. Feldman ed., 2000); Greene, *Political Balance*, *supra* note 26, at 1614-33.

<sup>207</sup> *See Cty. of Allegheny v. ACLU*, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); FELDMAN, *supra* note 202, at 242 ("[I]t is largely an interpretive choice to feel excluded by the fact of other people's faith.").

violations of my freedom of expressive association because they are “not in my name.” In this Part, I have argued that we should see the same thing going on when the state says (essentially) “Jesus is Lord” by, for example, erecting a crèche atop its county courthouse steps. This is harm from expression, to be sure, but the concern is not how I feel or how a reasonable observer would feel, not about second-class citizenship, but rather about an improper association of this contested idea with all citizens (and/or taxpayers).<sup>208</sup>

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Micah Schwartzman offers a different path to the conclusion that the state may not speak in a way that advances a contested view of religious truth.<sup>209</sup> He starts with Thomas Jefferson’s proposition “that taxpayers have a right, grounded in the freedom of conscience, not to pay taxes for the support of *religious* speech with which they disagree.”<sup>210</sup> If this would apply to religious, but not secular conscience, Schwartzman rejects it; he says there is no good argument for treating religion distinctively in this way, and thus Jefferson’s proposition, in this “narrow” sense,<sup>211</sup> falls prey to the “equality objection.”<sup>212</sup> One way of rescuing Jefferson’s freedom of conscience concern would be to expand its scope to include objections to taxpayer-funded “support for any moral, philosophical, or religious views with which citizens sincerely and

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<sup>208</sup> For a similar view, see Joshua Cohen, *Establishment, Exclusion, and Democracy’s Public Reason*, in REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T.M. SCANLON 256, 256-57, 267-69 (R. Jay Wallace, Rahul Kumar & Samuel Freeman eds., 2011). Cohen’s argument, though, is also based in a Rawlsian contention that religious endorsement “conflicts with the ideal of public reason.” *Id.* at 271; *see also id.* at 257, 261. While I have some sympathy for this approach, *see* Abner S. Greene, *Uncommon Ground: A Review of Political Liberalism by John Rawls and Life’s Dominion by Ronald Dworkin*, 62 GEO. WASH. L. REV. 646 (1994), there are tough questions about whether positions based on religion are devoid of public reason and whether, if they are, they are different from certain secular positions. *See* Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763 (1993); Scott C. Idleman, *Ideology as Interpretation: A Reply to Professor Greene’s Theory of the Religion Clauses*, 1994 U. ILL. L. REV. 337. Furthermore, Cohen seems open to invalidating certain state endorsements of secular comprehensive views of the good (similar to Schwartzman). *See* Cohen, *supra*, at 271. I reject these views. *See infra* text accompanying notes 222-23.

<sup>209</sup> *See* Schwartzman, *supra* note 16.

<sup>210</sup> *Id.* at 327. This claim is a subset of the larger debate about whether religious scruples should buttress claims for exemption from generally applicable law. There are competing views on whether conscience is a good ground for exemptions. *See* Arneson, *supra* note 26, at 1015 n.1, 1018, 1024 (answering no); Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 915-16 (2010) (arguing in favor, but not for religious conscience only); Steven D. Smith, *What Does Religion Have to Do With Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 916 (2005) (expressing a skeptical view on the subject).

<sup>211</sup> Schwartzman, *supra* note 16, at 327.

<sup>212</sup> *Id.* at 322, 327.

conscientiously disagree.”<sup>213</sup> This approach, though, risks a kind of anarchy of taxpayer objection, or, put differently, a society in which the state is forbidden or at least seriously hamstrung from engaging in expressive activity that is currently taken for granted (at least in a nation such as the United States). Schwartzman’s solution to this problem is to accept, presumptively, a broad Jeffersonian conscientious objection to taxpayer-funded state speech “promoting any opinions with which taxpayers disagree in conscience,”<sup>214</sup> but to permit this objection to be overridden by a legitimate state interest, that is, to use a kind of rational basis test.<sup>215</sup> Government promotion of a contested view of religious truth will flunk this test, as will government promotion of other contested comprehensive philosophical and ethical doctrines.<sup>216</sup> Other types of state speech—for example, promoting “scientific education and public health”<sup>217</sup>—will satisfy the rational basis test and trump the presumptive conscience claim of an objecting taxpayer.

Three key differences distinguish my approach from Schwartzman’s. First, I support the view that, at least in our constitutional order (and probably more broadly), religion is special, distinctive, and that this should (and often does) play out in both Establishment Clause and Free Exercise Clause doctrine. Second, I support a broad, robust role for state speech, including on contested philosophical and ethical matters. Combining these two positions, I take a categorical approach to state speech—secular almost entirely constitutional (and often a decidedly good thing); religious almost entirely unconstitutional. Schwartzman believes not only that religion should not be treated as distinctive but also that the state should not promote any comprehensive view of the good. He adopts a balancing approach to the state speech problem, subjecting such speech to a rational basis test, often met, but failed when the state uses taxpayer dollars to promote religious, philosophical, or ethical comprehensive views. Third, Schwartzman’s focus is on harm to conscience from being forced to fund ideas with which one disagrees. My focus in this Article is on harm to the freedom of expressive association.

On the first issue, whether religion is distinctive (at least for U.S. constitutional purposes): Much ink has been spilled in this debate;<sup>218</sup> here is a

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<sup>213</sup> *Id.* at 323.

<sup>214</sup> *Id.* at 341.

<sup>215</sup> *See id.* at 354, 382.

<sup>216</sup> *See id.* at 333 & n.46, 355-56, 382.

<sup>217</sup> *Id.* at 357.

<sup>218</sup> For arguments supporting the position that religion is appropriately treated as distinctive in U.S. constitutional law—sometimes religious claimants will get exemptions or accommodations where secular ones would not, and sometimes government support for religion will be deemed unconstitutional where state support for a secular view would not—see Thomas C. Berg, “*Secular Purpose, Accommodations, and Why Religion Is Special (Enough)*,” 80 U. CHI. L. REV. DIALOGUE 24 (2013), Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996), Michael W. McConnell, *The Problem of Singling Out Religion*, 60 DEPAUL L. REV. 1 (2000), and Michael Stokes Paulsen, *The Priority*

short version of why I support the “religion is distinctive” position. For most religious Americans, faith in God is central to their religious perspective. Reliance on an extra-human source of normative authority<sup>219</sup> points outward, beyond human experience that may otherwise ground a variety of secular beliefs. If religious beliefs were just like other forms of belief, why would so many people treat it specially? The theistic outward-pointing nature of religious belief, I have argued, is the foundation for some Establishment Clause restrictions on state action, in particular, a rule that laws should not be based in an express, predominant religious purpose.<sup>220</sup> We can view the Free Exercise Clause as specially protecting (at times) religious practice, as balancing or compensating for the Establishment Clause restriction,<sup>221</sup> or more generally as protecting practice based in belief that is inaccessible to nonbelievers and thus easily subject to legislative negligence (or worse), that is, a failure to appreciate and account for the practices in question. Thus, paying special constitutional attention to religious conscience is not unfairly unequal. We might treat secular conscience differently, but the difference is grounded in our textually, historically, and normatively justifiable concern for how following God’s authority, for some, intersects with both lawmaking and a need to be free of (at least some of) the law’s commands. My argument in this Article for a distinctive

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*of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1160, 1169, 1184 (2013) (advancing a theistic ground for treating religion as constitutionally distinctive, with apparently stronger results for free exercise-backed exemptions than for establishment-based invalidation of state action). See also Cohen, *supra* note 208, at 256-57, 267, 271 (advancing reasons for treating religion as distinctive in Establishment Clause setting, while leaving open possibility that some secular positions might be similarly problematic). For arguments rejecting religious distinctiveness in U.S. constitutional law, in addition to Schwartzman’s piece discussed here, see EISGRUBER & SAGER, *supra* note 171, Jean Cohen, *Freedom of Religion, Inc.: Whose Sovereignty?*, 44 NETH. J. LEGAL PHIL. 169, 176, 208 (2015) (expressing concern that the other side bases its argument on a jurisdictional clash between God’s authority and the state’s), Sager, *supra* note 183, at 79-80, and Micah J. Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). Regarding Jean Cohen’s concern that support for religious distinctiveness seems to turn on deferring to a claim of God’s authority: one can endorse a religious distinctiveness position from an agnostic perspective on the issue of God’s existence, as I do. For the view that some of those who adopt the agnostic position will end up in a (somewhat) similar position on the religious distinctiveness question as those who base their distinctiveness support on belief in God and the priority of his authority, see Paulsen, *supra*, at 1163 n.7, 1165 n.9. See also PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* (2011).

<sup>219</sup> Or generative/creative authority. For constitutional law purposes, God’s normative authority and its possible role in grounding secular law is what matters.

<sup>220</sup> GREENE, *AGAINST OBLIGATION*, *supra* note 26, at 150-55; Greene, *Political Balance*, *supra* note 26, at 1614-33. For cases supporting the rule against express, predominant religious purpose backing state action, see *McCreary Cty. v. ACLU*, 545 U.S. 844 (2005), *Edwards v. Aguillard*, 482 U.S. 578 (1987), *Wallace v. Jaffree*, 472 U.S. 38 (1985), and *Epperson v. Arkansas*, 393 U.S. 97 (1968).

<sup>221</sup> See GREENE, *AGAINST OBLIGATION*, *supra* note 26, at 155-57; Greene, *Political Balance*, *supra* note 26, at 1633-40.

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Establishment Clause-based disability on state religious speech is grounded in these sorts of claims for religious distinctiveness in our constitutional order, and in Supreme Court doctrine that considers state speech endorsing contested religious views of truth as unconstitutional in a way that the Court has never assumed would be problematic for secular positions, even based in comprehensive philosophical or ethical views.

On the second issue, the appropriate scope of government speech: I have endorsed the view that the state may speak and pay agents to speak, not only to promote relatively uncontested matters of science and public health and the like, but also to advance what may be contested views on social issues, indeed to advance positions in such debates that may stem from deeply contested and comprehensive philosophical or ethical notions of the good.<sup>222</sup> The state speaks for us in ways that we sometimes fail to do for ourselves, and the position of the state as a public, collective entity is different from the position of private actors and individuals. Thus, the state may seek to promote a certain way of viewing the environment, a way that has its roots in deep and contested positions about stewardship and what we owe future generations. It may seek to promote a specific conception of democracy, at home and abroad, and counterpose that conception not only against other conceptions of democracy but also against (say) communism or socialism. It may advocate for a wide array of school choices, or it may push for the opposite, a public school that everyone attends (push for, but not insist on).<sup>223</sup> These are just some examples of how the state may dig deeply into the foundations of contested social policy matters, and advance not only social science-inflected instrumental arguments on behalf of its positions, but also the philosophical or ethical roots of such arguments. The thinner view of liberal democracy—that the state should abstain from promotion of contested views of the good—is a poor fit for our constitutional order. It sometimes relies on the incorrect idea that citizens will defer too strongly to the state (why? so long as the state is transparent as speaker or funder of speech, citizens will know whom to blame, and can give credit or critique as they do with any source of speech). It sometimes relies on too libertarian a view of liberal democracy; whatever one thinks of hot debates about state regulatory authority, state speech power need not be limited in the name of liberty, because the state is just one speaker and, if just speaking, is not acting coercively. And it sometimes takes a Rawlsian notion of public reason too far, believing that reliance on comprehensive philosophical or ethical views places the basis of

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<sup>222</sup> See sources cited *supra* notes 37 and 109.

<sup>223</sup> See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (invalidating law requiring children between eight and sixteen years of age to attend public school, as against challenge from private religious and military schools). I have questioned *Pierce* on the ground that it helps support a parental monopoly over children’s education, and that a multiple repositories of power theory regarding children might support mandatory public schooling. Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477, 489-92 (2000); Abner S. Greene, *Why Vouchers Are Unconstitutional, and Why They’re Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 397, 406-08 (1999).

state action beyond generally accessible understanding. Why should we believe that, though, about nontheistic positions? In short, there are good reasons to think broad government speech is at least permissible in our constitutional order, and perhaps also to think it is advisable.

These two points, combined, help ground my approach regarding freedom of expressive association in the setting of compelled support for state speech. There is a weak, broad, *prima facie* right not to fund the expression of others, whether those others are private or public actors. One may wish not to be associated with such expression, even if no misattribution is involved, that is, if everyone knows one’s connection to the expression is just because of state compulsion and thus there is no endorsement (real or imagined) in play. This right, however, gives way to strong enough state interests. There is, generally speaking, a strong enough countervailing state interest in using taxpayer dollars to fund state speech. My principal contention earlier was that the “not in my name” type of argument that supports the presumptive expressive association claim disappears when taxpayer dollars are funding state speech, because in a liberal democracy such as ours, state speech is appropriately thought to be “in our name.” One can now add to this argument the more general normative support for a thick view of government speech I offered just above. Thus, state speech has special value, in part because it is in our name, the name of the citizen-taxpayers. Finally, if we accept that religion is distinctive in our constitutional order, then we can reanimate the expressive association claim, distinctively against compelled support for state religious speech, because such speech is not properly in our name.

On the third issue, the harm to conscience versus the harm to expressive association: In this Article, I have been developing an argument for seeing freedom of expressive association as a common theme in several areas of First Amendment law, and harm to such freedom as a way of understanding what’s at stake in these areas. The right is broad, and weak; although in some instances the harm is profound, and may be described in other ways, casting it as an expressive association right is meant to capture a somewhat disparate set of fact patterns and set up a presumptive entitlement, but not commit to too much up front about the strength of the right. Claims of conscience are stronger, require more normative backing, and should be harder to overcome.<sup>224</sup>

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<sup>224</sup> Indeed, the compelled speech and compelled subsidies for speech cases rely little on mentions of conscience. *Barnette* would seem the most obvious place for this, but as an analytical tool, conscience is mentioned only in Justice Murphy’s concurrence, *see* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 645-46 (1943) (Murphy, J., concurring) (“But there is before us the right of freedom to believe, freedom to worship one’s Maker according to the dictates of one’s conscience, a right which the Constitution specifically shelters.”), and in Justice Frankfurter’s dissent, which rejects exemptions generally, including for religious conscience in a case such as *Barnette*, *id.* at 654-56, 658, 662 (Frankfurter, J., dissenting). In his *Pacific Gas* dissent, then-Justice Rehnquist summarized the right not to speak cases as turning on individual conscience, then pivoted to denying that business corporations can make such a claim. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 32-33 (1986)



Perhaps turning to the dictionary may help. One relevant definition of “associate” is “to connect in the mind or imagination”;<sup>225</sup> “association” can mean “[a] mental connection or relation between thoughts, feelings, ideas, or sensations.”<sup>226</sup> Conscience is “[a]n awareness of morality in regard to one’s behavior; a sense of right and wrong that urges one to act morally.”<sup>227</sup> Assuming that acting under legal compulsion can harm conscience,<sup>228</sup> the harm to conscience from being confronted with a law that runs counter to one’s sense of right and wrong cuts deeply to one’s sense of self. In his discussion of compelled speech, Schwartzman refers to “a form of acquiescence in, or complicity with, the government’s view.”<sup>229</sup> In his discussion of compelled support of private speech, he refers to the subject’s belief that “giving in to the state’s demands

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(Rehnquist, J., dissenting). *Abood* is almost entirely about association; here’s the one mention of conscience: “For at 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.” *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). Justice Stevens’ opinion for the Court in *Glickman* distinguished *Abood* in this way: “Here, however, requiring respondents to pay the assessments cannot be said to engender any crisis of conscience.” *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472 (1997). In his *United Foods* dissent, Justice Breyer maintained that no conscience argument was available in that case (and was not in *Glickman*), contrasting *Barnette* and *Wooley*. *United States v. United Foods, Inc.*, 533 U.S. 405, 423-24 (2001) (Breyer, J., dissenting). Finally, *Masterpiece Cakeshop* refers several times to the conscience-based claims of various bakers, but in the service of developing the as-applied Free Exercise Clause holding, not as part of a compelled speech discussion. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1730-31 (2018). As I have argued, conscience is mostly not the best way to understand the compelled speech and compelled subsidies for speech holdings as a group.

<sup>225</sup> *Associate*, AMERICAN HERITAGE DICTIONARY, *supra* note 17.

<sup>226</sup> *Association*, AMERICAN HERITAGE DICTIONARY, *supra* note 17.

<sup>227</sup> *Conscience*, AMERICAN HERITAGE DICTIONARY, *supra* note 17. Other definitions of “conscience” also make clear it is about one’s sense of morality, of right and wrong action. See VISCHER, *supra* note 183, at 3 (noting that conscience is “person’s judgment of right and wrong”); Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1463 (“Conscience is a universal faculty that applies moral knowledge to one’s past and future acts, a moral judge.”); Greenawalt, *supra* note 210, at 904 (noting that conscience is usually about “judgments believed by those making them to be of considerable moral importance”); Thomas E. Hill, Jr., *Four Conceptions of Conscience*, in NOMOS XL: INTEGRITY AND CONSCIENCE 13, 14 (Ian Shapiro & Robert Adams eds., 1998) (explaining that the core idea linking conceptions of conscience is “idea of a capacity . . . to sense or immediately discern that what he or she has done, is doing, or is about to do (or not do) is wrong, bad, and worthy of disapproval”); Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 328 (2005) (“[W]hen we describe an act as being done from ‘conscience’ we usually mean at least to say that the person in question acted on the basis of a sincere conviction about what is morally required or forbidden.”).

<sup>228</sup> This requires further argument, because one could disobey the law and suffer the legal consequences, rather than comply with the law and risk harm to conscience.

<sup>229</sup> Schwartzman, *supra* note 16, at 351.

would be tantamount to negating her own moral views.”<sup>230</sup> And in his discussion of compelled support of state speech, he refers to being compromised in one’s moral views and integrity.<sup>231</sup> Both types of compelled funders “have an interest in following their moral values and in adhering to a principle of integrity.”<sup>232</sup>

Let’s assume no misattribution, and let us assume that the fact patterns in question involve compelled expression of one sort or another—compelled speech or compelled subsidization of speech (including state religious expression). Seeing the problem as one of expressive association foregrounds our control (or lack thereof) over the messages with which we’re connected. The harm from losing such control is easy to see in the misattribution setting (where the audience reasonably but mistakenly believes the subject supports or endorses the message). But even if the audience would appreciate the fact of legal compulsion and draw no conclusion regarding the subject’s actual beliefs, the subject is still connected with the message, in either the compelled speech or compelled subsidization of speech setting. The freedom of expressive association, in these settings, includes the right to be free of what one believes to be the taint of connection with a disliked idea, at least to be free of the state’s creating such a taint without one’s permission, and to not feel compelled to speak to explain one’s disaffection for the idea when one would prefer to remain silent. All of this could be true without reaching the depths of conscientious objection. One’s integrity in the sense of compromising one’s moral views might not be at stake when one is (merely) connected/associated with disliked ideas. Displaying an unwanted license plate motto or funding an unwanted message may be an infringement of one’s right to associate with ideas of one’s choosing without infringing on a deeper sense of right and wrong.

Schwartzman sometimes writes of conscience and association (somewhat interchangeably). Thus, in discussing compelled speech, he says “public affirmation may associate her with [a moral doctrine she rejects],”<sup>233</sup> and then adds the phrase quoted above, “form of acquiescence in, or complicity with, the government’s view.”<sup>234</sup> And regarding the taxpayer who objects to compelled funding for private speech, hers could be a “claim that a financial obligation targeted for the support of [the moral doctrine she rejects] . . . associates her with that doctrine.”<sup>235</sup> Furthermore, Schwartzman includes a (helpful, for my purposes) section called “Money Isn’t Association.”<sup>236</sup> Here he confronts the argument “against equating money, at least in the form of taxes, with association or complicity.”<sup>237</sup> The argument is that “conditions of moral responsibility—

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<sup>230</sup> *Id.* at 352.

<sup>231</sup> *See id.* at 352-53.

<sup>232</sup> *Id.* at 354.

<sup>233</sup> *Id.* at 351.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 352.

<sup>236</sup> *Id.* at 376.

<sup>237</sup> *Id.*

making a difference, having control, intentionality, and voluntariness—may seem lacking in the case of taxpayers funding government speech to which they object.”<sup>238</sup> Schwartzman’s first response is that this approach to evaluating individual moral responsibility may not be a good fit “for evaluating our involvement in large scale collective and cooperative action, including participation in systems of democratic governance.”<sup>239</sup> His second response is that perhaps “citizens ought to see themselves as contributing voluntarily to support the state. They are not primarily motivated by coercion but by the idea that the state represents them, that it acts in their name.”<sup>240</sup> He adds that one would need to work up a more complete account of complicity or accountability in this setting; such an account might support a limited version of protected conscientious objection.<sup>241</sup>

I argued above that state speech is properly considered “in our name.”<sup>242</sup> Here I want to resist the equating (if that is what it is) of arguments from conscience with arguments about association. We should reserve the language of association, in the settings discussed here, for a connection between subject and compelled message (either in the compelled speech or compelled subsidization of speech setting) that does not necessarily reach to a level of conscientious objection or a sense of moral complicity in the support for such message. I might have no view or a tentative or complex view about the morality of a particular message that is part of compelled speech or compelled subsidy for speech, but still object to having my good name connected with the expression, because I prefer to be an agent in a more knowing and volitional way of the messages with which I am connected.<sup>243</sup>

One final point to round out this comparison of Schwartzman’s approach to mine: Although money may be part of an expressive association claim, it isn’t necessary in the settings I have covered. Earlier I explained that the harm to the

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<sup>238</sup> *Id.* at 377.

<sup>239</sup> *Id.* at 378.

<sup>240</sup> *Id.* at 379.

<sup>241</sup> *Id.* at 380.

<sup>242</sup> See *supra* text accompanying notes 138-55.

<sup>243</sup> David Gaebler offers an eloquent defense for the compelled speech and subsidies for speech line of cases by focusing on conscience. David P. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. REV. 995 (1982). Although he also discusses the outward concern about how the world perceives our ideas, his core concern is the inward one, which he refers to as an “interest in selfhood” or “freedom of conscience.” *Id.* at 1003-04. Gaebler refers to the humiliation and shame one feels from not standing up for one’s beliefs, from not defying the state on a matter of principle, from acquiescing. *Id.* at 1005 n.71, 1006, 1012. To the extent that this argument is similar to Schwartzman’s focus on conscience, my response is similar—that kind of deep hit, from a sense of contributing to a moral wrong, may be present in some of the compelled speech/subsidies for speech/expressive association cases, but not always. A broader focus on the associational/not-in-my-name harm may better capture what’s going on in the case law. Also, whether one feels the pangs of shame and disgrace from acquiescing to the state in some of these settings varies across individuals.

Maynards from having to display “Live Free or Die” on their state-issued license plate is the same whether or not they are paying taxes to help fund the state speech.<sup>244</sup> If there is a First Amendment violation, it is because the state is compelling the Maynards to foster a message they would prefer not to foster. This is an expressive association harm with a kicker, and the kicker is the use of the Maynards’ personal property.<sup>245</sup> As I will discuss further below,<sup>246</sup> although the *Johanns* plaintiffs lost because the speech involved was that of the government, they might have won if a reasonable observer would have attributed the “Beef. It’s What’s for Dinner” ads to them. This is so whether or not the government had compelled them to pay for the speech. Finally, I explained earlier that the “not in my name” Establishment Clause claim from state sectarian religious speech holds for the citizen as well as for the taxpayer (consider a non-taxpaying citizen).<sup>247</sup> Schwartzman’s discussion of conscience is about money and its connection to unwanted speech (thus the title of his article, *Conscience, Speech, and Money*). My expressive association arguments may involve a money connection, but need not.

#### V. MISATTRIBUTION

We have seen that the freedom of expressive association grounds constitutional claims of compelled speech, compelled subsidies for speech, and establishment of religion, and that at least once the Court has relied upon expressive association as a stand-alone basis for recognizing a constitutional claim. The common theme is that the state sometimes acts in a way that associates one with a message with which one does not wish to be associated, either by others or just in one’s own mind. And this is so even if no one (or at least the reasonable person) mistakenly believes that the individual in question endorses the message. The expressive association claims in these settings can be restated as “not in my name” claims of constitutional right.

We can now return to the opening problem of this Article—should we recognize a certain type of misattribution as grounding a claim of constitutional violation, in either the compelled subsidies for speech or Establishment Clause setting? Now that we can see a common thread between compelled subsidy and Establishment Clause claims, we are in a better position to examine whether mistaken attribution as to speaker should matter, and if so, how. Before turning to the lingering problems from *Johanns* and *Pinette*, I will first discuss the misattribution issue in the compelled speech setting.

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<sup>244</sup> See *supra* note 95.

<sup>245</sup> The kicker, though, falls short of being an insult to human dignity or anything of that sort. See *supra* note 92.

<sup>246</sup> See *infra* text accompanying note 256; see also Klass, *supra* note 110, at 1122.

<sup>247</sup> See *supra* text accompanying notes 203-04; see also *infra* text accompanying note 281 (making similar point in misattribution setting).

A. *Compelled Speech*

When the Court has invalidated state action as unconstitutional compelled speech, we can see a grounding in the right of expressive association, the assertions as “not in my name” claims of constitutional right. Although that is a serious matter, one might think a misattribution ground is more serious. If a reasonable observer believes I endorse the pledge of allegiance (when I do not) or endorse “Live Free or Die” (when I do not), then that observer is acting on a false picture of who I am. That could affect me in various harmful ways, perhaps comparable to the ways in which defamation law is concerned with harm. Defamation law, though, is about false statements diminishing one’s reputation,<sup>248</sup> and perhaps we could say falsely believing someone supports the values contained in the pledge of allegiance or in “Live Free or Die” does not (necessarily, or at all) diminish one’s reputation. My reference to defamation law is therefore not about diminished reputation, but about erroneous understanding of all types of someone’s values, when caused by compelled speech. My claim in this paragraph is that although a compelled speech “not in my name” claim of constitutional right should be considered actionable even without misattribution, the harm is more serious when there is misattribution.

Note that the type of misattribution in the compelled speech cases from *Barnette* through *Becerra* is somewhat different from the type at issue in *Johanns* and *Pinette*. In the *Barnette* through *Becerra* line of cases, the government is requiring an individual or company to utter or physically host or display either a state-chosen message or the message of another private party. In each of these cases, the identity of the speaker is clear. The misattribution question is whether a reasonable observer would mistakenly think the speaker endorses the speech, and this turns at least in part on whether the observer knows the speech is compelled. If the observer would miss the fact of compulsion, and erroneously conclude the speaker has chosen (and thus endorses) the message, that would be a ground for invalidating the compelled speech (although as we saw, this is rarely so). The lingering problems from *Johanns* and *Pinette* arise at a prior stage of analysis, where the identity of the speaker might be unclear. If a reasonable observer would mistake state speech for the speech of an individual or company, or would mistake private speech for the speech of the state, such mistakes would entail misattribution of the message to the (mistakenly assumed) speaker. Mistake as to endorsement of message follows from mistake as to speaker identity.

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<sup>248</sup> See RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977) (laying out elements of cause of action for defamation). The Court has, though, rejected a claim under the Due Process Clause for state action that defames, unless the state action also alters or extinguishes a “right or status previously recognized by state law.” *Paul v. Davis*, 424 U.S. 693, 711-12 (1976); see also *Greene*, *supra* note 90, at 833-34. *But see Aziz Huq*, *When Government Defames*, N.Y. TIMES, Aug. 10, 2017, at A19 (proposing federal legislation authorizing defamation action for declaratory relief against federal officials).

B. *Compelled Subsidies for Speech*

Let’s return to *Johanns*.<sup>249</sup> Recall that the major premise of the holding, with which no Justice disagreed, is that compelled subsidies for government speech are (almost always)<sup>250</sup> constitutional. I have defended that holding as a proper exception to the *Abood* rule of “no compelled subsidies for the speech of another.” The rule is based in the expressive association “not in my name” right not to be connected through one’s funds to expression not of one’s choosing; the exception is that state speech is properly in the name of all citizens. What divided the Justices in *Johanns* was the application of the government speech exception to the facts of the case. There was pretty strong evidence that a reasonable observer would believe the “Beef. It’s What’s for Dinner” ads were the private speech of the beef producers, and not the government speech of the USDA. Under the *Abood* principle, and the reasoning of *United Foods* applying that principle, the objecting beef producers would seem to have a valid constitutional objection to the ads. Justice Scalia, writing for the majority, was not willing to accept this conclusion on the record in the case, but said he was open (possibly) to a constitutional claim from misattribution. He wrote, “If a viewer would identify the speech as respondents’, however, the analysis would be different.”<sup>251</sup> This would become a compelled speech, rather than compelled subsidy, argument, said Scalia.<sup>252</sup> “On some set of facts,” he continued, “this [compelled speech] theory might (again, we express no view on the point) form the basis for an as-applied challenge—if it were established, that is, that individual beef advertisements were attributed to respondents.”<sup>253</sup> Although Scalia uses the terms “a viewer” and “were attributed to,” I take the dicta to refer to what a reasonable observer might think about the ads, rather than any viewer.<sup>254</sup> On the facts as presented, Justice Souter in dissent had the better of it; a reasonable person would think the ads were those of the beef producers, and not the USDA.<sup>255</sup> But we can put aside whether Souter was correct on the facts of the case. What interests me here is how we should properly ground such a misattribution claim, whether it should be actionable, and how it relates to the

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

<sup>250</sup> Cases invalidating government religious speech, *see supra* text accompanying notes 184-86, would require us to modify the claim in the text, to the extent that the compelled subsidies for such speech (tax dollars) are implicated in the constitutional violation.

<sup>251</sup> *Johanns*, 544 U.S. at 564 n.7 (emphasis omitted).

<sup>252</sup> *Id.* at 564-65.

<sup>253</sup> *Id.* at 565.

<sup>254</sup> For a similar debate, see *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 779-80 (1995) (O’Connor, J., concurring in part and concurring in the judgment) (focusing on informed reasonable observer, aware of history and context), and *id.* at 800 n.5, 807 (Stevens, J., dissenting) (focusing on whether some reasonable viewers might perceive endorsement).

<sup>255</sup> *Johanns*, 544 U.S. at 577-78 (Souter, J., dissenting).

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more general expressive association/not-in-my-name type of claim I am suggesting threads through the cases discussed in this Article.

I agree with Justice Scalia that a *Johanns* misattribution case would not properly be considered a compelled subsidy case. Formally, one would still be subsidizing the government, and thus *Abood* and *Keller*, which turn on compelled subsidy of a private party's speech, are inapposite. Scalia says a *Johanns* misattribution case would be a compelled speech case, but doesn't offer much of an argument for that conclusion. The argument could be the following, although it is for an expressive association violation,<sup>256</sup> not compelled speech per se. If a reasonable observer would (mistakenly) believe that advertisement *X* is mine, the harm from such misattribution is similar to the harm from misattribution in the compelled speech cases (if there is any such harm in those cases). But in the compelled speech cases, someone has in fact been forced to speak or host/display another's speech. A *Johanns* misattribution case lacks this component—the complaining party has not actually spoken or hosted/displayed speech. Here is a better way to look at it: Suppose a case with no compelled funding, and no actual compelled speech, but the state still does something that leads the reasonable viewer to mistakenly attribute message *X* to the complainant. For example, assume the *Johanns* facts without a compelled subsidy, and with an ad that expressly attributes “Beef. It's What's for Dinner” to a particular private beef producer who, let us also assume, does not desire such attribution. So we have no compelled subsidy and no compelled speech (because the government is running the ad), but a clear instance of misattribution to which the falsely tagged party objects. Following the line of argument from this Article, that party should be able to successfully challenge the ad as a violation of its freedom of expressive association, of the “not in my name” variety.

This kind of rights violation is arguably worse than that at issue in *Abood* and its progeny. In those cases, we're assuming no misattribution, but there is still an actionable claim that the state has associated one with speech (via compelled subsidy) with which one does not wish to be associated. That is a violation of one's right to control not only the content of one's messages, but also of the messages with which one is associated (insofar as we are talking about state action causing the unwanted association). In a *Johanns* misattribution case—either the kind Justice Souter believed existed in *Johanns* (and that Justice Scalia was open to considering in a future case), or the kind in the hypothetical in the previous paragraph—not only is one associated with a message against one's will, but also the reasonable viewer mistakenly believes one endorses that message. As with my argument regarding compelled speech, state action that

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<sup>256</sup> See Greene, *supra* note 90, at 836; see also *Johanns*, 544 U.S. at 568 (Thomas, J., concurring) (“The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control.”).

creates a false impression of endorsement is more harmful than state action that creates an association of message with person that everyone (or the reasonable observer) knows the person doesn’t endorse, but with which she nonetheless does not wish to be associated.

C. *Establishment Clause*

Recall *Pinette*. The KKK sponsored a Latin cross in a state-owned plaza surrounding the capitol in Columbus, Ohio. The Court held by a seven-to-two vote that this doesn’t violate the Establishment Clause, and thus to deny the display would violate the KKK’s free speech rights (to display their expression equally with others in a public forum).<sup>257</sup> The seven-Justice majority divided, though, over the possibility of a misattribution claim in a situation such as this, that is, over whether even though the speech is formally private, it might be mistaken for that of the state, thus bringing the Establishment Clause back into play as a ground for denying the display. Justice Scalia’s opinion for a four-Justice plurality deemed this an issue of “transferred endorsement.”<sup>258</sup> Referring to precedent holding that religious speech may not be barred from public forums or designated public forums<sup>259</sup>—because it’s not reasonable to assume the state is endorsing any speaker in such forums, including the religious speakers—Scalia argued that “erroneous conclusions do not count.”<sup>260</sup> He added, “It has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—even reasonably—confuse an incidental benefit to religion with state endorsement.”<sup>261</sup> Scalia posited that the outcome might be different if the state “fostered or encouraged the mistake.”<sup>262</sup>

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<sup>257</sup> Justices Stevens and Ginsburg dissented, in separate opinions, deeming the display a violation of the Establishment Clause. *Id.* at 797-816 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting). In *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the Court held that privately donated monuments that become permanent displays in public parks after government approval constitute state speech. The Court distinguished *Pinette* on the ground that the displays in that case were temporary. *See id.* at 480. In *Summum*, although the City had permitted erection of a Ten Commandments monument (and had rejected a monument from a small religious group), no Establishment (or Free Exercise or Equal Protection) Clause issue was presented; the only issue before the Court was whether public forum analysis should apply or whether the speech was that of the state.

<sup>258</sup> *Pinette*, 515 U.S. at 764 (plurality opinion).

<sup>259</sup> *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395-97 (1993) (holding that there was no Establishment Clause violation for a religious group to use public school classrooms for after-school activities on an equal footing with other groups); *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981) (holding similarly in university setting).

<sup>260</sup> *Pinette*, 515 U.S. at 765 (plurality opinion).

<sup>261</sup> *Id.* at 768 (emphasis omitted). This is a bit confusing even for what Scalia was arguing. The issue wouldn’t be whether a “neutral law” should be deemed invalid, but whether a specific private display might be held to violate the Establishment Clause because it would be reasonably mistaken as state speech.

<sup>262</sup> *Id.* at 766.



Justice O'Connor, joined by Justices Souter and Breyer, concurred in part and in the judgment, leaving open the possibility of an Establishment Clause violation on the endorsement test, even if the speech is formally that of a private party. A reasonable observer might, in some scenarios, nonetheless believe the state is endorsing a religious message.<sup>263</sup> So far so good—or so clear—but at this point, O'Connor's opinion gets murky. She seems to agree with Justice Scalia that there could be an Establishment Clause violation if the state actively intended or encouraged viewers to believe it was endorsing the religious message.<sup>264</sup> But there could be endorsement even without that, and even if the speech is formally private. According to O'Connor:

This is so not because of 'transferred endorsement,' or mistaken attribution of private speech to the State, but because the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, actually convey a message of endorsement.<sup>265</sup>

But if we're not talking about the state fostering/encouraging/intending a mistake, and if we're not talking about mistake absent that, then what are we talking about? Maybe this: "At some point, for example, a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval."<sup>266</sup> And this: "Other circumstances may produce the same effect—whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others."<sup>267</sup> So O'Connor seems focused on a situation in which the state skews the public forum in the direction of a particular religious display. But if she is willing to deem that an Establishment Clause violation—even if the speech is formally private—then she is willing to adopt at least a version of a misattribution or mistake argument.

Justice Souter also penned an opinion concurring in part and in the judgment, in which Justices O'Connor and Breyer joined.<sup>268</sup> He stated that "in some circumstances an intelligent observer may mistake private, unattended religious displays in a public forum for government speech endorsing religion."<sup>269</sup> He added that "[u]nless we are to retreat entirely to government intent and abandon consideration of effects, it makes no sense to recognize a public perception of

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<sup>263</sup> *Id.* at 777 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>264</sup> *See id.*

<sup>265</sup> *Id.* (emphasis omitted) (citation omitted).

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

<sup>267</sup> *Id.* at 778.

<sup>268</sup> These three Justices were at the center of the Court on this issue, each joining the same two concurrences in part and in the judgment. And it is clear from their dissenting opinions that Justices Stevens and Ginsburg would deem some mistaken impressions in settings such as this to be Establishment Clause violations. *See id.* at 797-816 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting).

<sup>269</sup> *Id.* at 785 (Souter, J., concurring in part and in the judgment).

endorsement as a harm only in that subclass of cases in which the government owns the display.”<sup>270</sup> In this case, there was great concern about a possible conclusion of state endorsement of religion, even via a privately sponsored symbol: “[The Latin cross the KKK sought to erect] was displayed immediately in front of the Ohio Statehouse, with the government’s flags flying nearby, and the government’s statues close at hand. For much of the time the cross was supposed to stand on the square, it would have been the only private display on the public plot . . . .”<sup>271</sup> Importantly, though, for Souter as well as for O’Connor, the KKK had promised to erect a disclaimer stating that the cross was private and without government support.<sup>272</sup> For my discussion, the most interesting aspects of Souter’s opinion are his openness to the possibility of an intelligent observer mistaking private displays for government endorsement of religion, and O’Connor joining the opinion (despite saying, in her opinion, that the concern might not be about mistaken attribution of private speech to the state<sup>273</sup>).

The Court addressed a related possible Establishment Clause mistake issue in *Good News Club v. Milford Central School*.<sup>274</sup> A public school district allowed all manner of meetings and groups to use public school facilities after hours but denied such use to a group that would engage in some religious instruction.<sup>275</sup> Following precedent, the Court held that this denial was not required by the Establishment Clause (a reasonable observer should not assume the school district is endorsing any of the messages advanced in the forum), and was a violation of the Free Speech Clause.<sup>276</sup> Writing for a six-Justice majority, Justice Thomas refused to accept the possibility, on the facts at hand, that schoolchildren would mistakenly think the school had endorsed the religious speech.<sup>277</sup> He went further: “We decline to employ Establishment Clause jurisprudence using a modified heckler’s veto, in which a group’s religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.”<sup>278</sup> This does, though, leave the door open for different facts that would more strongly suggest reasonable mistake (perhaps on the part of an adult reasonable observer or a reasonable observer generally, not a young child). Justice Breyer, concurring in part, and Justice Souter (joined by Justice Ginsburg), dissenting, were open to a misattribution claim in a case such as this.<sup>279</sup> We can assume Justice Stevens would have been too (his dissent was

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<sup>270</sup> *Id.* at 787.

<sup>271</sup> *Id.* at 792.

<sup>272</sup> *See id.* at 776 (O’Connor, J., concurring in part and in the judgment); *id.* at 783, 793-94 (Souter, J., concurring in part and in the judgment).

<sup>273</sup> *Id.* at 776-78 (O’Connor, J., concurring in part and in the judgment).

<sup>274</sup> 533 U.S. 98 (2001).

<sup>275</sup> *Id.* at 108-09.

<sup>276</sup> *Id.* at 107-19.

<sup>277</sup> *See id.* at 113-19.

<sup>278</sup> *Id.* at 119.

<sup>279</sup> *Id.* at 128 (Breyer, J., concurring in part); *id.* at 142-44 (Souter, J., dissenting).

solely on the free speech issue).<sup>280</sup> Also, *Good News Club* involves religious speech as part of public school facilities opened as a limited public forum, which is a different setting from the religious symbols cases on which I am focused.

On the theory I have developed in this Article, a reasonable mistake of fact as to speaker identity should ground an Establishment Clause claim. The Establishment Clause injury is similar to—though not identical to—the Establishment Clause injury in the non-mistake case. Let's assume the Latin cross in *Pinette* was erected by the State of Ohio. That would be an easy case for Establishment Clause invalidation under either the endorsement test or the expressive association/not-in-my-name argument I have advanced. Even if we put aside the second-class citizenship expressive harm argument from the endorsement test, any citizen could properly argue that sectarian religious speech of this sort is not properly in the name of the state, and not properly in the name of the citizens thereof. For the taxpayer plaintiff, the rule against compelled subsidies for unwanted expression holds (of the Establishment Clause variety), as against the government speech exception to that rule.<sup>281</sup>

Now let's assume that the cross is privately sponsored, but that the reasonable observer would take it to be the state's speech. A citizen plaintiff could argue that the state is engaging in sectarian religious speech, improperly in the name of its citizens (and thus improperly in its own name, as well). A taxpayer plaintiff would not have a claim, because her funds are not being used for the expression, which is formally private. The harm to the citizen claimant is the same as in the non-mistake case: the state should not be acting in a way that actually advances a sectarian religious message in its name (and thus its citizens' names), and it should not act in a way that would lead a reasonable observer (even mistakenly) to see it as advancing a sectarian religious message in its name and in the name of its citizens.<sup>282</sup> We assume that in the mistake setting the average person thinks the state is engaging in the religious expression, and if my argument is correct, then there is an expressive association harm to all citizens.

One final point. Sometimes there is a complex state-private partnership involved with displaying religious symbols.<sup>283</sup> In *Lynch*, the park was owned by a private nonprofit group; the holiday display (including the crèche) was the city's.<sup>284</sup> In *Allegheny*, the county permitted a private Catholic group to place its crèche on the county courthouse staircase, with a plaque stating the private group had donated the crèche.<sup>285</sup> In *Van Orden*, a private group donated the Ten

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<sup>280</sup> *Id.* at 130-34 (Stevens, J., dissenting).

<sup>281</sup> I discussed the federal courts standing issues for citizen and taxpayer plaintiffs earlier in this Article. *See supra* text accompanying note 204.

<sup>282</sup> In these situations, a disclaimer might cure or prevent the problem. *See supra* note 100 and text accompanying note 272.

<sup>283</sup> For an excellent treatment of this kind of situation, see Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008).

<sup>284</sup> *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

<sup>285</sup> *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 579-81 (1989).

Commandments monument to the State of Texas, which then erected it on the state capitol grounds along with other monuments of its choosing.<sup>286</sup> The Ten Commandments monument bears an inscription stating the private donor’s name.<sup>287</sup> One question in each of these cases is whether the state or a private party is speaking, or whether the speech is a joint effort. Whether the state alone or the state-with-private party is speaking, however, one might conclude that the state has unconstitutionally endorsed a particular religion or that it has unconstitutionally sponsored sectarian religious expression that is not properly in its name or the name of its citizens. For my purposes in this Article, I need not figure out when the state is properly deemed the—or a—speaker. I am assuming that at least in some cases we properly tag the state with speech (sometimes as a collaborative actor), and it is those cases with which I am concerned.

#### CONCLUSION

We have a constitutional right against the state’s forcing us to be associated with expression with which we do not wish to be associated. The freedom of expressive association is not stated in our Constitution’s text. Rather, it is derived from the various provisions of the First Amendment, most notably the Free Speech Clause. As the freedom of speech protects, among other things, our right to shape how we present ourselves to the world, so does the freedom of expressive association protect us from the state’s shaping us by connecting us to ideas not of our choosing. Our freedom of expressive association allows us to claim an idea as our own, and to say “that idea is not mine . . . and you may not say it in my name.” In this Article, I have shown that this “not in my name” conception of constitutional right has iterations in several areas of First Amendment law. The right against compelled speech prevents the state from forcing us to utter or host/display expression not of our choosing. The right against compelled subsidies for speech prevents the state from forcing us to pay for expression not of our choosing. Because with tax dollars the state speaks in the name of the citizens, however, state speech is an exception to the rule against compelled subsidies for expression. The right of expressive association itself has grounded important dicta preventing the state from forcing us to admit as members those whose views are antithetical to groups we have formed to advance specific ideas, and it has produced one holding striking down state action of this sort.<sup>288</sup> Finally, the right against government establishment of religion prevents the state from expressing support for the truth claims of a specific religion or religions. Such state religious speech purports to be in all of our names, but this is something the state may not do; it may not connect us as

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<sup>286</sup> Van Orden v. Perry, 545 U.S. 677, 681-82 (2005).

<sup>287</sup> *Id.*

<sup>288</sup> All three of these rights—against compelled speech, subsidies, and association—are presumptive, subject to override by sufficiently compelling state interests. *See supra* text accompanying notes 83-85, 124-55, 172-76.

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citizens (or taxpayers, if tax dollars are involved) with sectarian claims of religious truth. Thus, state religious expression is an exception to the state speech exception to the right against compelled subsidies for speech—although usually state speech is properly in all of our names, state religious speech is not.

Understanding this common thread of the freedom of expressive association running through various parts of First Amendment doctrine and theory permits us to resolve cases in which a reasonable person would misattribute state speech to a private party or a private party's speech to the state. In the former, the state creates a false connection between message and person, which is a harm to the person that goes beyond the harm from an infringement of the freedom of expressive association in a setting without misattribution. The infringement without misattribution involves using me or my property or my funds to help advance an idea not my own. Misattributing state speech to me does this too, but in addition creates a false picture or impression of which ideas I endorse. The second type of misattribution—mistaking a private party's expression for the state's—can result in the same type of Establishment Clause harm as when the state is in fact speaking—both constitute a type of infringement of the freedom of expressive association. When the state provides a platform for private religious expression in a way that would cause a reasonable viewer to mistakenly think the expression is the state's, citizens may once again say that such speech may not be made in their name.