FIRST AMENDMENT PROTECTION AGAINST GOVERNMENT COMPELLED EXPRESSION AND ASSOCIATION†

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The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble . . . ."[1] The primary concern in most litigation arising under this constitutional guarantee has been to protect individuals from government interference with their ability to communicate or associate.[2] In some contexts, however, the first amendment's commitment to freedom of belief and expression has led to protection not only of the right to speak or to associate freely, but also to protection of a corollary right not to speak or associate at all — that is, a right to be free from government compulsion to engage in speech or associational activities.[3] For convenience, the more

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[1] U.S. CONST. amend. I.

[2] *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977); Buckley v. Valeo, 424 U.S. 1, 15 (1976); Griswold v. Connecticut, 381 U.S. 479, 483-84 (1965); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958). However, freedom of association as protected by the first amendment may be limited to association for the purpose of engaging in activity independently protected by the first amendment. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-23, at 700-03 (1978).

[3] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (compelled financial support of collective bargaining representative when funds used for political purposes unrelated to collective bargaining); Wooley v. Maynard, 430 U.S. 705 (1977) (state requirement that plaintiff display on his automobile a license plate imprinted with the state motto); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compulsory recitation of pledge of allegiance).

The first amendment protection against government compulsion to engage in expression or associational activities afforded in the *Abood*, *Wooley* and *Barnette* cases must be distinguished from first and fifth amendment protection of other interests which might also be described, though perhaps somewhat inaccurately, as involving a "right not to speak." For example, the first amendment has been invoked to prevent the coerced disclosure of individuals' organizational affiliations. *See, e.g.*, Baird v. State Bar of Ariz., 401 U.S. 1 (1971); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958). The reason for this protection is that disclosure might subject the individuals involved to harassment which in turn might discourage them from participating in unpopular organizations, thereby chilling free exercise of the right of association. *See Baird*, 401 U.S. at 6-7; *Shelton*, 364 U.S. at 485-87; *NAACP*, 357 U.S. at 460-63.

The fifth amendment provides similar protection against compelled disclosure of certain information. Under the fifth amendment an individual cannot be compelled to give information which he reasonably believes may be used against him in a criminal prosecution. *See, e.g.*, Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967). Unlike the first amendment protection afforded in *Shelton* and *NAACP*, however, the fifth amendment right not to speak does not bar compelled testimony if the individual is given immunity. *See, e.g.*, Kastigar v. United States, 406 U.S. 441 (1972).

By contrast the general first amendment right to be free from government compulsion

familiar rights to speak and to associate will be referred to as affirmative rights or interests, and their protection as affirmative protection. Similarly, rights not to speak or associate will be referred to as negative rights, and their protection as negative protection.

The United States Supreme Court has dealt explicitly with protection of negative first amendment interests in only a few cases.[4] In those cases, however, the Court has not focused adequately on the distinct nature of the infringement of individual interests where government compels rather than inhibits expression. Moreover, the Court lacks consensus as to the appropriate approach to balancing opposing government and individual interests in negative first amendment cases. This article will begin by surveying the cases in which the Court has considered negative first amendment interests. This survey will reveal that while the Court has identified several factors to be considered in evaluating these cases it has not articulated a consistent approach to

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to engage in expression or associational activities, as enunciated in *Abood*, *Wooley* and *Barnette*, is not limited to non-disclosure of particular information. Rather it protects against compelled expression or association of any sort so long as it is not outweighed by a countervailing government interest. *See infra* text and notes at notes 124-45. Moreover, first amendment protection against compelled expression is provided not simply as a means of avoiding a chilling effect on the exercise of the rights to speak and associate, but rather to protect against government invasion of the "sphere of intellect and spirit." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). *See infra* text and notes at notes 58-73.

[4] Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

There are other cases, however, which superficially appear to protect a right to refrain from speech or association, but which do so in circumstances where such protection is necessary to protect the more traditional first amendment rights to speak or associate freely. *See* Elrod v. Burns, 427 U.S. 347 (1976); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). *Elrod* involved employees in the county sherriff's office who were required to pledge their political allegiance to the political party of the sheriff in order to keep their jobs. *Elrod*, 427 U.S. at 350-51. The Court found that this requirement infringed upon the freedoms of belief and association and held that it was unconstitutional except as applied to policymaking employees. *Id.* at 372-73. In reaching this conclusion the *Elrod* Court appears to have relied in part on a first amendment right to be free from coercion regarding belief and association:

> The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief . . . . Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs.

Id. at 355.

However, *Elrod* does not depend on such protection to support its result. In fact the decision can easily be justified on more traditional first amendment grounds. As the Court noted, one of the restraints on freedom of association was that an employee could maintain affiliation with, or work for, the out-party only at the risk of losing his job. *Id.* at 355. Moreover as the Court pointed out:

> [s]ince the average employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished.

Id. at 355-56. Thus the patronage system held unconstitutional in *Elrod* involved a substantial chilling effect upon exercise of traditional first amendment rights to speak and associate.

negative first amendment issues. Next the article will discuss the nature of negative first amendment interests and suggest that the primary interest involved is the interest of the individual in his own selfhood. The article will then suggest an approach to evaluating the seriousness of any claimed infringement of this interest. Such an evaluation is necessary to permit a reasoned balancing of any infringement of individual negative first amendment interests against any countervailing state interests. Finally the suggested approach will be applied to reexamine the most troublesome negative first amendment case the Court has yet encountered, *Abood v. Detroit Board of Education*,[5] which involved compelled financial support of expression. It will be concluded that the Court's failure to develop a consistent approach to negative first amendment issues, and more specifically the Court's lack of consensus in *Abood*,[6] results from a failure to focus sufficiently on the nature of negative first amendment interests and a consequent inability to evaluate adequately the magnitude of any infringement of those interests.

I. The United States Supreme Court and Negative First Amendment Interests

The United States Supreme Court first articulated a theory of negative first amendment protection in 1943, in *West Virginia State Board of Education v. Barnette*.[7] This case involved a requirement by the State Board of Education that teachers and students salute the flag and recite the pledge of allegiance.[8] Students refusing to comply were subject to expulsion for insubordination, rendering the student liable to proceedings for delinquency and his parents or guardian liable to prosecution.[9] The plaintiffs, Jehovah's Witnesses, refused to salute the flag on religious grounds.[10] The Court, reversing itself from three years earlier,[11] held that the flag salute requirement violated the first amend-

In *Miami Herald Publishing Co. v. Tornillo* the Court struck down a Florida statute requiring a newspaper to publish, free of charge, replies by political candidates attacked or criticized in the newspaper. *Tornillo*, 418 U.S. at 244, 258. Like the decision in *Elrod*, however, the *Tornillo* decision can be explained on traditional first amendment grounds. The Court reasoned that the right to reply statute inflicted a content-based penalty upon a newspaper because the newspaper had to bear the financial cost of publishing the replies. *Id.* at 256-58. Moreover, to make space for a reply a newspaper must omit something else, because as a practical matter a newspaper does not have unlimited space. *Id.* The Court stressed that to escape these penalties a newspaper might simply avoid publishing anything which might give rise to the right to reply. *Id.* at 256-58. *But see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding an FCC rule requiring radio broadcasters to provide free reply time for replies to personal attacks and political editorials).

[5] 431 U.S. 209 (1977).

[6] *Compare* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (plurality opinion) *with id.* at 244 (Powell, J., concurring, joined by Burger, C.J., and Blackmun, J.).

[7] 319 U.S. 624 (1943).

[8] *Id.* at 626.

[9] *Id.* at 629.

[10] *Id.*

[11] Three years before the *Barnette* decision the Court had upheld a flag-salute requirement. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

ment.[12] Because the plaintiffs had refused to salute the flag for religious reasons,[13] the decision might have been based upon the free exercise clause. Nevertheless, the plurality expressly declined to limit its decision to religiously motivated refusals.[14] Noting that "[o]bjection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights,"[15] the Court held that the government could not constitutionally force an individual to salute the flag or recite the pledge of allegiance regardless of the nature of the individual's objections.[16] The Court summed up its position in the famous words of Mr. Justice Jackson:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[17]

Barnette announced first amendment protection from government compulsion to express, by word or act, acceptance of or agreement with any particular belief. The precise scope of this protection, however, has not been defined. In part, this results from the fact that despite the *Barnette* Court's express reliance on a general first amendment right to be free from government compulsion to express particular beliefs, at least two other sufficient explanations for protection are often present in similar cases: (1) that punishing an individual for refusal to salute the flag or recite the pledge of allegiance when the refusal is based on religious grounds violates the free exercise clause; and (2) that refusal to salute the flag or recite the pledge of allegiance may constitute an affirmative act expressing dissent, in other words, symbolic speech by silence.[18] Lower court decisions since *Barnette* involving similar facts display a melange of these rationales.[19]

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[12] *Barnette*, 319 U.S. at 642.

[13] *Id.* at 629.

[14] *Id.* at 634-35.

[15] *Id.* at 633.

[16] *Id.* at 635, 642.

[17] *Id.* at 642.

[18] The first amendment's protection of expression is not limited to words; it extends to symbolic speech as well. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Stromberg v. California, 283 U.S. 359 (1931). *Cf.* United States v. O'Brien, 391 U.S. 367, 376, 386 (1968) (the Court stated that even assuming O'Brien's act of burning his draft card was conduct protected by the first amendment, the statute constitutionally could prohibit destruction of the draft card for non speech-related reasons); Brown v. Louisiana, 383 U.S. 131 (1966) (the right to protest by silent presence in a segregated public library).

[19] *See* Goetz v. Ansell, 477 F.2d 636, 638 (2nd Cir. 1973); Russo v. Central School Dist., 469 F.2d 623, 631 (2nd Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); Hanover v. Northrup, 325 F. Supp. 170, 172 (D. Conn. 1970); Banks v. Board of Pub. Instruction, 314 F. Supp. 285, 294-96 (S.D. Fla. 1970), *vacated for entry of a fresh decree*, 401 U.S. 988 (1971), *aff'd after remand*, 450 F.2d 1103 (5th Cir. 1971); Frain v. Baron, 307 F. Supp. 27, 30-32 (E.D.N.Y. 1969); Sheldon v. Fannin, 221 F. Supp. 766, 775-76 (D. Ariz. 1963). *See also* Comment, *Compelled Expression:* Maynard v. Wooley, 28 ME. L. REV. 531 (1976).

amendment protection until 1977 in *Wooley v. Maynard*.[20] The plaintiff in *Wooley* objected to displaying on his license plate the New Hampshire state motto, "Live Free or Die," and therefore covered the motto with tape.[21] Subsequently the plaintiff was charged with and convicted of a misdemeanor for "knowingly [obscuring] . . . the figures or letters on any number plate."[22] Despite the conviction the plaintiff persisted in taping over the motto on his license plate and was convicted twice more.[23] Finally he commenced a federal action seeking to enjoin further enforcement of the statute which made his conduct a criminal offense.[24] A three-judge district court found that plaintiff's conduct constituted symbolic speech and that no state interest was shown sufficient to justify this restriction of plaintiff's affirmative first amendment interests.[25] The Supreme Court expressly declined to rule on the symbolic speech issue and chose instead, as in *Barnette*, to base its decision on plaintiff's negative first amendment interests.[26] Although the plaintiff in *Wooley* was not compelled to express anything either orally or by gesticulation, the Court held that the first amendment protected his right to refuse to participate in the dissemination of an ideological message displayed upon his license plate.[27] The Court considered the state's asserted interests in the requirement but concluded that they could not justify the infringement of plaintiff's negative first amendment interests.[28]

In reaching its conclusion, the *Wooley* Court cited *Barnette* in support of the proposition that the first amendment protects the right to refrain from speaking at all.[29] Merely displaying a message on one's license plate, however, is a much less intimate form of expression and requires a far lesser degree of personal involvement than the pledge of allegiance requirement in *Barnette*. Accordingly, the Court conceded that *Wooley* involved a less serious infringement of individual interests than had *Barnette*.[30] Nevertheless, the Court characterized the difference as merely one of degree because even carrying the state motto on his license plate forced the plaintiff in *Wooley*, as part of his daily life, to foster an

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[20] 430 U.S. 705 (1977).

[21] *Wooley*, 430 U.S. at 707-08.

[22] *Id.* at 707.

[23] *Id.* at 708.

[24] *Id.* at 709.

[25] Maynard v. Wooley, 406 F. Supp. 1381, 1387-89 (D.N.H. 1976), *aff'd on other grounds*, 430 U.S. 705 (1977).

[26] 430 U.S. at 713. The Court did express some doubt, however, as to whether Maynard's conduct in fact constituted symbolic speech. *Id.* at 713 & n.10.

[27] *Id.* at 713, 717.

[28] *Id.* at 716-17. The state argued that the requirement facilitated the determination that passenger vehicles carried the proper plates (only passenger vehicles were required to display license plates imprinted with the state motto) and that it promoted appreciation of history, individualism and state pride. *Id.* The Court concluded that these assertions were insufficient to outweigh the infringement of the plaintiff's first amendment interests because passenger vehicle license plates were already otherwise distinguishable and there were other ways to promote appreciation of history, individualism and state pride which would be less restrictive. *Id.* at 716-17.

[29] *Id.* at 714-15.

[30] *Id.* at 715.

ideological point of view which he opposed.[31] The Court distinguished the appearance of the motto "In God We Trust" on United States currency, arguing that currency is not so readily associated with its owner as an automobile and that since it is normally carried in a purse or pocket the individual is not forced to advertise the motto.[32] Thus, by making this distinction, the Court hinted that there might be no infringement of first amendment interests where the level of personal involvement was small enough to render any connection between the individual and the message sufficiently remote.

Only a month after the *Wooley* decision the Court again found a violation of negative first amendment rights in *Abood v. Detroit Board of Education*.[33] *Abood* involved objections by public school teachers to the agency shop provision in the collective bargaining agreement that governed their employment.[34] Pursuant to state statute a union selected by a majority of the teachers became the exclusive representative of all the teachers, union members and non-members alike.[35] The agency shop provision required all nonunion teachers represented by the union, including plaintiffs, as a condition of continued employment, to pay to the union service fees equal to the regular dues paid by union members.[36] The service fees were intended to prevent union non-members from receiving a "free ride" by obtaining the benefits of collective bargaining without bearing their share of the costs.[37] The plaintiffs alleged, however, that the union used the service fees in part to finance political and ideological activities unrelated to collective bargaining.[38]

The Court held that requiring plaintiffs to give financial support to political and ideological activities,[39] indeed requiring them to support financially their collective bargaining representative, implicated first amendment interests.[40] Reasoning that use of service fees for political and ideological activities unrelated to collective bargaining did not further the government interest in elimination of "free riders,"[41] the Court held that any such use of

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[31] *Id.*

[32] *Id.* at 717 n.15. *See also* Arrow v. United States, 432 F.2d 242 (9th Cir. 1970); O'Hair v. Blumenthal, 462 F. Supp. 19 (W.D. Tex. 1978), *aff'd*, 588 F.2d 1144 (5th Cir. 1979), *cert. denied*, 442 U.S. 930 (1979).

[33] 431 U.S. 209 (1977). Interestingly the *Abood* Court did not even refer to the *Wooley* case.

[34] *Id.* at 212-13.

[35] *Id.* at 212 & n.1. Such exclusive representation is common and is a basic principle in federal labor law. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 374-81 (1976).

[36] *Abood*, 431 U.S. at 212.

[37] *Id.* at 221-22.

[38] *Id.* at 213, 241.

[39] *Id.* at 235-36.

[40] *Id.* at 222.

[41] *Id.* at 220-23. The Court's reasoning was drawn from its earlier decision in International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). In *Street* the Court had acknowledged that Congress had authorized union shop in order to deal with the problem of "free riders," *id.* at 767, and went on to state:

> to support candidates for public office, and advance political programs, is not a use

service fees would violate plaintiffs' first amendment rights.[42] On the other hand, the Court approved the use of service fees for collective bargaining purposes, though, by concluding that the infringement of individual first amendment interests was outweighed by the government interest in promoting labor peace by elimination of "free riders."[43]

The Court most recently considered negative first amendment interests in *Pruneyard Shopping Center v. Robins*.[44] In *Pruneyard* the plaintiffs set up a table in the Pruneyard Shopping Center and began to distribute pamphlets and collect signatures on petitions opposing a United Nations resolution against Zionism.[45] Although their activity was peaceful, a Pruneyard security guard asked them to leave.[46] Subsequently they brought suit to enjoin Pruneyard from denying them access for purposes of circulating their petitions.[47] The California Supreme Court ruled that circulation of petitions on the premises of privately owned shopping centers was protected by the California Constitution.[48] On appeal to the United States Supreme Court, Pruneyard argued that under *Wooley v. Maynard* it could not be compelled to use its property as a forum for the

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> which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances or disputes. In other words, it is use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified.

Id. at 768.

[42] *Abood,* 431 U.S. at 235-37.

[43] *Id.* at 232. This holding requires that a distinction be drawn between collective bargaining activities and political and ideological activities unrelated to collective bargaining. In the public sector this distinction is particularly difficult to draw because public sector collective bargaining is inherently political. The Court acknowledged this difficulty. *Id.* at 236. For a discussion of this problem see Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds,* 14 U.C.D. L. REV. 591 (1981).

[44] 447 U.S. 74 (1980). *See also* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980). *Consolidated Edison* involved a challenge to a Public Service Commission rule prohibiting Consolidated Edison from including political inserts in its bills. *Id.* at 532. The Commission defended the rule, *inter alia,* on the ground that the utility's practice of including political inserts in its bills forced the ratepayers to subsidize distribution of the utility's message. *Id.* at 543. The Court, however, dismissed this argument by simply asserting that in the absence of a showing that the Commission could not exclude the cost of the bill inserts from the rate base there was no need to consider the claim. *Id.* at 543 & n.13. Yet, even if additional costs resulting from the extra material were excluded from the rate base, the utility would still get a "free ride." To eliminate any ratepayer subsidization it would be necessary either to prohibit the utility from including the inserts, as the Commission did, or to exclude the cost of mailing bills from the rate base altogether. Thus, for the Court to conclude that there was no occasion to decide whether *Abood* prohibited forcing ratepayers to subsidize utility political advertising seems incorrect. *See* Harrison, *Public Utilities in the Marketplace of Ideas: A Fairness Solution for a Competitive Imbalance,* to be published in 1982 WIS. L. REV.

[45] *Pruneyard,* 447 U.S. at 77.

[46] *Id.*

[47] *Id.* at 77.

[48] Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 910, 592 P.2d 341, 347 (1979), *aff'd,* 447 U.S. 74 (1980). Such a right of access to private property is not protected by the federal Constitution. Hudgens v. NLRB, 424 U.S. 507, 518-21 (1976). However, the Court did recognize such a right at one time. Food Employees v. Logan Valley Plaza, 391 U.S. 308, 313 (1968).

speech of others and that therefore the California Court's construction of the California Constitution violated Pruneyard's federal constitutional rights.[49]

The Supreme Court disagreed with appellants' position.[50] It found three factors distinguishing *Pruneyard* from *Wooley*.[51] First, because the shopping center was open to the public the Court concluded that the views expressed by others, even though on shopping center property, would not likely be associated with the shopping center owners.[52] Second, because no specific message was dictated by the state the Court saw no danger of governmental discrimination for or against any particular views.[53] Finally, the Court noted that the shopping center owners were entirely free to disavow publicly any connection with or approval of the message contained in the petitions.[54]

Although the Court took care to distinguish between *Pruneyard* and *Wooley* it did not address the more difficult question of whether *Pruneyard* can be reconciled with *Abood*. In *Abood* the Court held that for government to compel an individual to contribute to the support of an ideological cause he opposes infringes upon individual first amendment interests, and that, at least in the absence of an overriding government interest, such compelled subsidization is unconstitutional.[55] The compelled subsidy in *Abood* took the form of required financial contributions. Nevertheless, requiring the shopping center owners in *Pruneyard* to permit use of their property as a forum for speech by others constitutes a similar compulsion to subsidize ideological activity. Thus it is interesting that the only reference to *Abood* by the *Pruneyard* Court appears in Justice Powell's concurring opinion. Justice Powell acknowledged the potential conflict between *Pruneyard* and *Abood*, but dismissed it because the issue had not been raised by the litigants.[56]

Whether or not all of these decisions can be harmonized, the Court has yet to articulate any consistent general approach to negative first amendment issues. While the Court has suggested several factors to distinguish among these cases,[57] it has not adequately explained why these distinctions should be important in the negative first amendment context. The reason for this failure to

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[49] *Pruneyard,* 447 U.S. at 85-88 (1980).

[50] *Id.* at 88.

[51] *Id.* at 87-88.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See supra* text and notes at notes 33-43.

[56] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 98-99 n.2 (1980) (Powell, J., concurring). Although Justice Powell did not discuss at length any possible distinction between *Pruneyard* and *Abood* he did note that the shopping center owners in *Pruneyard* had not alleged that they opposed the message contained in the petitions circulated on shopping center property. *Id.* This distinction is not persuasive, however, because in *Abood* the Court had held that it was sufficient for the plaintiffs to allege that they opposed use of their compelled contributions for any political or ideological activity. To require more specific allegations would deprive the plaintiffs of the right to keep their views to themselves. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977).

[57] *See supra* text and notes at notes 51-54.

develop a consistent approach is that the Court has not focused sufficiently on the distinct nature of the injury to individual interests caused when the government compels, rather than prohibits, expression. To evaluate the usefulness of the factors suggested by the Court, it is necessary to begin with an analysis of the infringement of individual interests arising from government compelled expression.

II. The Nature and Analysis of Negative First Amendment Interests

A. *Negative First Amendment Interests*

Courts and commentators have attempted frequently to describe the purposes of the first amendment's guarantee of freedom of expression. Prominent among these explanations has been the notion that freedom of expression promotes intelligent self-government by insuring the opportunity for full and robust discussion of matters of public concern.[58] Closely related to this notion is the thought that freedom of expression facilitates the advancement of knowledge and the discovery of truth generally.[59] These thoughts are frequently expressed in terms of maintaining a "free marketplace for ideas" in which all views compete for acceptance.[60]

Government prohibition of expression inevitably interferes with the preservation of a "free marketplace for ideas." Consequently it is not necessary to search further to explain invocation of the first amendment to strike down government prohibitions of expression. However, when government compels rather than prohibits expression there is not the same conflict with the policy of preserving an opportunity for full and free discussion. Compulsion to express a particular view does not by itself preclude the opportunity to disavow whatever one has been compelled to express. Thus, Justice Frankfurter, dissenting in *Barnette*, argued that requiring school children to salute the flag did not violate the first amendment because it did not in any way restrict their opportunity to disavow publicly the meaning others might attach to their compliance with the requirement.[61] He noted that all channels of affirmative free expression remained open to the plaintiffs, and stated that, were that not true, he would be the first to find the restriction violative of the first amendment.[62] Nevertheless,

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[58] *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 356-57 (1976); Buckley v. Valeo, 424 U.S. 1, 14-15 (1976); New York Times v. Sullivan, 376 U.S. 254, 269-70 (1964). *See also* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 8-11 (1963); A. MEIKLEJOHN, POLITICAL FREEDOM (1960); TRIBE, *supra* note 2, § 12-1.

[59] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *See also* EMERSON, *supra* note 58, at 7-8; TRIBE, *supra* note 2, § 12-1.

[60] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); TRIBE, *supra* note 2, § 12-1, at 576-77.

[61] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 663-64 (1943) (Frankfurter, J., dissenting).

[62] *Id.* at 664 (Frankfurter, J., dissenting).

the Court rejected this argument and concluded that the requirement of the flag salute and pledge violated the first amendment.[63]

Even though Justice Frankfurter's argument did not persuade the Court it suggests the need to look beyond the "free marketplace for ideas" rationale to explain the Court's holding. The *Barnette* Court itself suggested the answer when it condemned the flag salute requirement as an invasion of the "sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to protect."[64] Freedom of expression is not merely an instrumentality to foster intelligent self-government or the advancement of knowledge.[65] It is rather, at least in part, in the words of Professor Tribe, "an expression of the sort of society we wish to become and the sort of persons we wish to be."[66] Professor Emerson has suggested the same idea noting that the ultimate justification for freedom of expression has to do with the right of an individual as an individual — that is, the right of an individual to the development of his own personality and the realization of his own potential free from government interference.[67] Thus the answer to Justice Frankfurter's argument is that although compelling one to recite the pledge of allegiance may not interfere with the "free marketplace for ideas," it does infringe upon what may be called the individual's interest in selfhood.[68]

Despite the *Barnette* Court's suggestion that the injury inflicted upon individual interests when government compels expression has to do with the individual interests in the self, the Court did not explain the precise nature of the infringement. Of course the compulsion in *Barnette* was so repugnant to any concept of individual freedom of conscience that careful analysis of the nature of the infringement would have seemed almost pedantic.[69] Nevertheless, such analysis is necessary in order to examine the application of the *Barnette* rationale to other less obvious circumstances.

When government compels expression it may infringe upon the individual interest in the self in at least two distinct ways: first, it may interfere with the individual's ability to define the persona he presents to the world; and, second, it may interfere with the individual's freedom of conscience. With respect to

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[63] *Id.* at 642.

[64] *Id.* The Court made a similar observation in *Wooley*: "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' " Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[65] *See generally* EMERSON, *supra* note 58, at 3-15; TRIBE, *supra* note 2, § 12-1.

[66] TRIBE, *supra* note 2, § 12-1, at 576.

[67] EMERSON, *supra* note 58, at 4-5.

[68] TRIBE, *supra* note 2, § 15-5. Professor Tribe describes this interest as an ingredient in a broader concept of rights of "personhood." *See generally id.* §§ 15-1 to -21. These rights derive in part from the first amendment and in part from the "penumbras" and "shadows" of other constitutional guarantees. *Id.* § 15-3. *See also* Whalen v. Roe, 429 U.S. 589, 598-600 (1977); Roe v. Wade, 410 U.S. 113, 152-54 (1973); Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (The Court stated that "the First Amendment has a penumbra where privacy is protected from governmental intrusion."). *Id.*

[69] *See supra* text and notes at notes 7-17.

[70] TRIBE, *supra* note 2, § 15-1 at 888.

the first of these interests Professor Tribe has stated, "freedom to have impact on others — to make the 'statement' implicit in a public identity — is central to any adequate conception of the self."[70] What one chooses to say or not to say helps define one's public identity. When government compels an individual to express a particular view it deprives the individual of the opportunity to remain silent, and thereby deprives the individual of control over the persona he presents to the world. Whether or not the individual agrees with the views he is required to express, and whether or not others perceive his coerced expression as sincere make no difference. If compelled expression is perceived as sincere it communicates either the individual's true views or alternatively, and perhaps even worse, a misimpression of the individual's views. The individual could correct any such misimpression, of course, only by disclosing his true views. If the compelled expression were perceived as insincere, however, the individual's true views would be suggested by negative implication. When one is thus deprived of the right to remain silent the essence of the injury to individual negative first amendment interests is the deprivation of the individual's freedom to decide how he will present himself to the world.[71]

The other way in which compelled expression infringes upon the individual interest in selfhood is by interfering with individual freedom of conscience. Unlike the interest in the projection of public identity, which focuses outward on the individual's impact upon others, the interest in freedom of conscience focuses inward on the individual's self-perception. When government compels expression the individual subject to the compulsion is likely to view compliance as acquiescence in, if not as outright affirmation of, the views involuntarily expressed. Consequently one who submits to such compulsion is likely to feel humiliated and ashamed that he did not stand up for his own beliefs. Thus, for the state to compel expression constitutes a direct and powerful affront to the individual as an individual because it requires a denial of the self and represents the ultimate submission of the individual — submission of mind.[72]

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[71] The interest in keeping one's views private as it relates to individual control over the projection of a public identity must be distinguished from the interest in keeping one's views or associations private for the purpose of avoiding harassment. Disclosure of an individual's adherence to unpopular views or membership in or support of unpopular organizations can subject the individual to harassment and thereby discourage expression of unpopular views or membership in unpopular groups. Accordingly the Court has protected such information from involuntary disclosure to avoid any chilling effect upon the affirmative exercise of the rights of expression and association. *See* note 3 *supra*.

The interest in the privacy of one's thoughts as it relates to individual control over the projection of a public identity is different. It does not focus on potential indirect chilling effects upon exercise of affirmative first amendment rights. Rather it focuses upon the direct effect of disclosure of one's views upon the definition of his public identity. In other words it is a negative first amendment interest in the privacy on one's thoughts and it is completely independent of any chilling effect upon affirmative first amendment interests.

[72] Although the Court did not speak specifically in terms of freedom of conscience, the injuries to individual interests in *Barnette* and *Wooley* were to this interest. *See infra* text and notes at notes 109-17. The magnitude of the affront to the individual is suggested by the familiar story of William Tell, the Swiss patriot who shot an apple from his son's head rather than bow to the

It is important to emphasize that the infringement of individual freedom of conscience resulting from compelled affirmation of belief has to do with the individual's self-perception. It arises from the individual's own response to his compliance with the government's requirement. Its essence is the individual's feelings of shame and disgrace resulting from his inability or unwillingness to defy the state on a matter of principle. Thus, unlike infringement of the interest in the projection of a public identity, infringement of the interest in freedom of conscience does not depend on any message conveyed to others. Rather, an individual submitting to compulsion to affirm a belief contrary to his own might well experience feelings of humiliation, even if no one else witnessed or knew of his actions.

Thus, compelled expression may infringe upon at least two distinctly different aspects of the more general interest in selfhood: the interest in projection of a public identity; and the interest in freedom of conscience. In any given case the question must be whether either of these interests has been infringed and, if so, to what extent. With that in mind, let us examine the factors suggested by the Court to distinguish among the cases.

B. *Analytical Factors Suggested by the Court*

1. Freedom to Disavow

One of the factors suggested by the *Pruneyard* Court to distinguish *Pruneyard* from *Wooley* was that in *Pruneyard* the shopping center owners were free to disavow any connection with the message conveyed by petitions circulated on shopping center property.[73] The flaw in this distinction, however, is that the plaintiff in *Wooley* was equally free to disavow agreement with the state motto he was compelled to display on his license plate.[74] It is true, as the *Pruneyard* Court noted,[75] that the plaintiff in *Wooley* was not permitted to cover up the state motto.[76] Nevertheless, he was free to indicate his disagreement with it in any manner which would not physically obscure the license plate. For example, he might have displayed a bumper sticker proclaiming his disagreement with the state motto.[77] The plaintiffs in *Barnette* and *Abood* were likewise free to disavow the messages they were compelled to express.[78] Thus the opportunity to disavow simply does not distinguish the cases factually.

Austrian governor's hat. For a reference to this story see West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 n.13 (1943).

[73] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 87 (1980). *But see id.* at 99 (Powell, J., concurring, suggests that freedom to disavow cannot restore the right to refrain from speaking at all.).

[74] *See* note 77 *infra*. *See also supra* text and notes at notes 20-24.

[75] *Pruneyard*, 447 U.S. at 87.

[76] *Wooley*, 430 U.S. at 707.

[77] *Wooley*, 430 U.S. at 707. This solution was specifically noted by Justice Rehnquist in his dissent. *Id.* at 722 (Rehnquist, J., dissenting).

[78] This point was specifically raised by Justice Frankfurter dissenting in *Barnette*. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 664 (1943) (Frankfurter, J., dissenting).

More fundamentally, freedom to disavow a message one has been compelled to express is simply irrelevant to the injury inflicted by such compulsion in the first place. Once government compels expression any individual subjected to the compulsion is deprived of the opportunity to refrain from speaking out at all.[79] This is so whether or not the individual avails himself of any opportunity to disavow. Thus, disavowal simply fails to remedy the loss of control over the projection of one's public identity.[80] Similarly disavowal cannot redress any infringement of individual freedom of conscience.[81] It seems unlikely that one compelled to affirm a belief contrary to his conscience would feel vindicated simply by later announcing that he had not really meant what he said. Although the remedy of more speech may be effective in some contexts[82] it is of little use in the area of negative first amendment interests.[83]

2. The Content-Based/Content-Neutral Distinction

Another, and perhaps superficially more persuasive, basis on which the Court sought to distinguish *Pruneyard* from *Wooley* was that in *Pruneyard* the state had dictated no particular message.[84] In *Wooley*, it will be recalled, the state specifically required the plaintiff to display the state motto on his license plate.[85] By contrast, in *Pruneyard* the state merely refused to permit the shopping center owners to eject individuals peacefully circulating petitions on shopping center property.[86] Even if this is viewed as a requirement that the shopping center owners permit use of their property as a forum for expression by others, the state did not require the shopping center owners to assist the expression of any particular message in this manner. The requirement in *Pruneyard* might thus be described as content-neutral in contrast to the requirement in *Wooley* which might be described as content-based.

It is usual to distinguish between content-based and content-neutral interferences with expression in the analysis of affirmative first amendment issues.[87] One role of the first amendment is to insure the opportunity for full and free

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[79] *See supra* text and note at note 71.

[80] See discussion of the interest in control over the projection of a public identity in text Section II A *supra*.

[81] See discussion of the interest in freedom of conscience in text Section II A *supra*.

[82] More speech may be an effective remedy where the injury flows from speech. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 347, 377 (1927) (Brandeis and Holmes, J.J., concurring).

[83] In fact a distinct negative first amendment issue arises only in cases where disavowal is not prohibited. If disavowal were prohibited, and no such case has been found, that prohibition would infringe upon affirmative first amendment interests, and relief could be based on protection of affirmative first amendment interests without reference to negative first amendment interests.

[84] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 87 (1980).

[85] Wooley v. Maynard, 430 U.S. 705, 707 (1977).

[86] *Pruneyard*, 447 U.S. at 77-79.

[87] *See generally* TRIBE, *supra* note 2, §§ 12-2 to -3.

discussion of matters of public concern — that is, to protect a "free marketplace of ideas."[88] From this perspective the danger inherent in government discrimination against particular views is obvious. If government can suppress particular doctrines, it can silence its critics and perpetuate error. This danger is not limited to restrictions which totally suppress expression of certain viewpoints. Even a time, place or manner restriction of a specific message may inhibit or hinder its expression.[89] Consequently government restriction aimed at specific content is presumptively invalid and is subjected to very rigorous scrutiny.[90]

Content-neutral government restrictions which affect expression only indirectly do not portend the same dangers for freedom of expression. Because the interference with expression is not related to the message, content-neutral regulation is not a practical means to stifle government critics or to suppress specific doctrines. With respect to the marketplace metaphor, content-neutral regulation leaves unaffected the variety of ideas available while restricting only the size or the hours of the marketplace generally. Thus, the rigorous scrutiny applicable to content-based restrictions is unnecessary for content-neutral restrictions.[91] Of course even a content-neutral restriction could eliminate a particular medium of expression altogether. Consequently, content-neutral restrictions are valid only if they do not unduly restrict expression.[92] This inquiry necessarily requires balancing of the public interest served by a given restriction against its impact upon expression.[93]

While the content-based/content-neutral distinction is appropriate in the affirmative first amendment context, it does not appear applicable to the

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[88] *See supra* text and notes at notes 58-60.

[89] *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (city ordinance prohibiting picketing except labor picketing within 150 feet of schools held violative of the fourteenth amendment because it was not content-neutral). *But see* Greer v. Spock, 424 U.S. 828 (1976) (military regulation banning speeches and demonstrations of a partisan political nature on army base upheld). Professor Tribe suggested that *Greer* may imply that a less rigid test of content-neutrality may apply to non-public forums. *See* TRIBE, *supra* note 2, § 12-21, at 691 & n.21.

[90] *See generally* TRIBE, *supra* note 2, §§ 12-2 to -19.

[91] *See* TRIBE, *supra* note 2, § 12-20.

[92] *Compare* Martin v. City of Struthers, 319 U.S. 141 (1943) (Court struck down ordinance prohibiting any person from knocking on doors, ringing doorbells or otherwise summoning any resident to the door for purposes of delivering handbills) *and* Schneider v. State, 308 U.S. 147 (1939) (ordinance banning all public distribution of handbills held invalid) *with* Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding antinoise ordinance prohibiting a person from willfully making noise tending to disturb school sessions) *and* Adderley v. Florida, 385 U.S. 39 (1966) (upholding conviction of petitioners for criminal trespass where petitioners had engaged in demonstration on the grounds of the county jail to protest arrests of others). *Cf.* Greer v. Spock, 424 U.S. 828 (1976) (upholding military regulation banning partisan political speeches and demonstrations from military base). *See also* TRIBE, *supra* note 2, § 12-2, at 581-82, § 12-20.

[93] *See generally* TRIBE, *supra* note 2, § 12-20. One commentator has pointed out that this balancing is "at the margin" weighing the incremental promotion of the public interest against the incremental interference with free expression. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1485 & n.16 (1975).

negative first amendment context.[94] The dangers implicit in government discrimination against particular views do not arise when government discriminates in favor of particular views, at least when it does so either by expressing those views itself or by compelling others to express them. It has been suggested that the "free marketplace of ideas" may be undermined as readily by government protection of particular views as by government restriction of particular views.[95] However, this proposition as stated is too broad. Of course special protection of particular views is often tantamount to a restriction upon all other views. Where government protection of particular views works a concomitant restriction on other views, government protection is as injurious to freedom of expression as government restriction. Indeed government protection of specific content is in such cases indistinguishable from government restriction of specific content. Thus the Court has held for example that an ordinance prohibiting all picketing except labor picketing near schools is invalid as a content-based restriction of all non-labor picketing.[96] However, when government discrimination in favor of particular views takes the form of the government's merely adding its own voice to the throng on behalf of that view, there is no concomitant restriction on the expression of other views. Government expression does affect the relative quantity of expression of various views but does not restrict any expression on the basis of content.[97] Similarly, government compelled expression does not restrict expression of any specific views but, rather, only affects the relative quantity of all expression. Even if government can create a false sense of support for a certain view by forcing expression of it, no restriction of other views occurs. Thus, while compelled expression may infringe upon individual interests it should not be condemned as an interference with the "free marketplace of ideas."

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[94] This point appears to be what Justice Powell had in mind in his concurring opinion in *Pruneyard* when he stated, "But even when no particular message is mandated by the State, First Amendment interests are affected by state action that forces a property owner to admit third-party speakers. In many situations, a right of access is no less intrusive than speech compelled by the State itself." Pruneyard Shopping Center v. Robins, 447 U.S. 74, 98 (1980) (Powell, J., concurring).

[95] Ely, *supra* note 93 at 1506-08. Professor Ely's argument is that statutes prohibiting desecration or improper use of the flag are not truly content-neutral. Although such statutes are neutral in the messages they inhibit, they single out the particular message conveyed by the flag for special protection. Thus Professor Ely argues that such statutes should be subjected to the more demanding scrutiny associated with content-based regulations. A statute prohibiting desecration of any privately owned symbols would present a different case. *Id.* at 1507 n.101.

[96] Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

[97] Government is generally free to engage in expression so long as it does not violate the establishment clause. *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977) (state may legitimately communicate an official view as to proper appreciation of history, state pride and individualism in any number of ways). *Cf.* Buckley v. Valeo, 424 U.S. 1, 92-93 & n.127 (1976) (Court rejected any analogy between the establishment of religion and public financing of political campaigns because government may facilitate expression); *but see id.* at 248-51 (Burger, C.J., dissenting on this issue). *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 697-716 (1970); TRIBE, *supra* note 2, § 12-4, at 590 & n.8; Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C.L. REV. 578 (1980).

Moreover, the content-based/content-neutral distinction also fails to help identify negative first amendment cases in which the infringement of individual interests is particularly severe. For example, the Court held in *Barnette* that the state may not require school children to recite the pledge of allegiance.[98] Suppose instead a state requirement that school children recite, not the pledge of allegiance per se, but rather, a message to be selected by some nongovernment entity, and that the message selected happened to be the pledge of allegiance.[99] Although in this case the government would not have mandated any particular message, the infringement of individual interests would not seem any less severe. The essence of the infringement in either case is the denial of individual freedom of conscience and in this regard the two cases are indistinguishable.[100] Similarly it makes little difference whether it is the government or the nongovernmental entity that chooses the specific message with respect to infringement of the individual's interest in control over the projection of his public identity.[101]

3. The Nexus Between the Individual and the Message

The third basis on which the Court sought to distinguish *Pruneyard* from *Wooley* was that views expressed by the public in circulating petitions on shopping center property would not likely be identified with those of the shopping center owners. The Court described this identification factor as the most important of the three distinctions it had suggested.[102] By definition government cannot infringe upon individual interests by compelling expression unless what it compels constitutes expression. When, as in *Barnette*, the state forces individuals to recite the pledge of allegiance or salute the flag[103] government has clearly compelled expression. However, when the government requires only that an individual participate in some less personal and less direct manner in the expression of a message the infringement of individual interests is less clear. In such a case, as the required participation becomes less direct and personal the likelihood decreases that compliance will identify the individual with the message expressed. Unless the government requires an individual to do something which reasonably identifies him with a message it is difficult to describe the government's action as compelling expression.

Negative first amendment interests are infringed when government by compelling expression interferes with individual control over the projection of

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[98] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 635, 642 (1943).

[99] This is in effect what happened in *Pruneyard*. The government required the shopping center owners to permit others to circulate petitions on shopping center property. The particular petitions to be circulated were chosen by the individuals desiring to circulate them, not by the government. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 77-78 (1980).

[100] See discussion of the interest in freedom of conscience in text Section II A *supra*.

[101] See discussion of the interest in control over the projection of a public identity in text Section II A *supra*.

[102] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 87 (1980).

[103] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 626-27 (1943).

one's public identity[104] or deprives the individual of freedom of conscience.[105] In either case the infringement requires that the individual somehow be identified with some message. The interest in projection of a public identity involves the way in which others perceive the individual. Infringement occurs when that perception is affected because the individual has been forced to speak out when he might have preferred to remain silent. However, unless others will identify some particular message with the individual, he has not been forced to speak out in any meaningful sense and his public identity will not be affected. Infringement of the interest in freedom of conscience occurs when the individual is forced to affirm a belief he does not hold. Coerced affirmation of belief constitutes an affront to personal dignity because the individual is likely to feel humiliated and ashamed that he did not stand up for his own beliefs. This may occur whether or not the compelled acts communicate anything to others. It cannot occur, however, unless the compelled acts associate the individual at least in his own mind with particular beliefs he finds objectionable.

In *Wooley v. Maynard*, for example, the state did not actually require the plaintiff to say anything.[106] It merely required him to display on his automobile a license plate bearing the state motto.[107] Consequently Justice Rehnquist argued in dissent that the state had not compelled any expression because it had not forced the plaintiff to say anything or "to communicate ideas with nonverbal actions reasonably likened to 'speech' such as wearing a lapel button . . . or waving a flag."[108] It is true that, had plaintiff complied with the license plate requirement, it would seem highly unlikely that anyone would have regarded plaintiff's compliance as an expression of plaintiff's views concerning the state motto. Thus, Justice Rehnquist seems correct in concluding that the state did not force the plaintiff to communicate anything to others. Accordingly it would appear that there was no infringement of the plaintiff's interest in maintaining control over the projection of his public identity.[109]

It does not necessarily follow, however, that there was no infringement of the plaintiff's interest in freedom of conscience. Such infringement does not require that the individual be forced to communicate anything to others.[110] It requires only that the individual himself can reasonably view what he is forced to do as an involuntary affirmation of a belief.[111] In this connection Justice Rehnquist seems incorrect in suggesting that displaying a license plate bearing the state motto is inherently unlike "speech."[112] The reason why others would not

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[104] See discussion of the interest in control over the projection of a public identity in text Section II A *supra*.

[105] See discussion of the interest in freedom of conscience in text Section II A *supra*.

[106] *Wooley*, 430 U.S. at 720 (Rehnquist, J., dissenting).

[107] *Id.* at 707. *See supra* text and notes at notes 20-32.

[108] *Id.*

[109] See discussion of the interest in control over the projection of a public identity in text Section II A *supra*.

[110] See discussion of the interest in freedom of conscience in text Section II A *supra*.

[111] *Id.*

[112] *Wooley*, 430 U.S. at 720.

likely have regarded compliance with the license plate requirement by plaintiff as an expression of plaintiff's views is simply that everyone else was also required to display similar license plates on their automobiles. Consequently they probably would have paid little or no attention to plaintiff's doing the same. Had plaintiff been the only one required to display such a license plate, others who saw it might well have regarded it as an expression of the plaintiff's views. After all, it is a common form of expression to attach slogans to one's personal property, including automobiles — witness the frequency of bumper stickers and even personalized license plates.

Although the generality of the license plate requirement rendered it unlikely that others would regard plaintiff's compliance as an expression of his views, the general applicability of the requirement has little bearing on how the plaintiff himself would view his own compliance. In *Barnette*, for example, all students were required to recite the pledge of allegiance.[113] It is probable, therefore, that the other students would not necessarily have regarded compliance as an expression of anyone's personal views. Nevertheless, that did not diminish the plaintiff's conscientious scruples over reciting the pledge. The essence of the infringement of freedom of conscience is the individual's own feeling that he has been false to his own beliefs.[114] This interest, therefore, does not depend on how others interpret his actions. Indeed one might be just as reluctant to affirm a belief contrary to his conscience even if no one else were aware of it. To determine whether a particular government requirement infringes upon freedom of conscience the crucial inquiry is not whether compliance would communicate any message to others, but rather, whether compliance could reasonably be regarded by the individual himself as an affirmation of or acquiescence in some belief.

In *Wooley*, two sets of circumstances combine to suggest that the plaintiff could reasonably have regarded compliance with the state's requirement as an involuntary affirmation of a belief. First, displaying a slogan is generally an effective means to express the slogan's message. That others might not perceive the display as an expression of the individual's views is not important because the individual himself, sensitized by his opposition to the slogan, would not miss the suggestion. Second, the plaintiff's compelled involvement in the display of the state motto was direct and personal. As the Court noted, and indeed deemed critical, the plaintiff was required to display publicly the state motto as part of his daily life on his personal property.[115] Moreover, an automobile is a possession which is readily associated with its owner. Thus, it seems reasonable that the plaintiff might view compliance with the state requirement as some acquiescence in the views suggested by the state motto.

The inference of acquiescence is, of course, more compelling when an individual actually recites a pledge rather than merely displays a motto on his

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[113] *See supra* text and notes 7-10.

[114] See discussion of the interest in freedom of conscience in text Section II A *supra*.

[115] *Wooley*, 430 U.S. at 715.

license plate. Recitation is one of the most direct and personal ways one could be involved in expression. While identification of an individual with a message displayed upon his personal belongings can be problematic, identification of an individual with his spoken words is virtually inescapable. This is why the Court considered the infringement in *Wooley* to be less severe than the infringement in *Barnette*.[116] Nevertheless, it seems evident that forcing an individual to display on his license plate a message which he opposed could cause significant pangs of conscience. Imagine, for example, being forced to display a license plate bearing a Nazi slogan or a racial slur. Thus, the Court was correct in concluding that the license plate requirement in *Wooley* worked a significant infringement of individual interests.[117]

In *Pruneyard Shopping Center v. Robins*,[118] the shopping center owners, like the plaintiff in *Wooley*, were compelled to permit use of their property for dissemination of an ideological message.[119] The California Supreme Court had held that peaceful circulation of petitions on privately owned shopping center property was protected by the California Constitution.[120] Consequently, the shopping center owners in *Pruneyard* were unable to eject individuals peacefully circulating petitions on shopping center property. The circumstances in *Pruneyard*, however, were such that any resulting identification of the owners with the message conveyed by the petitions was extremely remote. The shopping center was large and generally open to the public.[121] It would, therefore, be unreasonable for anyone to infer that the shopping center owners endorsed all messages expressed on the premises by members of the public.[122] It would similarly be unreasonable for the owners themselves to think that they somehow endorsed any views expressed by others on shopping center property.

As *Barnette*, *Wooley* and *Pruneyard* suggest, the potential range of the extent of compelled personal involvement in expression, and thus the potential range of the degree of infringement of negative first amendment interests, can be viewed on a continuum. The compulsion involved in *Barnette*[123] represents one end of this continuum. The compulsion involved in *Pruneyard*[124] is perhaps near the other end. As the compelled involvement in expression of a message becomes less personal and less direct, association of the individual with the message diminishes. It becomes less likely that others will ascribe the views ex-

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[116] *Id.*

[117] *Id.*

[118] 447 U.S. 74 (1980).

[119] *Id.* at 77-78.

[120] *See* note 48 *supra*.

[121] *Pruneyard*, 447 U.S. at 101 (Powell, J., concurring) ("The shopping center occupies several city blocks. It contains more than 65 shops, 10 restaurants, and a theater. Interspersed among these establishments are common walkways and plazas designed to attract the public.").

[122] *Pruneyard*, 447 U.S. at 87 ("It is . . . a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets . . . will not likely be identified with those of the owner.").

[123] *See supra* text and notes at notes 7-17.

[124] *See supra* text and notes at notes 44-54.

pressed to the individual involved. Similarly, it becomes less likely that the individual will view his involuntary involvement as acquiescence. Eventually a point is reached where the level of personal involvement is so minimal and the resulting nexus between the individual and the message so remote that no legally cognizable infringement of negative first amendment interests occurs.

C. *Balancing and Negative First Amendment Interests*

Whenever a government requirement is challenged on the basis that it compels expression the initial inquiry must be whether the requirement does in fact infringe upon negative first amendment interests and if so how seriously. The judicial task does not end here, however. It is also necessary to consider what government interests may be served by the requirement in question, and under what circumstances advancement of a government interest might outweigh the concomitant infringement of individual negative first amendment interests.

In *Barnette* the Court acknowledged that the government purpose in compelling school children to recite the pledge of allegiance was to promote national unity and thereby advance national security.[125] In concluding that the asserted government interest was not sufficient to justify the infringement of individual interests, the Court noted the futility of seeking to promote national unity in this manner[126] and the egregiousness of the infringement of individual interests.[127] The Court opined that so intimate an affirmation of a belief and an attitude of mind could be required, if ever, only for reasons even more compelling than those necessary to justify suppression of expression.[128] The Court could think of no such situations.[129]

In *Wooley v. Maynard*[130] the Court again acknowledged the need to consider whether the state's asserted interest was sufficiently compelling to justify the infringement of individual negative first amendment interests.[131] Although the Court did not attempt to articulate a particular standard for what would be sufficiently compelling, it took much more care than the *Barnette* Court to show that the asserted state interests were not sufficiently important.[132] The state argued that displaying the state motto on automobile license plates aided identification of passenger vehicles and fostered an appreciation of history, in-

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[125] West Virginia State Bd. of Educ. v. Barnette, 319 U.S 624, 640 (1943).

[126] *Id.* at 640-41.

[127] *Id.* at 633.

[128] *Id.* at 633, 642.

[129] *Id.* at 642.

[130] 430 U.S. 705 (1977).

[131] *Id.* at 715-16. The Court stated: "Identifying the Maynards' interests as implicating First Amendment protections does not end our inquiry however. We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates." *Id.*

[132] *Id.* at 716-17.

dividualism and state pride.[133] The Court considered the first asserted interest insubstantial because passenger license plates were otherwise easily distinguishable and noted that in any event this interest could be achieved through less drastic means.[134] The state interests in promoting appreciation of history, individualism and state pride could also be legitimately pursued in other ways less injurious to individual interests.[135]

The greater attention focused on the state interests asserted in *Wooley* suggests that as the degree of infringement of individual interests decreases, the Court's deference to competing government interests increases. This tendency is further exemplified in *Abood v. Detroit Board of Education*.[136] There the Court was unanimous in holding that requiring teachers to pay service fees to the union which represented them in collective bargaining infringed upon the teachers' negative first amendment interests.[137] Nevertheless, the plurality concluded that use of service fees for collective bargaining purposes was justified by the asserted government interest in promoting labor peace through the elimination of "free riders."[138] In reaching this conclusion it is significant that the plurality did not subject the asserted government interest to particularly rigorous scrutiny. They did not question, for example, the extent to which elimination of "free riders" in fact promotes peaceful labor relations. Nor did they consider whether the same objective might be obtained by employing any less drastic measures.[139] Indeed, several members of the court sharply criticized the plurality for failing to apply established first amendment principles and require the state to come forward and demonstrate overriding government objectives.[140] The plurality's failure to apply rigorous scrutiny to the asserted government interest appears to have been based on a tacit assumption that the infringement of individual interests was not very severe.[141]

Finally, in *Pruneyard* the California Supreme Court held that the Califor-

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[133] *Id.* at 716.

[134] *Id.*

[135] *Id.* at 717.

[136] 431 U.S. 209 (1977).

[137] *Id.* at 222 (Stewart, J., plurality opinion); *id.* at 243-44 (Rehnquist, J., concurring); *id.* at 244 (Stevens, J., concurring); *id.* at 244-45 (Powell, J., concurring).

[138] *Id.* at 232. *See supra* text and note at note 43.

[139] 431 U.S. at 220-23. The Court relied heavily on its earlier decisions in Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956) and International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). However, the questions of to what extent elimination of "free riders" contributes to, or is necessary for, labor peace were not discussed in those cases either. *Hanson* upheld in the private sector context the constitutionality of union shop agreements which require financial support of the collective bargaining agency by all who receive the benefits of its work. *Hanson*, 351 U.S. at 238. *Street* was based on statutory grounds and prohibited the use of union shop funds for political purposes. *Street*, 367 U.S. at 769-70. *Street*, however, did not consider, but rather assumed in view of *Hanson*, the constitutionality of using shop funds for collective bargaining purposes. *Id.* at 749.

[140] *Abood*, 431 U.S. at 262-64 (Powell, J., concurring).

[141] *See supra* text and notes at notes 150-60.

nia Constitution protected a right of access to privately owned shopping center property for the purpose of circulating petitions.[142] The United States Supreme Court rejected the shopping center owners' claim that the California rule violated their negative first amendment rights without even referring to any possible state interest.[143] The Court's rejection of the shopping center owners' contention appears to be based entirely on the conclusion that the degree of infringement of the owners' negative first amendment interests, if any, was so insignificant as not to be legally cognizable.[144]

The Court's position in *Pruneyard*, then, suggests that the extent to which compelled expression must serve the public interest to justify subordination of the concomitant infringement of individual interests depends on the extent to which the individual interests are infringed. The seriousness or magnitude of infringement of negative first amendment interests may vary throughout a continuum ranging from extreme to de minimis.[145] Accordingly the degree of urgency necessary for a government interest to outweigh the infringement of individual interests must vary in response. In other words, negative first amendment cases require a sliding scale approach to balancing. The more serious the infringement of individual interests, the more vital the asserted advancement of government interests must be to outweigh the infringement and vice versa. The question in each case must be whether the compelled participation in expression infringes unduly upon individual interests.

To summarize, a satisfactory approach to compelled expression requires a two-step analysis. In any case in which a government requirement is challenged on the basis that it compels expression the first inquiry must be whether the requirement works any infringement of individual negative first amendment interests. This inquiry must focus on whether under all the facts and circumstances compliance with the particular requirement would associate the individual involved with some message or point of view. Even if the circumstances are such that others would not ascribe the views expressed to the individual involved, the individual himself may regard his compliance with the challenged requirement as an affirmation of the views expressed. To the extent that others ascribe the views expressed to the individual involved, the individual is deprived of control over the projection of his own identity. To the extent that he views his own actions as an involuntary affirmation of belief he is deprived of freedom of conscience. If it is determined that some infringement of

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[142] *See* note 48 *supra*.

[143] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85-88 (1980). However, the shopping center owners had also argued that they had been deprived of their property without due process of law. In rejecting that contention the Court noted that the state did have an interest in promoting more expansive rights of free speech and petition than conferred by the federal Constitution. *Id.* at 82-85.

[144] The Court stated: "We conclude that neither appellants' federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision . . . ." *Id.* at 88.

[145] *See supra* text and notes at notes 123-24.

individual interests has occurred the second step of the analysis involves balancing that infringement against any government interests furthered by the compelled expression. It is the first step of this analysis that the Court has largely ignored. Nevertheless, even meticulous application of this approach would not shed much additional light on cases like *Barnette* where the infringement of individual interests was as severe as it was obvious.[146] The suggested analysis will help, however, in cases like *Abood* where the underlying fact of infringement is not so clear.[147]

III. *ABOOD*-A REEXAMINATION

A. *The Nature of the Disagreement Between the Plurality and Concurrence*

The *Abood* Court was unanimous in holding that use of required service fees for political and ideological activities unrelated to collective bargaining violated the first amendment.[148] However, the Court was divided significantly over the use of required service fees for collective bargaining activities.[149] The disagreement within the Court ostensibly centered on the proper approach to balancing conflicting government and individual interests. The plurality found the government interest in promoting labor peace by eliminating "free riders" to outweigh the infringement of individual interests.[150] In his concurrence, however, Justice Powell argued that the plurality had failed to apply an appropriately demanding level of scrutiny because the government had not been required to show that a paramount government interest was served by agency shop.[151]

The dispute as to the appropriate level of scrutiny obscures a related but unarticulated disagreement concerning the severity of the underlying infringement of individual negative first amendment interests. Neither the plurality opinion nor Justice Powell's concurring opinion focused on the distinct nature of the infringement of first amendment interests where government compulsion rather than government prohibition or interference is the cause of infringement. Consequently, neither opinion explicitly analyzed the magnitude of the infringement of individual negative first amendment interests. Nevertheless, it

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[146] *See supra* text and notes at notes 7-17.

[147] *See supra* text and notes at notes 33-43.

[148] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (Stewart, J., plurality opinion); *id.* at 242-44 (Rehnquist, J., concurring); *id.* at 244 (Stevens, J., concurring); id. at 244 (Powell, J., concurring) (1977). *See also* Galda v. Bloustein, 516 F. Supp. 1142 (D.N.J. 1981). In *Galda*, plaintiffs, students at Rutgers-Camden College of Arts and Sciences, objected to paying mandatory but refundable fees added to the bill of every student by the university and earmarked for the New Jersey Public Interest Research Group. *Id.* at 1144-46. The Court granted the defendant's motion for summary judgment, distinguishing *Galda* from *Abood*, in part, on the basis that the judgments in *Galda* were refundable. *Id.* at 1148, 1150.

[149] *See* note 6 *supra*.

[150] *Abood*, 431 U.S. at 222-23, 232.

[151] *Id.* at 255, 263-64 (Powell, J., concurring, joined by Burger, C.J., and Blackmun, J.).

appears that the dispute between the plurality and the concurrence as to the appropriate approach to balancing the opposing individual and government interests is based on unarticulated but different intuitive judgments as to the gravity of the infringement of individual interests.

Although the *Abood* plurality concluded that compelled contributions infringed first amendment interests,[152] the plurality may not have considered the infringement to be particularly severe. This is suggested in part by the fact that the plurality upheld use of compelled contributions for collective bargaining purposes without subjecting the asserted government interest to rigorous scrutiny. More significantly the plurality's only direct reference to the severity of the infringement was the assertion that the fact that the plaintiffs had been compelled to make, rather than prohibited from making, political contributions resulted in no less an infringement of their first amendment rights.[153] However, a year earlier in *Buckley v. Valeo*[154] the Court in upholding federal limits on political contributions[155] had said specifically that limits on political contributions involve only a marginal restriction upon free communication.[156]

Unlike the plurality at least three concurring justices definitely considered the infringement of first amendment interests in *Abood* to be significant. Justice Powell, joined by the Chief Justice and Justice Blackmun,[157] stated:

> I agree with the Court as far as it goes, but I would make it more explicit that compelling a government employee to give financial support to a union in the public sector — regardless of the uses to which the union puts the contribution — impinges seriously upon interests in free speech and association protected by the First Amendment.[158]

The whole thrust of Justice Powell's concurring opinion is that public sector agency shop has a serious impact upon first amendment interests and must, therefore, be subject to an exacting level of scrutiny.[159] According to Justice Powell, in approving use of service fees for collective bargaining purposes, the plurality failed to apply an appropriately rigorous level of scrutiny. He pointed out that the plurality not only failed to require the state to prove that its actions were justified by an overriding state interest, but that the plurality in fact

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[152] *Id.* at 235-36 (Steward, J., plurality opinion).

[153] *Id.* at 234-35.

[154] 424 U.S. 1 (1976).

[155] *Id.* at 29.

[156] *Id.* at 20-21. The Court stated:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.

Id. at 21.

[157] *Id.* at 244. Justice Powell wrote a concurring opinion in which the Chief Justice and Justice Blackmun joined.

[158] *Id.* at 255 (Powell, J., concurring).

[159] *Id.* at 254-56, 264.

reversed the burden and placed it on the individual.[160] Of course, if the infringement were as severe as Justice Powell suggested, rigorous scrutiny would seem appropriate. The difficulty with Justice Powell's argument, however, is that he did not explain why the compelled contributions in *Abood* constituted so serious an infringement.

Thus, both the plurality and the concurrence skirted the central problem in *Abood* — how seriously did the compelled contributions infringe upon individual negative first amendment interests? Indeed analysis of that issue was largely foreclosed by the Court's failure to focus on the distinct nature of the injury to individual interests when government compels rather than prohibits expression. This lacuna in the Court's analysis served to obfuscate the real nature of the disagreement between the plurality and the concurrence.

B. *The Magnitude of the Infringement in* Abood

Infringement of individual negative first amendment interests can occur in two ways. First, compelling an individual to participate in expression may interfere with the individual's projection of a public identity.[161] Second, it may interfere with the individual's freedom of conscience.[162] In either case, however, the infringement depends on association of the individual with some message.[163] Several circumstances in *Abood* suggest that any association of individual teachers with views ultimately expressed by the union was probably minimal. In *Abood*, and indeed in any agency shop situation, any association of the individual with the views expressed by a union is likely to be remote. A union is a separate entity. Any views expressed by a union, which is a majoritarian institution, can reasonably be understood only as the views of the institution and not as those of any individual member.[164] Furthermore, the

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[160] *Id.*

[161] See discussion of the interest in control over the projection of a public identity in Section II A. *supra*.

[162] See discussion of the interest in freedom of conscience in text Section II A *supra*.

[163] *See supra* text and notes at notes 102-24.

[164] *Cf.* Lathrop v. Donohue, 367 U.S. 820, 859 (1961) (Harlon, J., concurring). *Lathrop* involved a challenge to the annual dues requirement of the Wisconsin State Bar. *Id.* at 822 (Brennan, J., plurality opinion). The plaintiff contended that the bar's use of his dues in part to finance political activity violated his first and fourteenth amendment rights. *Id.* at 822-23, 827. The plurality held that the state bar may impose dues requirements to finance activities which elevate the educational and ethical standards of the bar. *Id.* at 843. Because the plaintiff's complaint lacked concreteness, the plurality did not address whether the use of state bar dues for political purposes violates the plaintiff's first amendment rights. *Id.* at 845-48. In his concurring opinion, however, Justice Harlan discussed the plaintiff's contention that required state bar dues payments amount to a compelled affirmation of belief. *Id.* at 857-61 (Harlan, J., concurring). In rejecting the plaintiff's argument, Justice Harlan agreed with the Wisconsin Supreme Court's opinion that "everyone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual." *Id.* at 859 (Harlan, J., concurring). *See also* Galda v. Bloustein, 516 F. Supp. 1142, 1148 n.10 (D.N.J. 1981) (The court deemed frivolous plaintiff's argument that, due to university policy of requiring student to make

general public is unlikely even to be aware of any particular individual's financial support compelled by an agency shop agreement. Without that knowledge it is impossible to draw any inference, mistaken or otherwise, about the individual's views based on his financial support of the union. Other employees who would be aware of an individual's financial support would also be aware of the agency shop agreement and, therefore, could not reasonably conclude that the individual's views coincided with those expressed by the union. Thus, it seems unlikely that others would ascribe to the individual employee views expressed by the union merely because of the individual's compelled financial support of the union.[165]

That no one would likely ascribe the union's views to individual employees does not conclusively eliminate the possibility of infringement of individual interests. An employee who opposed the union on principle might still himself regard his coerced financial contribution as some expression of support for the union. The remoteness of any connection between individual employees and any particular views expressed by the union would seem to make it unreasonable for an employee to view his service fee as an endorsement of any particular view expressed by the union. Nevertheless, the employee might well consider his compelled contribution as some general endorsement of the union as an institution. Unlike the connection between the individual and particular views expressed by the union, which is remote, the connection between the individual and the union as an institution is direct. Moreover, making a financial contribution to an institution is a common means of expressing support for the institution when not coerced. Yet financial support of an institution is a far less personal or intimate endorsement of the institution or its principles than the reciting of a pledge or the giving of a salute or even than the public display of a slogan or motto on one's personal property.[166] Financial contributions need not

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refundable payments earmarked for the New Jersey Public Interest Research Group, his status as a student at Rutgers automatically associated him with positions taken by the New Jersey Public Interest Research Group.).

[165] The remoteness of any connection between the individual employee and any views ultimately expressed by the union is underscored by the difficulty of devising an appropriate remedy. For example, the Court has said that the individual should not be required to trace his funds to objectionable expenditures. Machinists v. Street, 367 U.S. 740, 775 (1961). Rather, the Court has suggested a pro rata refund of the percentage of an employee's compelled agency shop payments equal to the percentage of the union's total budget spent on political and ideological activities unrelated to collective bargaining. *Id.* In *Abood* the court cited *Street* on this point and noted that no lesser remedy should be available in *Abood*. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 238-39 & n.38, 240 (1977). If the individual employee's funds cannot be traced to any particular objectionable expenditures it is surely questionable to what extent a pro rata refund would dissociate the employee from views expressed by the union. In Buckley v. Valeo, 424 U.S. 1, 21 (1976), the Court pointed out that a financial contribution constitutes a symbolic expression of support for the recipient of the contribution, and that size of the contribution is merely a rough guide to the intensity of the contributor's support. *Id.*

[166] *See* Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

be conspicuous or even public.[167] Nor need the individual confront the fact of his coerced contributions as part of his daily life.

Finally, the government's purpose in requiring service fees militates against the individual's regarding his coerced payments as an endorsement of the union. An action which does not in itself constitute expression is not likely to be viewed as a symbolic expression of any particular message unless the action has somehow been associated with the message. If the government specifically requires an action as a symbolic expression of a particular belief, the government thereby associates the action with the message. The result is that an individual would almost certainly regard compliance as a compelled affirmation of belief. If, on the other hand, the government specifically requires an action for reasons other than compelling symbolic expression of any particular beliefs, any association of the action with any particular message would be diminished.[168] Thus, in *Barnette* when the board of education required all school children to salute the flag the stated purpose was to require at least an outward manifestation of a mental attitude of patriotism and respect for the flag.[169] As a result the individuals involved were unlikely to miss the significance of their compliance as an affirmation of a belief.[170] In *Abood*, by contrast, the purpose of compelling all represented employees to support financially their collective bargaining representative had nothing to do with mandating even an outward manifestation of conformity of thought. Rather, the purpose was to require all beneficiaries of union representation to share the financial burdens of that representation.[171] Because the government so clearly did not require, or regard, payment of the service fee as a symbolic acknowledgement of support for the union it may be unreasonable for the individual to so regard it.[172]

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[167] In *Wooley v. Maynard* the Court struck down the state's requirement that the plaintiff display a license plate bearing the state motto. The Court, however, distinguished the appearance of the motto, "In God We Trust," on United States currency noting that "[c]urrency is generally carried in a pocket or purse and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto." *Wooley*, 430 U.S. at 717 n.15.

[168] Whether the government's purpose is to require a symbolic affirmation of belief is not the same question as whether a government requirement is content-neutral. The content-neutral/content-based distinction focuses on whether a government requirement works to inhibit or advance any particular views. *See supra* text and notes at notes 84-101. Even if a requirement is content-based in that it advances particular views it may do so by means other than compelling affirmations of belief. Thus, the focus here is not on whether a government requirement is content-based in that it ultimately advances particular views, but rather the focus is on whether the government's purpose is specifically to compel affirmations of belief.

[169] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).

[170] Of course saluting the flag was already recognized as an expression of patriotism. Thus, in *Barnette* the government purpose of requiring the flag salute as an expression of patriotism did not give the flag salute its symbolic meaning. Rather it merely took advantage of an already existing association of meaning with the gesture.

[171] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220-22, 224 (1977).

[172] An individual might reasonably regard compliance with a government requirement

In sum, compelled financial support of one's collective bargaining representative would not seem likely to identify the individual with the union or its views in the minds of others. Accordingly, there is little or no danger of infringing upon the individual's interest in control over the projection of his personality to others.[173] Nevertheless, there remains some possibility that the individual would regard his coerced payments as a general endorsement of the union.[174] This possibility, too, seems somewhat unlikely because monetary payments do not constitute a very personal or intimate form of expression, and because the clear government purpose for the requirement is ideologically neutral. Thus, while compelled financial support of one's collective bargaining representative might work some infringement of freedom of conscience the likelihood and magnitude of any such infringement appear slight. Certainly the severity of any infringement of individual negative first amendment interests in *Abood* falls far short of the magnitude of the infringements involved in *Wooley* and *Barnette*.[175]

The *Abood* Court thus seems correct in finding a constitutional violation at least where the compelled payments serve no government interest whatsoever.[176] However, because any infringement of individual interests seems minimal, it

as an act of compelled symbolic expression even if the government did not impose the requirement for that purpose, so long as the required action was otherwise associated with a particular message. This might be the case where the required action, like a flag salute, has an already established symbolic meaning. This might also be the case where refusal to comply with the requirement has been publicly adopted as a means of symbolically expressing dissent. Thus, for example, during the Vietnam War compliance with the requirement of registration for the draft might have been viewed as an expression of support for the war simply because refusal to register for the draft was used and understood to express opposition to the war.

[173] See discussion of the interest in control over the projection of a public identity in text Section II A *supra*.

[174] See discussion of the interest in freedom of conscience in Section II A *supra*

[175] In Elrod v. Burns, 427 U.S. 347 (1976), the Court suggested a possible third way in which compelled financial support of expression might infringe upon first amendment interests. The argument is that irrespective of any other infringement of individual interests the compelled support advances views opposed by the individual at the expense of the views he supports. *Id.* at 355. This view is based on the notion that increasing the quantity of expression of certain views drowns out expression of opposing views. However, this argument raises several problems. First, if the connection between the individual subjected to the compulsion and any message ultimately expressed is insufficient for the individual to view his financial contribution as an involuntary affirmation of belief, there is simply no compelled expression. Although the individual has been forced to pay money he has not been forced to engage in expression. Thus, such a compulsion might raise due process problems if it were not somehow relevant to a government interest. However, it is not clear how such a compulsion would implicate first amendment interests. Second, it is not clear that increasing the quantity of expression of particular views necessarily drowns out opposing views. Conceivably it could make expression of opposing views more poignant. Finally, far from there being any first amendment right not to have one's opponents heard, it is common practice for the government to encourage expression. *See* Buckley v. Valeo, 424 U.S. 1, 92-94 & n.127 (1976). For a judicial rejection of this "drowning out" argument see Lathrop v. Donohue, 367 U.S. 820, 855-57 (1961) (Harlan, J., concurring). Thus, it is submitted this argument is a "red herring." Any infringement of first amendment interests in *Abood* arises from the individual employee's viewing his forced contributions as an involuntary affirmation of support for the union.

[176] *See supra* text and note at note 42.

might be outweighed by less than a compelling state interest. Elimination of "free riders" may not be of paramount importance in maintaining peaceful labor relations. Nevertheless, agency shop at least helps insure that a union will have the financial resources necessary to discharge its representational functions. Thus, the *Abood* plurality also seems correct in approving use of agency shop funds for collective bargaining purposes.[177]

CONCLUSION

In the few cases which have raised the problem of compelled expression the Supreme Court has not focused adequately on the distinct nature of the infringement of individual interests when government compels rather than inhibits expression. Consequently, the Court has failed to analyze sufficiently the severity of the infringement of individual interests in such cases. Indeed, differing intuitive judgments within the Court concerning the seriousness of the injury to individual interests have remained largely unarticulated, thereby obscuring the fact that such differences underlie the disagreements concerning the outcomes in these cases. The result has been a failure to provide any consistent basis for resolution of the conflict between individual and government interests in the negative first amendment context.

Compelled expression may infringe upon individual negative first amendment interests in at least two ways. First, by forcing an individual to speak out when he would prefer to keep his thoughts to himself he may be deprived of control over the personality he projects to the world. Second, by compelling an individual to affirm a belief contrary to his own he may be deprived of freedom of conscience. In either case, however, there can be no infringement of individual interests unless compliance with a government requirement somehow identifies the individual with a message or point of view. The extent to which the individual becomes identified with a message determines the magnitude of any infringement of individual negative first amendment interests.

In cases involving claims of infringement of negative first amendment interests the Court should evaluate more explicitly the seriousness of the alleged infringement. This inquiry — which should be based on the extent to which the compulsion in a given case associates the individual with the message expressed — can provide a rational and consistent basis for weighing the opposing individual and government interests in negative first amendment cases.

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