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# First Amendment Enclave: Is the Public University Curriculum Immune from the Sweep of the Compelled Speech Doctrine?

Joseph J. Martins

*Liberty University*, [jmartins2@liberty.edu](mailto:jmartins2@liberty.edu)

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# FIRST AMENDMENT ENCLAVE: IS THE PUBLIC UNIVERSITY CURRICULUM IMMUNE FROM THE SWEEP OF THE COMPELLED SPEECH DOCTRINE?

Joseph J. Martins\*<sup>±</sup>

ABSTRACT .....	158
INTRODUCTION .....	159
PART I: COMPELLED SPEECH AND THE RISE OF THE “VOLUNTARY ENROLLMENT” DISQUALIFIER.....	161
PART II: THE REJECTION OF THE “VOLUNTARY ENROLLMENT” DISQUALIFIER’S TWO PREMISES.....	165
A. A Student’s Voluntary Decision to Enroll in a University Cannot Extinguish His Compelled Speech Claims.....	165
1. In <i>Barnette</i> , Students were not Forced to Enroll, and yet the Supreme Court Recognized their Compelled Speech Claims.....	165
2. Government Coercion Exists in a Variety of Non-Compulsory Contexts.....	166
a. Compelled Speech .....	166
b. Establishment Clause.....	167
c. Free Exercise Clause.....	170
B. A Student’s Decision to Avail Himself of the “Privilege” of a State Education Cannot Extinguish his Compelled Speech Claims because the “Right-Privilege” Distinction is no longer a Viable Ground for Denying Constitutional Claims.....	171
1. The Rise of the Right-Privilege Distinction.....	172
2. The Demise of the Right-Privilege Distinction.....	175
3. The Rejection of the Right-Privilege Distinction in Public Education.....	178
C. Federal Courts have Recognized that Public University Students have Compelled Speech Claims against Curricular and Curricular-related	

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\* Assistant Professor of Law and Director of the Constitutional Litigation Clinic, Liberty University School of Law. B.A., University of Virginia, 1995; J.D., University of Tennessee College of Law, 2002.

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Requirements .....	180
1. <i>Barnette</i> : Grade School Curricular Requirements.....	180
2. <i>Southworth</i> : University Curricular-Related Requirements .....	183
3. <i>Axson-Flynn</i> and <i>Ward</i> : University Curricular Requirements .....	184
PART III: THE DISTURBING IMPLICATIONS OF THE “VOLUNTARY ENROLLMENT”	
DISQUALIFIER.....	186
A. On-Campus Consequences.....	186
B. Off-Campus Consequences .....	189
CONCLUSION .....	190

#### ABSTRACT

Seventy years ago, in *West Virginia State Board of Education v. Barnette*,<sup>1</sup> the United States Supreme Court eloquently held that the state could not compel public school-children to salute the flag while reciting the Pledge of Allegiance. The decision has been heralded as one of the Court’s most significant free speech cases because it acknowledged expansive protection for freedom of conscience. But recently, the United States Court of Appeals for the Eleventh Circuit held that *Barnette*’s protection does not extend to college students who challenge their public institution’s curriculum because university enrollment is “voluntary.” The impact of this decision is potentially far-reaching. Because academia has recently placed greater emphasis on “real life” education, college students are increasingly constrained to adopt their university’s ideology as their own in order to successfully earn a degree. Indeed, in the last decade, public universities have forced students to lobby for legislation, to provide live counseling, and to embrace political philosophies that reflect the dogmatic preferences of the universities in contradiction to the students’ consciences. As dissenting students around the country are raising compelled speech claims to such requirements, federal courts are increasingly being asked to decide what degree of constitutional protection is available for them.

While few courts have addressed the question directly, the Eleventh Circuit’s so-called “voluntary enrollment” disqualifier entirely forecloses constitutional review of curricular compelled speech claims brought against public universities. But the court misread *Barnette* and the case precedent that has developed since that decision. Moreover, the Supreme Court has recognized that the First Amendment is implicated when public universities compel student speech in the curriculum-related context, and two federal courts of appeals have done the same in the curricular context. The “voluntary enrollment” disqualifier not only goes against the weight of judicial precedent, but taken to its logical conclusion, would produce devastating consequences for liberty on the university campus and beyond. For if a student waives his right to refuse to affirm state-sponsored ideas when he voluntarily enrolls at college, it is doubtful that other constitutional rights would remain secure. This article maintains that federal courts should reject the “voluntary enrollment” disqualifier and permit judicial review of compelled speech claims aimed at public university curricula.

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1. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

## INTRODUCTION

Two women face a crisis of conscience at their respective universities. Lucy, a junior, is taking a Political Science course at a state college in California. She is a devout Roman Catholic who believes very strongly in the Catholic Church's stance against contraception. Her professor has just assigned her class to draft a graded paper supporting the Department of Health and Human Services' (HHS) proposed rule that includes contraception in the required "preventative care" coverage under the Affordable Care Act.<sup>2</sup> Moreover, her professor will submit the students' papers to HHS for consideration during the public comment period on the proposed rule.

Alysse is a senior enrolled at a state university in Texas. She is an ardent gun control advocate and has worked tirelessly for stricter gun laws in her home state of Connecticut following the Sandy Hook shooting. The Regents of the University of Texas System are currently considering a policy that would allow students and faculty at all of its academic institutions to carry firearms on campus. Alysse's Criminology professor has just required her class to draft a graded essay in favor of the measure that he will present to the Regents as they consider this proposed policy.

While conscience-based conflicts with public university curricula are nothing new,<sup>3</sup> the potential for conflicts such as the ones faced by Lucy and Alysse have heightened in recent years as higher education has increasingly emphasized experiential learning<sup>4</sup> and other "real life" opportunities both inside and outside the classroom.<sup>5</sup> Typically, such dis-

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2. 42 U.S.C § 300gg-13(a)(4).

3. See *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934) (Christian pacifist students attending state university brought a free exercise challenge to a curricular provision requiring all males to complete a course in military training.).

4. See *Academic Affairs Highlights: Experiential Learning*, U. COLO., Vol. 2, Issue 2, Feb. 2012, available at [https://www.cu.edu/sites/default/files/OAA\\_Highlight\\_2.2--Experiential\\_Learning.pdf](https://www.cu.edu/sites/default/files/OAA_Highlight_2.2--Experiential_Learning.pdf) ("Experiential learning integrates classroom learning with hands-on experience. It encompasses a wide range of activities including internships, service learning, study abroad, and research.")

5. See Peter Stokes, *Job Skills Increasing Focus of Many Colleges*, INSIDE HIGHER EDUC. (Oct. 4, 2013), <http://www.insidehighered.com/views/2013/10/04/job-skills-increasing-focus-many-colleges-essay>.

The pursuit of jobs or job readiness or real-world work experience seems to be the trend of trends . . . This can be seen in the growing focus on experiential learning opportunities—whether it takes the form of internships and co-ops, or field research experiences, or participation in business incubators, or any number of other kinds of outside-the-classroom learning experiences.

*Id.*

putes have arisen when a student is required not only to express but to *adopt* the university's ideological message as his own in order to successfully complete a project,<sup>6</sup> internship,<sup>7</sup> clinical,<sup>8</sup> or degree.<sup>9</sup> When such a conflict occurs, may a dissenting student bring a First Amendment<sup>10</sup> compelled speech challenge to the curricular requirement that forces him to affirm an offensive belief?

Off campus, the legal answer to this question would be simple. A citizen would have a compelled speech claim against any state mandate that forced affirmation of a belief. However, the Supreme Court has previously insinuated that public universities may be immune from constitutional challenges to their curricula. In 2011, the United States Court of Appeals for the Eleventh Circuit relied on these hints to hold that a graduate student was barred from raising a compelled speech challenge to part of her state university's counseling curriculum because she "voluntarily enrolled" in the program.<sup>11</sup> This so-called "voluntary enrollment" disqualifier<sup>12</sup> effectively precludes constitutional review of compelled speech challenges to public university curricula.

But the "voluntary enrollment" disqualifier is not good law or policy, and this article will explain why. Part I explores the background of the compelled speech doctrine and traces the development of the "voluntary enrollment" disqualifier. Part II exposes the two foundational legal flaws inherent in the disqualifier. First, it rests upon the errant view that a student's voluntary choice alone automatically nullifies unlawful government coercion. In fact, federal courts have recognized, in a variety of First Amendment contexts, that illegal compulsion may exist even when a citizen voluntarily chooses to participate in a state-sponsored program. Second, the "voluntary enrollment" disqualifier mistakenly assumes that the state may condition a public education upon the forfeiture of constitutional freedoms simply because education is a "privilege" rather than a "right." This difference,

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6. See *Citrus College: Compulsory Anti-War Speech*, FOUND. FOR INDIVIDUAL RTS. EDUC., <http://thefire.org/case/26.html> (last visited July 16, 2014) (A Citrus College professor required her students to write anti-war letters to President George W. Bush "demanding" that America not go to war with Iraq. The professor penalized the grades of those students who dissented or refused to send the letters.); *Missouri State University: Political Litmus Test in School of Social Work*, FOUND. FOR INDIVIDUAL RTS. EDUC., <http://thefire.org/case/837.html> (last visited July 16, 2014) (Missouri State University threatened to expel social work student Emily Brooker when, as a matter of personal conscience, she refused to send a signed letter to the Missouri state legislature advocating in favor of homosexual foster parenting and adoption.).

7. See *Rhode Island College: Violation of Student's Freedom of Conscience*, FOUND. FOR INDIVIDUAL RTS. EDUC., <http://thefire.org/case/669.html> (last visited July 16, 2014) (Rhode Island College's School of Social Work informed Bill Felkner that he could no longer pursue a Master's degree in the program when he refused a mandatory internship that would require him to lobby the Rhode Island legislature for social policies which he opposed.).

8. See *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (Eastern Michigan University expelled Julea Ward from the graduate counseling program for failing to provide gay-affirming therapy to a client in EMU's counseling clinic.).

9. See *Columbia University: Ideological Litmus Tests at Teachers College*, FOUND. FOR INDIVIDUAL RTS. EDUC., <http://thefire.org/case/725.html> (last visited July 16, 2014) (Columbia University's Teacher's College required students to demonstrate a "commitment to social justice" as a condition of graduating from the program.).

10. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

11. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 878 (11th Cir. 2011).

12. The author will primarily refer to this principle as either the "voluntary enrollment" disqualifier or the "voluntary enrollment" nullifier throughout this article, along with other variations.

sometimes called the “right-privilege” distinction, is no longer a legitimate basis for denying constitutional claims. The Supreme Court has implicitly acknowledged these flaws by recognizing that the First Amendment is implicated when public universities compel student speech in the curriculum-related context, and two federal courts of appeals have done so in the curricular context. Finally, Part III highlights the dangerous and disturbing policy implications if the “voluntary enrollment” disqualifier becomes the law of the land. This article, therefore, maintains that the “voluntary enrollment” disqualifier is unsound as a matter of law and policy and that a student should not be foreclosed from raising a compelled speech challenge to a public university’s curriculum merely because she chose to matriculate there.<sup>13</sup>

PART I: COMPELLED SPEECH AND THE RISE OF THE “VOLUNTARY ENROLLMENT”  
DISQUALIFIER.

The compelled speech doctrine is rooted in the Free Speech Clause of the First Amendment.<sup>14</sup> This clause precludes the government from both censoring and compelling speech because it protects the citizen’s “decision of both what to say and what *not* to say.”<sup>15</sup> The Supreme Court first enunciated the compelled speech doctrine in the landmark decision of *West Virginia Board of Education v. Barnette*.<sup>16</sup> There, Jehovah’s Witness children contested a part of the public school program that required all students to salute the flag and recite the Pledge of Allegiance.<sup>17</sup> The constitutionality of the mandatory Pledge had reached the high court no less than five times previously, and the most recent case had upheld it.<sup>18</sup> But in *Barnette*, the Court reversed course and ruled that public schools cannot force students to recite the Pledge.<sup>19</sup> In so doing, it relied on the students’ “freedom of mind,” which it found rooted in the Free Speech Clause.<sup>20</sup> The Court held that the students effectively were being forced to “declare a belief,” and that such compulsion transgressed a foundational principle of the First Amendment:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>21</sup>

The Supreme Court has since clarified, in a variety of situations, that the compelled speech

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13. This article does not address the standard that should be applied to such claims. That is a matter for further scholarly discussion. However, such discussion cannot take place if compelled speech claims are extinguished upon matriculation.

14. U.S. CONST. amend. I. “Congress shall make no law . . . abridging the freedom of speech . . .” *Id.*

15. *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 797 (1988) (emphasis in original).

16. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

17. *Id.* at 629.

18. *Id.* at 664 (Frankfurter, J., dissenting); *see also* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

19. *Gobitis*, 310 U.S. at 594 (holding that governments could require the recitation of the Pledge of Allegiance and that the Constitution permits “legislation of general scope not directed against doctrinal loyalties of particular sects”).

20. *Barnette*, 319 U.S. at 637, 639, 642.

21. *Id.* at 642.

doctrine precludes the state from forcing private citizens to “foster . . . an idea they find morally objectionable.”<sup>22</sup> For “[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”<sup>23</sup> For instance, the government may not require citizens to display an objectionable state motto on their license plates,<sup>24</sup> force a newspaper to publish a reply to one of its articles,<sup>25</sup> command a private parade organization to include a group of marchers that would impart a message the organizer does not wish to convey,<sup>26</sup> or even to fund speech with which one disagrees.<sup>27</sup> While the Supreme Court has thus ruled on the compelled speech doctrine in a variety of contexts, it has never squarely addressed its application to the public university curriculum.<sup>28</sup>

The Supreme Court did, however, review a free exercise suit against a university curriculum. In *Hamilton v. Regents of the University of California*, Christian pacifists alleged that the university’s required course in military training transgressed their religious liberty, but the Court disagreed.<sup>29</sup> Because *Hamilton* had obvious implications for the Jehovah’s Witnesses’ religious-based objections to the Pledge, the *Barnette* Court distinguished between the collegiate and pre-collegiate contexts<sup>30</sup>:

This issue is not prejudiced by the Court’s previous holding that where a State, without compelling attendance, extends college facilities to pupils who *voluntarily enroll*, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who

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22. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

23. *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994)).

24. *Wooley*, 430 U.S. at 717 (“We conclude that the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates . . .”).

25. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.

*Id.*

26. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 566 (1995) (“We granted certiorari to determine whether the requirement to admit a parade contingent expressing a message not of the private organizer’s own choosing violates the First Amendment. We hold that it does . . .”) (citation omitted).

27. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977).

The fact that the appellants are compelled to make, rather than being prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.

*Id.*

28. As discussed *infra* in Part II.C.2., the Supreme Court has addressed the compelled speech doctrine’s application to a university requirement that compelled *extracurricular* speech for an educational purpose. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

29. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 262 (1934).

30. In both *Hamilton* and *Barnette*, the student-plaintiffs raised religious objections to the curriculum. In *Barnette*, the Court noted the Jehovah’s Witnesses’ religious objections, but held that the Pledge implicated rights under the Free Speech Clause. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634-35 (1943); *Hamilton*, 293 U.S. at 262.

take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. In the present case attendance is not optional.<sup>31</sup>

According to the Court then, the nature of the enrollment decision itself was sufficient to permit a constitutional challenge to a public school curriculum (where enrollment was compulsory) and also to bar such a challenge to a university curriculum (where enrollment was voluntary).

This “voluntary enrollment” theory lay virtually dormant<sup>32</sup> for sixty-eight years until 2011, when the Eleventh Circuit applied it to foreclose a compelled speech challenge to a state university’s curricular requirement. In *Keeton v. Anderson-Wiley*, professors in the Counselor Education Program at Augusta State University (ASU) imposed a remediation plan upon first-year student Jennifer Keeton in response to controversial comments she had made regarding homosexuality.<sup>33</sup> According to ASU officials, this remediation plan was a curricular measure designed to address ethical deficiencies in Ms. Keeton’s ability to “be a multiculturally competent counselor.”<sup>34</sup> The plan required Ms. Keeton to read information about and to increase her exposure to the gay, lesbian, bisexual, transgendered, and questioning (GLBTQ) population and then to write monthly essays about the experiences.<sup>35</sup> Her re-admission into the counseling program depended on how her experience in the remediation plan “influenced her beliefs.”<sup>36</sup> When she decided to not complete the plan, ASU expelled her from the program.<sup>37</sup>

31. *Barnette*, 319 U.S. at 631-32 (internal citation omitted) (emphasis added).

32. The Sixth Circuit has tangentially referred to the “voluntary enrollment” principle on two occasions. In *Spence v. Bailey*, 465 F.2d 797, 799 (6th Cir. 1972), the court held that a high school’s R.O.T.C. training requirement violated the free exercise rights of an objecting student. The *Spence* court found that *Hamilton* was not controlling because, among other distinctions, “enrollment at California’s university . . . was voluntary while attendance here is required by law.” *Id.* at 799. Twenty-one years later, in *Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 180 (6th Cir. 1993), the court mentioned the voluntary enrollment principle while reviewing a college student’s post-settlement petition for attorney’s fees. The court denied the petition because the college’s requirement that veterinary students take a course involving operations on live animals did not violate the Free Exercise Clause. *Id.* at 178. After reaching this conclusion, the court, in passing, commented that the student could not “demand that the College change its curriculum” because she “was not compelled to attend” and she knew “that operations on live animals were part of the curriculum” when she enrolled. *Id.* at 180-81.

33. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 867 (11th Cir. 2011). The Author represented Ms. Keeton at the district court level.

34. *Id.*

35. Specifically, Ms. Keeton’s remediation plan required her to:

(1) attend at least three workshops which emphasize improving cross-cultural communication, developing multicultural competence, or diversity sensitivity training toward working with the GLBTQ population; (2) read at least ten articles in peer-reviewed counseling or psychological journals that pertain to improving counseling effectiveness with the GLBTQ population; (3) work to increase her exposure and interaction with the GLBTQ population, by, for instance, attending the Gay Pride Parade in Augusta; (4) familiarize herself with the Association for Lesbian, Gay, Bisexual and Transgender Issues in Counseling (“ALGBTIC”) competencies for Counseling gays and Transgender Clients; and (5) submit a two-page reflection to her advisor every month summarizing what she learned from her research, how her study has influenced her beliefs, and how future clients may benefit from what she has learned.

*Id.* at 870.

36. *Id.*

37. *Id.* at 868 n.3.



Ms. Keeton sued, claiming, among other things, that the remediation plan forced her to affirm an ideological belief in violation of the compelled speech doctrine.<sup>38</sup> The district court refused to issue a preliminary injunction and the Eleventh Circuit, relying on the “voluntary enrollment” disqualifier, affirmed, holding that Ms. Keeton had no redress for her compelled speech claim.<sup>39</sup>

We find *Barnette* and its progeny inapplicable here for several reasons. First, unlike the plaintiff in *Barnette*, Keeton may choose not to attend ASU, and indeed may choose a different career. . . .

Likewise, ASU has conditioned participation in the clinical practicum and graduation on compliance with the ACA Code of Ethics, and Keeton, having *voluntarily enrolled* in the program, does not have a constitutional right to refuse to comply with those conditions.<sup>40</sup>

With this declaration, the court of appeals not only barred Ms. Keeton’s compelled speech claim, but effectively immunized universities in the Eleventh Circuit from such claims in the future.

Therefore, the *Keeton* court held what the *Barnette* Court only implied: that a student’s “voluntary enrollment” entirely forecloses compelled speech challenges to university curricula. But neither court fully explained the constitutional rationale for the conclusion. However, both relied on *Hamilton*, which outlined the disqualifier’s logic briefly:

California *has not drafted or called* [appellants] to attend the University. They are seeking education offered by the state and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs . . . . [A]ppellants’ contentions amount to no more than an assertion that the [Constitution] confers **the right to be students in the State University free from obligation to take military training as one of the conditions of attendance**.

Viewed in the light of our decisions, that proposition must at once be put aside as untenable.<sup>41</sup>

Hence, *Hamilton* sets forth two potential justifications. First, because students *choose* to enroll at a public university (i.e., they “are not drafted”), there is in fact no legal compulsion.<sup>42</sup> Without such compulsion, both free exercise and compelled speech claims would presumably fail. Second, the government may place conditions on the receipt of state benefits up to and including the forfeiture of constitutional rights.<sup>43</sup> Accordingly, students choosing to receive the benefits and privilege of a public university education effectively waive any constitutional objections to the manner in which that education is provided. Either of the two options would yield the same result as the disqualifier: the barring of

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38. *Keeton*, 664 F.3d at 878.

39. *Id.* at 867-68, 880.

40. *Id.* at 878 (emphasis added).

41. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 262 (1934) (emphasis added).

42. *Id.*

43. *Id.*

compelled speech claims in higher education. As discussed below, both justifications are flawed.

PART II: THE REJECTION OF THE “VOLUNTARY ENROLLMENT” DISQUALIFIER’S TWO PREMISES.

The “voluntary enrollment” nullifier’s two foundations find no support in the law. First, a citizen’s initial choice to register for school or any state-sponsored program has no bearing on whether the state subsequently coerces that citizen. Second, the state can no longer condition the receipt of “privileges,” such as a public education, upon the waiver of constitutional liberties. Federal courts have implicitly acknowledged these defects in the disqualifier by recognizing that students have a right to bring compelled speech claims against both curricular and curricular-related university policies.

A. *A Student’s Voluntary Decision to Enroll in a University Cannot Extinguish His Compelled Speech Claims.*

The *Barnette* Court attempted to distinguish *Hamilton* based on its perception that state school attendance laws rendered public elementary and secondary schools uniquely compulsory.<sup>44</sup> But the majority ignored its own precedent holding that the state cannot mandate public education.<sup>45</sup> *Barnette*, interpreted in light of this disregarded precedent, implicitly recognizes that compulsion sufficient to trigger a cognizable compelled speech claim can exist even where enrollment is not mandatory. Hence, the nature of enrollment is irrelevant to the question of whether the state has exercised unauthorized compulsion. The relevant First Amendment jurisprudence since *Barnette* confirms this position.

1. In *Barnette*, Students were not Forced to Enroll, and yet the Supreme Court Recognized their Compelled Speech Claims.

If the *Barnette* majority hoped to justify the “voluntary enrollment” disqualifier based on the compulsory nature of pre-collegiate education, then it stumbled in its first step. For, as Justice Frankfurter explained in his dissent, West Virginia did not, and indeed could not, compel students to attend as a matter of constitutional law.<sup>46</sup> Eighteen years prior, in *Pierce v. Society of Sisters*, the Court reviewed a state statute that required “general attendance at public schools by . . . children, between 8 and 16 who have not completed the eighth grade.”<sup>47</sup> The Court voided the statute, explaining that, “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from *public teachers only*.”<sup>48</sup> This holding, Frankfurter explained, rendered it “impossible . . . to differentiate what was sanctioned in the *Hamilton* case from what [was] nullified” in *Barnette*.<sup>49</sup>

44. *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 631-32 (1934).

45. *See Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (affirming the district court’s grant of preliminary orders restraining the state from enforcing an act that required children between ages of eight and sixteen to attend a public school).

46. *Barnette*, 319 U.S. at 656-57 (Frankfurter, J. dissenting).

47. *Pierce*, 268 U.S. at 531.

48. *Id.* at 535 (emphasis added).

49. *Barnette*, 319 U.S. at 657.

As a matter of constitutional decree, therefore, neither public high school students nor college students are compelled to enroll. Consequently, both the Christian pacifists in *Hamilton* and the Jehovah's Witnesses in *Barnette* "voluntarily enrolled" at their respective schools. Given, then, that the perceived distinction between enrollment in secondary and higher education is fictitious, the "voluntary enrollment" disqualifier is unfounded. Shorn of this errant distinction, *Barnette* implicitly stands for the proposition that unconstitutional compulsion may exist even when student enrollment is not officially required.

## 2. Government Coercion Exists in a Variety of Non-Compulsory Contexts.

Indeed, since *Barnette*, the federal courts have affirmed the position that illicit government coercion can exist outside of contexts where attendance or participation is compulsory. A sample of the Supreme Court's landmark compelled speech cases, as well as related cases under the Establishment and Free Exercise Clauses,<sup>50</sup> bear this out.

### *a. Compelled Speech*

In *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court reviewed a Florida statute that required any newspaper which had criticized a political candidate to print the candidate's response to that criticism.<sup>51</sup> The Court struck down the law because "compulsion exerted by government on a newspaper to print that which it would not otherwise print. . . . is unconstitutional."<sup>52</sup> The law did not require the paper to publish the critical editorials in the first place. Nevertheless, the paper's voluntary choice to do so did not, in the Court's opinion, mollify the coercive nature of the state's attempt to force it to print a reply.

Similarly, in *Wooley v. Maynard*, the Supreme Court addressed a New Hampshire law making it a misdemeanor to cover the portion of the automobile license plate that bore the state motto, "Live Free or Die."<sup>53</sup> The objecting litigants—Jehovah's Witnesses—violated the law on multiple occasions because they found the motto "repugnant to their moral, religious, and political beliefs."<sup>54</sup> The Court held that New Hampshire could not enforce the law against the Maynards even though it required only the "passive act" of carrying the motto on their license plate.<sup>55</sup> "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."<sup>56</sup> Citizens, such as the Maynards, choose whether or not to drive a car. And according to the *Wooley* Court, such choice does not extinguish a citizen's right to object to serving as an unwilling "mobile billboard" for the state's ideological message.<sup>57</sup>

Likewise, in *Hurley v. Irish-American Gay Group of Boston*, the Court reviewed a

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50. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." *Id.*

51. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 243 (1974).

52. *Id.* at 256.

53. *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

54. *Id.* at 705.

55. *Id.* at 715.

56. *Id.* at 717.

57. *Id.* at 715.

state court ruling that a private parade organizer's exclusion of gay, lesbian, and bisexual marchers from the St. Patrick's Day parade violated Massachusetts' public accommodations law.<sup>58</sup> The state court opined that the parade organizer had no First Amendment right to engage in sexual orientation discrimination.<sup>59</sup> However, the high Court unanimously disagreed with the lower court's appraisal of the matter. In the Court's view, the state unlawfully "compel[led] the [parade organizer] to alter the message [of the parade] by including one more acceptable to others."<sup>60</sup>

While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.<sup>61</sup>

Therefore, the Supreme Court found that the state had unconstitutionally compelled speech even though the plaintiff voluntarily chose to organize the parade.

In similar fashion, the Supreme Court has also ruled in favor of civil servants,<sup>62</sup> attorneys,<sup>63</sup> professional fundraisers,<sup>64</sup> public grant recipients<sup>65</sup> and a host of other compelled speech litigants in contexts where neither attendance nor participation was compulsory. The Court has been consistent: Illegal coercion can exist even in voluntary contexts.

#### *b. Establishment Clause*

Establishment Clause cases teach the same lesson. Both the compelled speech doctrine and the Establishment Clause preclude state coercion. While the former prohibits the government from forcing a citizen to speak, the latter,<sup>66</sup> at a minimum, "guarantees that government may not coerce anyone to support or participate in religion or its exercise."<sup>67</sup> If mandatory enrollment were a constitutional prerequisite to actionable coercion, certainly

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58. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995).

59. *Id.* at 563.

60. *Id.* at 581.

61. *Id.* at 579.

62. *See Elrod v. Burns*, 427 U.S. 347, 355 (1976) (holding that public employment is not mandatory, yet a sheriff unconstitutionally compelled the speech of his employees when he required them to "pledge their political allegiance to the Democratic Party").

63. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14 (1990) (holding a law license is not compulsory, yet the state bar may not, consistent with the First Amendment, use a dissenting attorney's dues for ideological activities not relevant to the legal profession or the quality of legal services).

64. *See Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 784 (1988) (holding that no one is required to become a fundraiser, yet the state transgresses the First Amendment if it compels those who do to disclose the percentage of contributions actually given to charity).

65. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2330 (2013) (holding that private organizations are not compelled to seek public grants, but if they do, the government cannot "requir[e] recipients to profess a specific belief" as a condition of receiving the grant).

66. Justices Stevens and Ginsberg, in the context of rejecting a limited reading of the Establishment Clause, have compared the right to be free from compelled speech with the minimum Establishment Clause guarantee against government-imposed "religious coercion." *See Van Orden v. Perry*, 545 U.S. 677, 733 n.35 (2005) (Stevens, J., dissenting) (Under the view that the Establishment Clause "reaches only the governmental coercion of individual belief or disbelief . . . the Establishment Clause would amount to little more than a replica of our compelled speech doctrine with a religious flavor") (citations omitted).

67. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

the courts would have said so in the myriad of public school Establishment Clause cases. But they have not so held. To the contrary, the courts have found unconstitutional coercion in circumstances where even simple *attendance* at the contested school event was not officially required.

Perhaps the clearest example of this principle is found in *Lee v. Weisman*, wherein a student challenged the prayer at her public high school graduation.<sup>68</sup> The parties stipulated that graduation attendance was voluntary, but the Supreme Court held the societal pressure both to attend and to participate in the prayer—though “subtle and indirect”<sup>69</sup>—sufficiently compelled the students to join in a religious exercise in violation of the Establishment Clause.<sup>70</sup>

Petitioners . . . argu[ed] that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. . . . Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term “voluntary,” for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.<sup>71</sup>

Notably, the *Lee* Court’s analysis did not address the nature of the petitioner’s enrollment at the school, but rather focused on the disputed event itself.<sup>72</sup> The Court found unauthorized coercion existed even though it conceded that graduation attendance was not “required by official decree.”<sup>73</sup>

Similarly, in *Santa Fe Independent School District v. Doe*, the Supreme Court struck down a public school district’s policy that authorized a student body representative to deliver an invocation at school football games.<sup>74</sup> The school district insisted that impermissible coercion did not exist because attendance at the games was voluntary.<sup>75</sup> The Court pointed out that some students were required to attend, but even those under no official compulsion would feel “immense social pressure” to conform.<sup>76</sup> “Even if we regard every high school student’s decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.”<sup>77</sup> As in *Lee*, and without discussing enrollment, the Court ruled that proscribed coercion existed notwithstanding the lack of official compulsion to attend the games.

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68. *Id.* at 584.

69. *Id.* at 593.

70. *Id.* at 596 (“The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.”).

71. *Id.* at 594-95.

72. *Lee*, 505 U.S. at 594-96.

73. *Id.* at 595.

74. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000).

75. *Id.* at 310.

76. *Id.* at 311.

77. *Id.* at 312.

The principle from *Lee* and *Santa Fe*—that the absence of *initial* compulsion to attend a public school event does not eliminate the possibility of *subsequent* state coercion once a student chooses to attend—also applies in the college environment. For example, in *Anderson v. Laird*, the Court of Appeals for the District of Columbia Circuit reviewed a federal regulation requiring cadets and midshipmen at three military academies to attend chapel services on Sundays.<sup>78</sup> The court held that the chapel requirement violated the Establishment Clause because it compelled the students to “engage in religious practices and to be present at religious exercises.”<sup>79</sup> Unlawful coercion existed, in the court’s opinion, even though students could be excused from chapel<sup>80</sup> and enrollment in the military academies was entirely voluntary.<sup>81</sup> On the latter point, the court specifically distinguished *Hamilton*.

In *Hamilton* [], the Supreme Court upheld the constitutionality of the state university’s requirement that all students must participate in military training against attack under the Free Exercise Clause. The Court reasoned that since the students were not *compelled* to attend the university, they were not compelled to violate their religious scruples. The continued validity of this reasoning is doubtful in light of recent Supreme Court decisions.<sup>82</sup>

The D.C. Circuit’s holding pointedly refutes the foundation of the “voluntary enrollment” disqualifier. If the government cannot force a voluntarily-enrolled student merely to sit mutely at a chapel service, then it cannot compel him actually to articulate a message with which he disagrees. The latter infringement is surely more intrusive than the former. Students in both situations should have a constitutional remedy against such state compulsion.

Similarly, the Fourth Circuit voided supper prayers at Virginia Military Institute (VMI) as a form of compelled religious exercise under the Establishment Clause.<sup>83</sup> In *Mellen v. Bunting*, VMI defended the meal invocations because the cadets were adults and the policy permitted them to excuse themselves from the prayers.<sup>84</sup> But, the court explained, VMI’s educational philosophy emphasized obedience and conformity and the supper prayer itself was instituted to build solidarity among the cadets.<sup>85</sup> In this context, the court held the students would find participation obligatory despite the prayer’s “technical ‘voluntariness.’”<sup>86</sup> The Fourth Circuit, therefore, agreed with the D.C. Circuit that the officially optional nature of the school supper prayers did not automatically nullify governmental

78. *Anderson v. Laird*, 466 F.2d 283, 284 (D.C. Cir. 1974) (per curium).

79. *Id.* at 291.

80. *Id.* at 293 (“It is of no importance that certain cadets and midshipmen may be excused from attendance for conscientiously held beliefs.”).

81. *Id.* at 295 (“It bears emphasis that the fact that attendance at the military academies is voluntary does not eliminate the possibility of coercion.”).

82. *Id.* at 295 n.80 (emphasis in original).

83. *Mellen v. Bunting*, 327 F.3d 355, 372 n.9 (4th Cir. 2003) (“Even if dining in the mess hall was truly voluntary, the First Amendment prohibits [VMI] from requiring religious objectors to alienate themselves from the VMI community in order to avoid a religious practice.”).

84. *Id.* at 371.

85. *Id.*

86. *Id.* at 372.

coercion.

The lesson to be learned from *Lee*, *Bunting*, and the cases in between is that illegal compulsion can exist even in specific educational environments that students voluntarily enter. The courts in these cases squarely rejected arguments to the contrary and did not consider the voluntary nature of enrollment in the school relevant to the coercion analysis.<sup>87</sup> It follows then that curricular mandates, which are required to graduate, would create an even greater risk of compulsion than attendance at graduation, supper, chapel, and football games and would consequently have a higher claim to constitutional protection. Therefore, claims that university curricula impermissibly compel speech should likewise be entitled to judicial review.

*c. Free Exercise Clause*

The lesson that a citizen's initial voluntary choice alone does not eliminate unlawful compulsion also holds true with respect to the Free Exercise Clause, which—like the compelled speech doctrine—forbids the government from “compel[ling] affirmation of a repugnant belief.”<sup>88</sup> In *Torcaso v. Watkins*, the petitioner was appointed to the office of notary public by the governor, but was refused his commission when he would not “declare a belief in God” pursuant to the state constitution.<sup>89</sup> The petitioner sued and appealed after the state's highest court ruled against him.<sup>90</sup> The United States Supreme Court flatly rejected the state court's reasoning that the petitioner was “not compelled” to believe anything. “The fact, however, that a person is *not compelled to hold public office* cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.”<sup>91</sup> The state's “religious test for public office unconstitutionally invades the appellant's freedom of belief and religion.”<sup>92</sup>

Torcaso's free choice to pursue public office did not alleviate the coerciveness of the state's criteria or disqualify him from bringing a free exercise claim.<sup>93</sup> Similarly, the choice to pursue a state university education should neither diminish the coerciveness of curricular criteria that compel speech, nor bar a student from bringing a compelled speech claim thereto.

The preceding cases—whether in school, college, or elsewhere—demonstrate that a citizen's voluntary decision alone does not *per se* eliminate claims against unlawful gov-

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87. *But see* *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997) and *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997), wherein the Courts of Appeals for the Seventh and Sixth Circuit rejected Establishment Clause challenges to religious invocations at state university graduation ceremonies because attendance at the ceremonies was voluntary. However, while the courts found *attendance* to be voluntary, neither court based its decision upon the “voluntary enrollment” disqualifier.

88. *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). The close relation between the compelled speech doctrine and the Free Exercise Clause is also buttressed by the fact that the *Barnette* majority expressly tried to distinguish its holding from *Hamilton* with the voluntary enrollment qualifier. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631-32 (1943). As this section argues, this distinction ultimately failed.

89. *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). “Article 37 of the Declaration of Rights of the Maryland Constitution provides: ‘[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God . . . .’” *Id.* at 489.

90. *Id.* at 489.

91. *Id.* at 495-96 (emphasis added).

92. *Id.* at 496.

93. *Id.*

ernment compulsion. A citizen may choose to *enroll* in public elementary school, secondary school, or college. He may choose to *attend* graduation, football games, supper time, or to *seek* public office, and these choices alone will not extinguish his right to constitutional review if the government subsequently compels him to engage in a religious exercise or to affirm a repugnant belief. The same should be true if the state compels him to speak. Consequently, the “voluntary enrollment” disqualifier is unwarranted, and cannot serve as a principled basis to deny valid compelled speech claims to university curricula, unless it can be justified on other grounds.

*B. A Student’s Decision to Avail Himself of the “Privilege” of a State Education Cannot Extinguish his Compelled Speech Claims because the “Right-Privilege” Distinction is no longer a Viable Ground for Denying Constitutional Claims.*

The “voluntary enrollment” disqualifier rests upon another principle raised in *Hamilton* that was not refuted in *Pierce*, namely, the constitutional distinction between “rights” and “privileges.” In the classical understanding, “‘rights’ are interests held by individuals independent of the state.”<sup>94</sup> As such, they exist prior to the state and are possessed by persons at birth by virtue of their humanity and as endowments from their Creator.<sup>95</sup> This view of rights was adopted by America’s founders and is forever enshrined in the Declaration of Independence.

WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. . . .<sup>96</sup>

A modern view might differ with the source of rights, but few would question the basic premise that a right, at its core, is a “liberty, claim, or power to be respected by the government.”<sup>97</sup> In contrast to rights, “‘privileges’ are interests created by the grace of the state

94. 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 7:3 (2014).

95. *Id.* See also JAMES MADISON, MEMORIAL AND REMONSTRANCE ON THE RELIGIOUS RIGHTS OF MAN (1784).

Because we hold it for a “fundamental and undeniable truth” that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. . . . This right is, in its nature, an unalienable right. . . . because what is here a right towards men, is a duty towards the Creator. . . . [T]his duty is precedent, both in order of time and degree of obligation, to the claims of civil society. . . .

. . . .  
 . . . “[T]he equal right of every citizen to the free exercise of his religion according to the dictates of his conscience, is held by the same tenure with all our other rights. *If we recur to its origin, it is equally the gift of nature. . . .*”

*Id.* at 3-4, 11 (emphasis added). See also THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, QUERY XVIII: MANNERS (1781) (“And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that *these liberties are the [g]ift of God?*”) (emphasis added); THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774) available at <http://www.monticello.org/site/jefferson/quotations-jefferson-memorial> (“God who gave us life gave us liberty.”).

96. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

97. BOUVIER LAW DICTIONARY 972 (Compact ed. 2011).



and dependent for their existence on the state's sufferance."<sup>98</sup> Such privileges can take many forms, including, but not limited to, funding, public employment, licenses, public forums, unemployment benefits, and—important for our purposes—education at a public university.<sup>99</sup>

The right-privilege distinction operates on the simple premise that no one has a right to government largess.<sup>100</sup> Accordingly, while the government cannot constitutionally restrict the enjoyment of rights, it can attach conditions to the privileges it grants, up to and including the total surrender of constitutional freedoms.<sup>101</sup> *Hamilton* is a textbook example of the operation of this distinction. There, the Court rebuffed the students' argument that public education was a "right,"<sup>102</sup> and instead held that the state could condition the "'privilege' of attending the university"<sup>103</sup> on the successful completion of military training, even if that training transgressed the students' religious beliefs.<sup>104</sup> The Eleventh Circuit echoed this position when it held that Ms. Keeton did not have "a constitutional right to refuse to comply with [the] conditions" of her degree.<sup>105</sup>

While the right-privilege distinction was in force when *Hamilton* and *Barnette* were decided, it has effectively been overruled since.<sup>106</sup> In its place the unconstitutional conditions doctrine has arisen, which holds that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."<sup>107</sup> The right-privilege distinction's extinction removes the last of the twin premises undergirding the "voluntary enrollment" disqualifier. Therefore, the Eleventh Circuit was wrong to apply it to extinguish university students' compelled speech claims generally.

### 1. The Rise of the Right-Privilege Distinction

In the 1892 case of *McAuliffe v. Mayor of New Bedford*, Oliver Wendell Holmes famously enunciated the right-privilege distinction while addressing the petition of a policeman who had been fired for engaging in political activity.<sup>108</sup> Speaking for the Massachusetts Supreme Judicial Court, Holmes dismissed the claim bluntly, by stating, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right

98. 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 7:3 (2014).

99. *Id.*

100. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442 (1968).

101. 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 7:3 (2014).

102. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 253 (1934).

103. *Id.* at 261 (emphasis added).

104. *Id.* at 262.

105. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 878 (11th Cir. 2011).

106. *See infra* Part II.B.2. Some scholars have argued that traces of the right-privilege doctrine still remain—for example, in procedural due process jurisprudence. *See* Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982). Shadows of the distinction also appear when the government seeks to promote a program through the provision of cash subsidies. For example, in *Rust v. Sullivan*, 500 U.S. 173, 178 (1991), the Supreme Court reviewed a federal regulation that prohibited the recipients of "family planning" funds from engaging in abortion counseling. Certain recipients argued that the regulation transgressed the First Amendment because it conditioned the receipt of a federal benefit on the relinquishment of their constitutional right to freedom of speech. *Id.* at 196. The Supreme Court disagreed, holding that the condition was a proper method of ensuring that federal monies were not spent on activities outside the scope of the federal program. *Id.* at 193.

107. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

108. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

to be a policeman.”<sup>109</sup> Holmes reasoned that a public employer may attach conditions to employment, including restrictions on speech, in the same manner a private employer does.<sup>110</sup> So, Officer McAuliffe was just like any other employee; he could not protest the infringement upon his freedom of speech because he “takes the employment on the terms which are offered him.”<sup>111</sup>

Three years later, Holmes reaffirmed his view that recipients of governmental privileges receive very limited constitutional protection. In *Commonwealth v. Davis*, a preacher contested his conviction for speaking in a public park without a permit.<sup>112</sup> Holmes opined that the state could control its property just like a private landowner.<sup>113</sup> Given this absolute authority to end public access altogether, Holmes saw no problem if the state took “the lesser step of limiting the public use to certain purposes.”<sup>114</sup> In other words, the preacher may have a “constitutional right to talk religion, but he has no constitutional right to use [a public park].”<sup>115</sup>

The United State Supreme Court fully embraced this distinction when it affirmed the *Davis* decision along with Holmes’ reasoning:

For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for an owner of a private house to forbid it in his house.<sup>116</sup>

According to Holmes, and now the Supreme Court, the state could ask its citizens to surrender their freedom to speak in order to receive public benefits. As the Justices adopted this principle, it was also increasing in influence around the nation as numerous state courts used it to defeat a variety of constitutional claims brought by public employees, licensees, and welfare beneficiaries.<sup>117</sup> The high Court itself would continue to apply the distinction against recipients of government benefits for another sixty years.

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109. *Id.*

110. *Id.* at 517-518.

111. *Id.* at 518.

112. *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895).

113. *Id.*

114. *Id.*

115. Van Alstyne, *supra* note 100, at 1440.

116. *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897).

117. Van Alstyne, *supra* note 100, at 1441 n.7.

Shepardizing *McAuliffe* yielded more than 70 cases, 77% of which resolved the decision against the constitutional claim being asserted. *See, e.g.*, *Hirschman v. L.A. Cnty.*, 231 P.2d 140 (Cal. Dist. Ct. App. 1951), *aff’d*, 39 Cal. 2d 698, 249 P.2d 287 (1952) (county employees dismissed for refusal to sign loyalty oath); *Hornstein v. Ill. Liquor Control Comm’n*, 412 Ill. 365, 106 N.E.2d 354 (1952) (summary revocation of liquor license without prior notice or hearing); *Wilkie v. O’Connor*, 261 App. Div. 373, 25 N.Y.S.2d 617 (1941) (welfare pension cut off after recipient’s insistence on ‘right to sleep under an old barn, in a nest of rags’); *CIO v. City of Dallas*, 198 S.W.2d 143 (Tex. Ct. Civ. App. 1946) (injunction against no-union rule for city employees denied); *Starkey v. Bd. of Educ.*, 14 Utah 2d 227, 381 P.2d 718 (1963) (married high school student barred from extracurricular activities).

*Id.*

For example, as discussed above, the Supreme Court utilized the distinction in *Hamilton* to affirm the state's power to require military training as a condition of receiving a public education.<sup>118</sup> Then, in the 1947 case *United Public Workers of America v. Mitchell*, the Court applied the distinction to a federal worker who was charged<sup>119</sup> with violating the Hatch Act for taking an "active part in . . . [a] political campaign[]." <sup>120</sup> The federal worker challenged the Act as an unconstitutional restraint on his ability to engage in political activities.<sup>121</sup> Quietly citing to *McAuliffe* in a footnote, the Court found "no constitutional objection" to the Act.<sup>122</sup> Congress, the Court opined, was free to impose on the petitioner's political actions in the interest of providing an "efficient public service."<sup>123</sup>

Yet this subtle opinion carried significant and troubling implications. The Hatch Act<sup>124</sup> prohibited approximately three million federal employees<sup>125</sup> and their families<sup>126</sup> from taking any active part in a political campaign, even during their free time.<sup>127</sup> The Act thus constituted an unprecedented intrusion upon constitutional liberties.<sup>128</sup> Never before had the right-privilege distinction been stretched so far. Indeed, the distinction could apparently be applied beyond the workplace and into citizens' private lives to extinguish the freedom of speech and other liberties.

The Court confirmed this conclusion five years later in *Adler v. Board of Education*, when various teachers challenged a New York law that barred from employment any person who advocates or belongs to an organization that advocates the overthrow of government by "force, violence or any unlawful means."<sup>129</sup> Relying upon *United Public Workers*, the Court summarily dispatched the teachers' claims in a manner reminiscent of Holmes:

It is clear that such persons have the *right* under our law to assemble, speak, think and believe as they will. It is equally clear that they have *no right* to work for the State in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.<sup>130</sup>

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118. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 262-63 (1934).

119. *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 91-92 (1947).

120. *Id.* at 78.

121. *Id.* at 94.

122. *Id.* at 99.

123. *Id.* at 99.

124. Act of July 19, 1940, Pub. L. No. 76-753, ch. 640, 54 Stat. 767 (codified as amended at 5 U.S.C. §§ 1501-08 (2012)).

125. *Mitchell*, 330 U.S. at 106 (Black, J., dissenting).

126. *Id.* at 108 (Black, J., dissenting) ("Employees are . . . accountable for political activity by persons other than themselves, including wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly.")

127. *Id.* at 95.

128. *Id.* at 112 (Black, J., dissenting) ("No statute of Congress has ever before attempted so drastically to stifle the spoken and written political utterances and lawful political activities of federal and state employees as a class.")

129. *Adler v. Bd. of Educ. of City of N.Y.*, 342 U.S. 485, 487 n.3 (1952).

130. *Id.* at 492 (internal citation omitted) (emphasis added).

*Adler* therefore reaffirmed the Court's "take it or leave it" approach to the receipt of government benefits. Moreover, the case represents the zenith of the right-privilege distinction's influence. In an opinion that was both curt and exceptionally broad, the *Adler* Court trumpeted what *United Public Workers* only implied: The state could require citizens to choose between their First Amendment rights and public employment.<sup>131</sup>

Was there any end to the conditions the government could place upon its largess? The Court's answer appeared to be in the negative, but interestingly, it had conceded such a limit in *United Public Workers*.<sup>132</sup> There, the petitioner argued that if Congress could enforce the Hatch Act, it could also pass a "regulation providing that no Republican, Jew or Negro shall be appointed to federal office or that no federal employee shall attend Mass or take any active part in missionary work."<sup>133</sup> While the *United Public Workers* Court sustained the Hatch Act, it conceded that congressional power over its employees was not limitless.<sup>134</sup> And it was this concession that would set the stage for the demise of the right-privilege distinction.

## 2. The Demise of the Right-Privilege Distinction

Nine months after *Adler*, in *Wieman v. Updegraff*, the Court considered whether the state had the power to impose upon state university professors "an oath that they are not . . . members of any . . . 'subversive' or 'Communist-front' [organizations]."<sup>135</sup> Several professors refused to take the oath and sought to enjoin enforcement of the Act.<sup>136</sup> The state supreme court upheld the Act and ordered the state to discontinue any further salary payments to the dissenting professors.<sup>137</sup> The United States Supreme Court granted review "because of the public importance of this legislation and the recurring serious constitutional questions which it presents."<sup>138</sup>

The state insisted that *Adler* and *United Public Workers* controlled because the professors at issue had "no right to work for the State in the school system on their own terms."<sup>139</sup> In a historic shift, the Court explained that *Adler* was not dispositive because, as it had conceded in *United Public Workers*, the government's power over its employees was not boundless.<sup>140</sup> "We need not pause to consider whether an abstract right to public

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131. *Id.* at 508 (Douglas, J., dissenting).

I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights. I cannot for example find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher.

*Id.*

132. *United Pub. Workers of Am.*, 330 U.S. at 100.

133. *Id.*

134. *Id.* ("None would deny such limitations on Congressional power but because there are some limitations it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid.")

135. *Wieman v. Updegraff*, 344 U.S. 183, 194 (1952) (Frankfurter, J., concurring).

136. *Id.* at 184-86 (majority opinion).

137. *Id.* at 186.

138. *Id.*

139. *Id.* at 191.

140. *Wieman*, 344 U.S. at 191-92.

employment exists. It is sufficient to say that the constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.”<sup>141</sup>

For the first time, the Court expressly held that the government could not impose unlimited conditions upon the “privilege” of public employment.<sup>142</sup> *Wieman* signaled the Justices’ disagreement with Holmes’s statement that public employees had no right to talk politics. The Court subsequently reaffirmed this position in the academic employment context multiple times over the next fifteen years, ruling that the state lacked the power to hold a professor in contempt for refusing to answer questions about his allegedly “subversive” activities,<sup>143</sup> or to compel school teachers to divulge every organization to which they have belonged,<sup>144</sup> or to require professors to certify that they had never “advocated” for the violent overthrow of the government.<sup>145</sup>

In *Keyishian v. Board of Regents of the University of the State of New York*, the Court made its rejection of the right-privilege distinction in public employment explicit by overturning the very law upheld in *Adler*.<sup>146</sup>

Subdivision 2 of the Feinberg Law was . . . before the Court in *Adler* and its constitutionality was sustained. But constitutional doctrine which has emerged since that decision has rejected its major premise. . . . that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action.<sup>147</sup>

In *Keyishian* and in subsequent cases, the Court explained that *Adler*’s “major premise” had been rejected because denying a benefit based on the exercise of a constitutional right “would allow the government to ‘produce a result which (it) could not command directly.’”<sup>148</sup> What the Constitution forbids the government to do directly it equally forbids the government to do indirectly.<sup>149</sup> The Justices signaled that the right-privilege distinction’s end-run around the Constitution must cease and that the state may no longer place “unconstitutional conditions”<sup>150</sup> upon benefits such as public employment.

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[I]n *United Public Workers*, though we held that the Federal Government through the Hatch Act . . . could properly bar its employees from certain types of political activity . . . we cast this holding into perspective by emphasizing that Congress could not “enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.

*Id.*

141. *Id.* at 192.

142. *Id.*

143. *Sweezy v. New Hampshire*, 354 U.S. 234, 254-55 (1957).

144. *Shelton v. Tucker*, 364 U.S. 479, 490 (1960).

145. *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 604 (1967).

146. *Id.* at 589.

147. *Id.* at 605 (alteration in original).

148. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

149. *Van Alstyne*, *supra* note 100 at 1445-46.

150. *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 59 (2006). “[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected [. . .] freedom of speech even if he has no entitlement to that benefit.” *Id.* (citations omitted). Of course, this doctrine is not unlimited, as the

While *Wieman* and *Keyishian* rejected the right-privilege distinction in the academic employment setting, these cases had obvious implications for First Amendment freedoms in other contexts. As we shall see, in a series of decisions, the Justices unraveled the distinction and upheld the rights of citizens to challenge government conditions imposed upon benefits such as tax exemptions, unemployment benefits, and ultimately, public education.

*Speiser v. Randall* raised the question of whether the State of California could require veterans seeking a state property tax exemption to sign an affidavit declaring that they did not advocate for the overthrow of the government by unlawful means.<sup>151</sup> The State defended the requirement, contending that because a tax exemption is a “‘privilege’ . . . its denial may not infringe speech.”<sup>152</sup> The high Court disagreed, holding that “the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech.”<sup>153</sup> The declaration requirement heightened these concerns by requiring the veteran to prove that he did not embrace the prohibited viewpoint.<sup>154</sup> This procedural mechanism, the Court opined, chilled speech and violated due process.<sup>155</sup> *Speiser* revealed that the Court’s impatience with indirect assaults upon the First Amendment extended beyond public employment.

In *Sherbert v. Verner*, the State of South Carolina declared the petitioner, a Seventh Day Adventist, ineligible for unemployment benefits because she would not work on the Sabbath pursuant to her religious beliefs.<sup>156</sup> The state supreme court found that this denial had no effect on her right to observe her religion.<sup>157</sup> But the federal Justices disagreed, concluding that the state simply cannot place conditions on public benefits if they operate to “deter the exercise of First Amendment freedoms.”<sup>158</sup> The Court reasoned that South Carolina penalized Ms. Sherbert’s free exercise rights just as California had chilled Mr. Speiser’s freedom of speech.<sup>159</sup> South Carolina, hence, could not force Ms. Sherbert to choose between her faith and her benefits.<sup>160</sup>

Moreover, the Court chastised the South Carolina court for even raising the right-privilege distinction.<sup>161</sup> “It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”<sup>162</sup> To further drive the point home, the Court cited to *Wieman*, *Speiser*, and other decisions in which it and lower courts had invalidated conditions placed on governmental benefits that impeded constitutionally protected conduct.<sup>163</sup> The Court’s sweeping

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government may place some reasonable conditions upon the receipt of benefits. Such acceptable conditions primarily arise in the context of direct government funding. Accordingly, this exception to the rule has had little or no application in the university context except where receipt of direct government subsidies was at issue. *See supra* note 106.

151. *Speiser v. Randall*, 357 U.S. 513, 515 (1958).

152. *Id.* at 518.

153. *Id.* at 519.

154. *Id.* at 521-22.

155. *Id.* at 528-29.

156. *Sherbert v. Verner*, 374 U.S. 398, 399-401 (1963).

157. *Id.* at 401.

158. *Id.* at 405.

159. *Id.*

160. *Id.* at 410.

161. *Sherbert*, 384 U.S. at 404.

162. *Id.*

163. *Id.* at 404-05.

condemnation of South Carolina's unemployment criterion effectively buried the legitimacy of the right-privilege distinction as a viable constitutional defense.

### 3. The Rejection of the Right-Privilege Distinction in Public Education

Though the Court had explicitly rejected the right-privilege distinction in contexts of public employment, tax exemptions, and unemployment benefits, it was not clear how those decisions would impact public education. That changed in the landmark student speech case of *Tinker v. Des Moines Independent Community School District*.<sup>164</sup> The facts of *Tinker* are well known, as the Court famously enunciated the constitutional standard for student speech in the public elementary and secondary schoolhouse settings.<sup>165</sup> A student may "express his opinions, even on controversial subjects . . . if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school.'"<sup>166</sup> Applying this standard, the Court held that the school administrators violated the Tinkers' First Amendment rights by banning their symbolic arm-bands.<sup>167</sup>

What is less well known about the case, however, is that it was the first time since *Barnette* that the Court directly addressed *Hamilton*'s impact upon students' First Amendment rights. As the Court announced that teachers and students did not abandon their rights at the schoolhouse gate, it undermined *Hamilton* in a significant footnote.<sup>168</sup> Indeed, this was necessary because *Hamilton* had not been directly overruled<sup>169</sup> and could itself have undone the *Tinker* decision, given that public education had not been held to be a "right."<sup>170</sup>

[*Hamilton*] is sometimes cited for the broad proposition that the State may attach conditions to attendance at a state university that require individuals to violate their religious convictions. . . . The decision cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees. See, e.g. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624.<sup>171</sup>

In this single footnote, the Court finally signified its retreat from *Hamilton* and expressly acknowledged that the right-privilege distinction no longer applied to public education.<sup>172</sup> Moreover, the citation to *Barnette* indicated specifically that the distinction would provide

164. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

165. *Id.* at 504, 512-13.

166. *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966) (alteration in original)).

167. *Id.* at 514.

168. *Id.* at 506 n.2.

169. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 251-52 (1963) (Brennan, J., concurring).

170. See *Plyer v. Doe*, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution.")

171. *Tinker*, 393 U.S. at 506 n.2 (citations omitted).

172. *Hamilton* may still retain some vitality on the grounds that the decision also relied upon the State's "power to raise militia and impose the duties of service therein upon its citizens." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

no shelter for state educators who compelled student speech. Therefore, the *Tinker* Court rejected the idea that the state could condition the receipt of a public education on the forfeiture of essential liberties, and it hinted the same for higher education.<sup>173</sup>

The Court explicitly extended *Tinker*'s rejection of the right-privilege distinction to higher education three years later in *Healy v. James*.<sup>174</sup> In *Healy*, a group of students at Connecticut State Community College requested official recognition from the college for a proposed student group called the "Students for Democratic Society" (SDS).<sup>175</sup> The president of the college, fearing that the student group would adopt the violent philosophy of the national chapter of SDS, denied recognition.<sup>176</sup> The students sued, alleging violations of their rights to expression and association.<sup>177</sup> Both the district court and the court of appeals agreed that no associational rights were violated because the college simply withheld its official "stamp of approval," while allowing the students to meet informally on campus.<sup>178</sup>

The Supreme Court concurred that official recognition was a privilege, but it objected to the lower courts' appraisal of the consequences of withholding that privilege.<sup>179</sup> Noting that this precise issue was novel, the Court pointed out that it had "consistently disapproved governmental action . . . denying rights and privileges solely because of a citizen's association with an unpopular organization."<sup>180</sup> "There can be no doubt," the Court announced, "that denial of official recognition, without justification, to college organizations burdens or abridges that associational right."<sup>181</sup> The Court then reversed and remanded the case, instructing the lower court that the university bore the "heavy burden" of justifying the denial of recognition.<sup>182</sup>

The Court could not have been clearer in rejecting *Hamilton*'s premise that college students waived their rights when they accepted the benefit of a public education. The SDS students, having already accepted the initial benefit of public education, were seeking an *additional* benefit—official recognition—and the Court ruled that even this subsequent benefit could not be withheld arbitrarily.<sup>183</sup> Moreover, the Court dispersed the cloud *Hamilton* had cast over the availability of constitutional liberties at public universities. "[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment."<sup>184</sup> "The precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large."<sup>185</sup>

While neither *Tinker* nor *Healy* directly addressed the college curriculum, the Court

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173. *Tinker*, 393 U.S. at 506.

174. *Healy v. James*, 408 U.S. 169 (1972).

175. *Id.* at 172.

176. *Id.* at 174-75.

177. *Id.* at 177.

178. *Id.* at 179.

179. *Healy*, 408 U.S. at 193.

180. *Id.* at 185-86.

181. *Id.* at 181.

182. *Id.* at 184.

183. *Id.* at 185.

184. *Healey*, 408 U.S. at 180.

185. *Id.* at 180.



shut the door on the conclusion that First Amendment rights could be denied on a university or high school campus simply because a plaintiff-student had “voluntarily enrolled” there. The same year as *Healy*, the court further strengthened this position by reaffirming the right-privilege distinction’s burial:

For at least a quarter-century, this Court has made clear that even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which (it) could not command directly.’ Such interference with constitutional rights is impermissible.<sup>186</sup>

Thus, the “voluntary enrollment” disqualifier no longer has any foundation upon which to stand. It cannot be justified on the grounds that unlawful compulsion can only exist where enrollment is mandatory, because enrollment is optional in both pre-collegiate and collegiate institutions of learning. And several compelled speech, establishment clause, and free exercise clause plaintiffs have succeeded in settings in which participation was voluntary. Likewise, the disqualifier cannot be supported by the right-privilege distinction because that distinction has eroded over time and no longer justifies the denial of constitutional claims. Without these two foundational premises, the “voluntary enrollment” disqualifier is simply of no effect.

C. *Federal Courts have Recognized that Public University Students have Compelled Speech Claims against Curricular and Curricular-related Requirements.*

The compelled speech jurisprudence becomes much clearer once one removes the two defunct premises of the “voluntary enrollment” nullifier. For without those premises, *Barnette* itself supports the recognition of a curricular compelled speech claim.<sup>187</sup> Likewise, more recent decisions from the Supreme Court and two federal courts of appeals that have relied on *Barnette* have permitted review of compelled speech claims against curricular and curricular-related requirements.

1. *Barnette*: Grade School Curricular Requirements

The Eleventh Circuit should have recognized that *Barnette* itself, when shorn of the “voluntary enrollment” disqualifier, supports the position that judicial review exists for compelled speech claims against university curricula. For the Pledge and salute in that case were state curricular mandates. Furthermore, the heightened constitutional protection

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186. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (alteration in original).

187. *See generally*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (discussing the constitutionality of compelling public school students to salute the American flag).

given to adults in the college environment leaves little reason to distinguish it from the public school context in *Barnette*. Therefore, college adults must, at a minimum, be entitled to the same level of First Amendment protection enjoyed by grade school children.

The Supreme Court has explained that “activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”<sup>188</sup> With this definition in mind, it becomes evident that the *Barnette* children’s religious scruples conflicted with a state curricular requirement. For the West Virginia State Board of Education had adopted the flag salute as “a regular part of the program of activities in the public schools”<sup>189</sup> in order to promote “national unity.”<sup>190</sup> Moreover, the state adopted the measure in response to *Minersville School District v. Gobitis*, wherein the Court upheld the salute because a contrary holding would intrude into the “pedagogical and psychological dogma” of the schools.<sup>191</sup> Also, the West Virginia district court recognized that the Jehovah’s Witnesses’ objections to the flag salute confronted the “educational policy” of the state.<sup>192</sup> The courts’ references to “program of activities,” “pedagog[y],” “psychological dogma,” and “educational policy” undoubtedly refer to the school curriculum.

Moreover, the *Barnette* Court recognized that the precise issue before it was a matter of *teaching*, the quintessential method for transmitting a school’s curriculum to the students.

As the present Chief Justice said in dissent in the *Gobitis* case, the State may ‘require *teaching by instruction* and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country.’ Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan.<sup>193</sup>

The Court thus specified that the state could not shortcut the educational process by compelling speech.<sup>194</sup> Its holding confirms that there are constitutional limits on how a public school may accomplish its curricular goals.<sup>195</sup> Public schools may educate, but not indoctrinate.<sup>196</sup> They may persuade students, but not compel them to articulate state-approved

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188. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

189. *Barnette*, 319 U.S. at 626.

190. *Id.* at 640.

191. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 597 (1940).

192. *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 254 (S.D. W. Va. 1942), *aff’d*, *Barnette*, 319 U.S. 624 (1943).

193. *Barnette*, 319 U.S. at 631 (emphasis added).

194. *Id.*

195. *Id.*

196. *Id.*

beliefs.<sup>197</sup>

While the *Barnette* opinion was issued in the pre-collegiate context, the nature of the environment and the age of the students in higher education both cut in favor of extending *Barnette*'s reasoning to the university setting. The courts have made this point explicit when dealing with the corollary of compelled speech, government censorship.<sup>198</sup>

The public university holds a constitutionally unique place in our culture. Indeed, it is well-recognized that “[t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas.”<sup>199</sup> Liberty is the lifeblood of this marketplace, without which all of society suffers.<sup>200</sup> “The essentiality of freedom in the community of American universities is almost self-evident. . . . [S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”<sup>201</sup> Given the implications at stake, the door is tightly shut against the view that our first liberties “apply with less force on college campuses,” for “(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”<sup>202</sup> These judicial exhortations signify that the First Amendment operates on college grounds with more vigor than it does on high school campuses. Therefore, if *Barnette* is sound jurisprudence for the latter, then it must be so for the former.

Moreover, the university classroom is attended almost exclusively by *adult* students who are granted greater freedom than their minor counterparts. The courts have consistently recognized that the First Amendment rights of schoolchildren “are not automatically coextensive with the rights of adults in other settings.”<sup>203</sup> “The First Amendment guarantees wide freedom in matters of adult public discourse.”<sup>204</sup> Consequently, “public secondary and elementary school administrators are granted more leeway [to restrict speech] than public colleges and universities.”<sup>205</sup> The corollary to this principle is also true. Power to compel student speech—if any—is more circumscribed on the college campus than in the public school classroom. If therefore, as *Barnette* holds, public school officials are not

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197. *Id.*

198. *See* *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (discussing the lack of constitutional significance in differentiating compelled speech and compelled silence). “There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.” *Id.*

199. *Healy v. James*, 408 U.S. 169, 180 (1972).

200. *Id.* at 194.

201. *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1966) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

202. *Healy*, 408 U.S. at 180 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)) (alteration in original); *see also* *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (explaining that the danger of “chilling [] individual thought and expression. . . . is especially real in the university setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition”).

203. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)). “It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.” *Fraser*, 478 U.S. at 682.

204. *Fraser*, 478 U.S. at 682.

205. *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 (3d Cir. 2008) (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 260 (3d Cir. 2002)).

immune from suit for using curricula to compel speech, then neither are university officials. The Supreme Court has implied this conclusion while two courts of appeals have held so expressly.

## 2. *Southworth*: University Curricular-Related Requirements

In *Board of Regents of the University of Wisconsin System v. Southworth*, the Supreme Court addressed its first compelled speech claim in the university context.<sup>206</sup> A group of students challenged the mandatory student fee imposed by the University of Wisconsin (UW) to fund the extracurricular speech of other students.<sup>207</sup> The students claimed the fee subsidized political and ideological speech that was offensive to their personal beliefs.<sup>208</sup> Outside of the university setting, forced subsidy policies had been stricken as compelled speech in prior cases, and the Court now recognized this principle as applicable to public universities.<sup>209</sup> “If the University conditions the opportunity to receive a college education . . . on an agreement to support objectionable, extracurricular expression by other students, [First Amendment] rights . . . become implicated.”<sup>210</sup> Under this principle, the Court ruled that Wisconsin’s fee system could only survive constitutional scrutiny if it ensured that funds were allocated in a viewpoint-neutral manner.<sup>211</sup> The Court then remanded to confirm compliance with this rule.<sup>212</sup> While the Court’s decision addressed compelled “extracurricular speech,” its reasoning supports recognition of compelled curricular speech claims as well.

Significantly, the Justices lessened the distinction between curricular and extracurricular activities by tying them both into the broad academic mission of the university. For example, the Court accepted the University’s contention that its academic mission was well served<sup>213</sup> when students had the “means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects . . . outside the lecture hall.”<sup>214</sup> Similarly, the concurring Justices characterized student organization activities as a “second curriculum.”<sup>215</sup> The Court in a subsequent case made this comparison explicit: “A

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206. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000). In *Rosenberger*, the Court acknowledged, but did not resolve, the question of whether a public university transgresses the compelled speech doctrine by requiring its students to pay fees to support the extracurricular speech of other students. *Id.* at 233.

207. *Id.* at 226-27.

208. *Id.* at 227.

209. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (invalidating rule allowing union to use a portion of union dues for political causes).

210. *Southworth*, 529 U.S. at 231.

211. *Id.* at 233-34.

Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

*Id.*

212. *Id.* at 235-36.

213. *Id.* at 222-23. The university maintained that the fees “enhance[d] the educational experience” of its students. *Id.* at 223.

214. *Southworth*, 529 U.S. at 233.

215. *Id.* at 237 (Souter, J., concurring) (quoting the University’s Student Organization Handbook).

college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process.”<sup>216</sup> By placing both extracurricular and curricular requirements under the university's broad academic mission, the Court has logically committed to similar constitutional treatment for both.

Of course, the *Southworth* Court recognized that its compelled speech findings would not apply in situations in which the government itself is speaking,<sup>217</sup> and explained that the government speech doctrine would instead apply when a professor is speaking in an academic context.<sup>218</sup> However, this observation does not undercut the claims of students like Jennifer Keeton (or fictitious students like Lucy and Alysse). When these students complete their assignments, it is they—not the government—who are speaking.<sup>219</sup> This is true at both the high school<sup>220</sup> and the university level.<sup>221</sup>

This caveat aside, *Southworth* clearly recognized a compelled speech claim in the university context. The Court's decision to focus on the broad academic mission of the university has blurred the lines between curricular and extracurricular policies. Therefore, the Court's recognition of a curricular-related extracurricular compelled speech claim implicitly supports the existence of a curricular one.

### 3. *Axson-Flynn* and *Ward*: University Curricular Requirements

Unlike the Eleventh Circuit, two other circuits have recognized that university students can raise compelled speech claims, even though they voluntarily enrolled. In *Axson-Flynn v. Johnson*, a former University of Utah student brought suit against the faculty in the school's Actor Training Program (ATP) after she was forced to read a script that contained certain words she considered offensive and blasphemous to her Mormon faith.<sup>222</sup> She claimed, among other things, that the requirement compelled her to speak in violation

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216. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2988-89 (2010).

217. *Southworth*, 529 U.S. at 235.

Where the *University speaks* . . . the analysis likely would be altogether different. . . . In the instant case, the speech is not that of . . . an instructor or a professor in the academic context, where principles applicable to *government speech* would have to be considered.

*Id.* (emphasis added).

218. *Id.*

219. *See C.H. ex. rel. Z.H. v. Oliva*, 226 F.3d 198, 214 (3d Cir. 1999) (Alito, J., dissenting) (“Things that students express in class or in assignments when called upon to express their own views . . . do not represent ‘the school’s own speech.’”).

220. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (“[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of *student speech* in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”) (emphasis added).

221. While the circuit courts have divided as to whether *Hazelwood*'s deferential standard applies in the college context, none have questioned its central premise that student curricular expression is, after all, *student speech*. *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), is perhaps the best example of this consensus. The panel turned away a student's claim that university officials violated the First Amendment by declining to approve his thesis because it contained a profanity-laced “[d]isacknowledgments” section. *Id.* at 945-46. One judge ruled that *Hazelwood* should apply to curricular speech at the university level, a second judge opined that it should not, and a third judge based his opinion on other grounds. *Id.* at 956-57 (Reinhardt, J., concurring in part and dissenting in part). While the first two judges disagreed as to the relevant First Amendment standard, both confirmed that the speech at issue—a student's master's thesis—was student speech. *Id.*

222. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1282 (10th Cir. 2004).

of the First Amendment.<sup>223</sup> The Tenth Circuit quickly dispelled the notion that Axson-Flynn's speech was "government speech."<sup>224</sup> Instead, the court concluded that her claim should be analyzed under minimal scrutiny because the script was part of the curriculum.<sup>225</sup> Yet, the court found a genuine issue for trial as to whether the script requirement was motivated by anti-Mormon bias.<sup>226</sup> Significantly, the court of appeals did not immediately foreclose Axson-Flynn's compelled speech suit, but rather, acknowledged she had a cognizable claim.<sup>227</sup>

The Sixth Circuit reached the same conclusion in *Ward v. Polite*.<sup>228</sup> Julea Ward, a graduate counseling student at Eastern Michigan University (EMU), was expelled from the program when she asked to refer a client in EMU's clinic who sought gay-supportive counseling that conflicted with her strong Christian beliefs.<sup>229</sup> Ms. Ward challenged the expulsion under the compelled speech doctrine, arguing that EMU required her to speak the university's gay-affirming message to clients even though it permitted other student-counselors to refer clients who raised different value conflicts.<sup>230</sup> The Sixth Circuit agreed with the Tenth Circuit that curriculum-related student speech should be subject to minimal scrutiny.<sup>231</sup> Interestingly, the court noted that because a college student is not forced to be there, it would be a "rare day when a student [could] exercise a First Amendment veto over [the curriculum]."<sup>232</sup> Nonetheless, the court ruled that such a day had arrived.<sup>233</sup> Harkening back to *Barnette*, it ruled that EMU's no referral policy appeared to "mandate[] orthodoxy" rather than tolerance on the issue of homosexuality.<sup>234</sup> Consequently, it permitted the case to go to trial.<sup>235</sup>

Both *Axson-Flynn* and *Ward* recognized—albeit narrowly—what the Eleventh Circuit rejected outright. Public university curricula are not immune from compelled speech

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223. *Id.* at 1283.

224. *Id.* at 1285 ("Axson-Flynn is a student, not a school official, and recitation of the play is not being advanced as government speech.")

225. *Id.* ("We thus find that the ATP's classroom constitutes a nonpublic forum, meaning that school officials could regulate the speech that takes place there 'in any reasonable manner.'")

226. *Id.* at 1293.

227. *Axson-Flynn*, 356 F.3d at 1299. At least one commentator has further agreed implicitly with the position that compelled speech claims are available for public university students. For example, Brandon Pond said the following:

Although universities should be granted broad discretion when making and enforcing curricular requirements, the university should be restricted from compelling a student to adopt a particular idea, belief, or viewpoint. In evaluating these actions, "[t]he crucial question is whether . . . the government is compelling others to espouse . . . certain ideas and beliefs."

Brandon C. Pond, *To Speak or not to Speak: Theoretical Difficulties of Analyzing Compelled Speech Claims Under a Restricted Speech Standard*, 10 B.Y.U. EDUC. & L.J. 149, 162 (2010) (quoting *Phelan v. Laramie Cnty. Cmty. Coll. Bd. Of Trs.*, 235 F.3d 1243, 1247 (10th Cir. 2000)).

228. *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012). The author represented Ms. Ward at the district court level.

229. *Id.* at 731-32.

230. *Id.* at 732.

231. *Id.* at 733-34.

232. *Id.* at 734.

233. *Ward*, 667 F.3d at 733-34.

234. *Id.* at 735; *see also* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("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.") (emphasis added).

235. *Ward*, 667 F.3d at 742.

claims. The *Keeton* court's flat ban on such claims has split the circuits and forces college students to shed their constitutional rights at the university admissions office in violation of principles declared in a long line of Supreme Court cases from *Barnette* to *Tinker* to *Southworth*.

PART III: THE DISTURBING IMPLICATIONS OF THE "VOLUNTARY ENROLLMENT"  
DISQUALIFIER.

The Eleventh Circuit's "voluntary enrollment" nullifier would have drastic repercussions for constitutional liberties. Taken to its logical end, the nullifier would have reversed several landmark speech cases and jeopardized other basic freedoms Americans currently enjoy inside and outside the classroom.

A. *On-Campus Consequences*

As a matter of policy, the "voluntary enrollment" disqualifier would have devastating implications for campus liberty, for the disqualifier has no logical limitation. The *Keeton* court bluntly asserted that Ms. Keeton, "having voluntarily enrolled in the [counseling] program, does not have a constitutional right to refuse to comply with [the] conditions" that violated her conscience.<sup>236</sup> The Eleventh Circuit may have wished to limit the principle to compelled speech claims, but this is limitation by fiat. For if voluntary matriculation extinguishes a student's compelled speech claim, it is unclear why other speech claims would remain viable. After all, under the First Amendment, compelled speech and compelled silence are "constitutional[ly] equivalent[ly]."<sup>237</sup> A cursory review of a few landmark speech decisions demonstrates the logical—and disturbing—consequences of the disqualifier.

In *Papish v. Board of Curators of University of Missouri*, the university expelled graduate student Barbara Papish for distributing a newspaper containing "indecent" speech in violation of the General Standards of Student Conduct.<sup>238</sup> Ms. Papish sued, claiming the expulsion violated her First Amendment rights.<sup>239</sup> Both lower courts denied relief but the Supreme Court reversed, holding "that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus [sic] may not be shut off in the name alone of 'conventions of decency.'"<sup>240</sup> This ruling stands as a powerful affirmation of the breadth of speech protection for university students.

But the *Keeton* court would have reached the opposite conclusion. Applying the "voluntary enrollment" disqualifier, it would have concluded:

[The University of Missouri] has conditioned participation in its [graduate program] and graduation on compliance with [the General Standards of Student Conduct] and [Papish], having voluntarily enrolled in the program, does not have a constitutional right to refuse to comply

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236. *Keeton v Anderson-Wiley*, 664 F.3d 865, 878 (11th Cir. 2011).

237. *Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781, 797 (1988).

238. *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667 (1973).

239. *Id.* at 668-69.

240. *Id.* at 670.

with those conditions.<sup>241</sup>

This reversal is beyond mere conjecture, for the district court ruled against Ms. Papish on these precise grounds.<sup>242</sup>

Likewise, the *Keeton* court would have ruled against the religious student group, Cornerstone, in *Widmar v. Vincent*, unlike the Supreme Court.<sup>243</sup> In *Widmar*, University of Missouri Kansas City (UMKC) had made its facilities generally available for use by all student organizations, but passed a new policy excluding any group from using such facilities for “religious worship or religious teaching.”<sup>244</sup> Pursuant to this new policy, UMKC refused to allow Cornerstone to continue using its facilities.<sup>245</sup> The case was significant because the Supreme Court had not directly addressed how or whether the First Amendment public forum doctrine might apply on a university campus.<sup>246</sup> While the Court had hinted in prior cases that the college campus possessed some of the features of public forums, it had also permitted colleges to impose “reasonable regulations” on the use of their facilities to preserve their unique academic mission.<sup>247</sup> Over one dissent, the Court applied the public forum doctrine to the facilities at issue and held that content-based exclusions from a “generally open forum” must be justified by a compelling state interest.<sup>248</sup> UMKC’s exclusion of Cornerstone failed this test.<sup>249</sup> This bedrock decision firmly established the forum doctrine as a foundational principle of analysis for campus speech claims.

However, the *Keeton* court never would have reached this conclusion under the “voluntary enrollment” principle. UMKC essentially conditioned the use of its facilities upon compliance with its regulations.<sup>250</sup> Thus, under *Keeton*, the students of Cornerstone, who chose to attend the school, had no grounds to object. Their remedy was simply to “choose not to attend [UMKC].”<sup>251</sup>

The disqualifier would have likewise thwarted the First Amendment claims of members of Wide Awake Productions (WAP), again in stark contrast to the Supreme Court’s

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241. *Keeton*, 664 F.3d at 878.

242. *Papish*, 410 U.S. at 669 n.4.

Prefatorily, the District Court held that petitioner, who was a nonresident of Missouri, was powerless to complain of her dismissal because she enjoyed no “federally protected or other right to attend a state university of a state of which she is not a domiciled resident.” . . . The District Court’s reasoning is directly inconsistent with a long line of controlling decisions of this Court.

*Id.*

243. *Widmar v. Vincent*, 454 U.S. 263 (1981).

244. *Id.* at 264-65.

245. *Id.* (“From 1973 until 1977 . . . Cornerstone regularly sought and received permission to conduct its meetings in University facilities.”).

246. The public forum doctrine states that the level of First Amendment protection for private speech on public property depends upon whether the property at issue can be characterized as a traditional public forum, a limited public forum, or a nonpublic forum. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983). Content-based restrictions are presumed unconstitutional in the first two fora. *Id.* The government may regulate speech in a nonpublic forum only if such regulations are reasonable and viewpoint-neutral. *Id.* The Court did not state the doctrine in its modern form with these recognizable three categories of fora until the *Perry* decision, two years after *Widmar*.

247. *Widmar*, 454 U.S. at 267 n.5.

248. *Id.* at 269-70.

249. *Id.* at 277.

250. *Id.* at 265.

251. *Keeton*, 664 F.3d at 878.



decision in *Rosenberger v. Rector & Visitors of the University of Virginia*.<sup>252</sup> There, the Supreme Court invalidated the university's student activity funding policy because it excluded from eligibility student journalistic efforts that "manifest[] a particular belie[f] in or about a deity."<sup>253</sup> This exclusion, in the Court's opinion, discriminated against the religious viewpoint of WAP's members,<sup>254</sup> and thus, transgressed the First Amendment.<sup>255</sup>

But again, the conclusion would have been quite different under the "voluntary enrollment" analysis, which would have quashed the students' claim upon arrival. The University of Virginia had simply conditioned the opportunity to receive student activity funds on acquiescence to the university's guidelines. WAP was at liberty to maintain its beliefs and go elsewhere. But having chosen to apply for the funds, it had no grounds to object to the no-deity exclusion.

As this sample of cases demonstrates, the "voluntary enrollment" disqualifier would likely have reversed the outcomes in three landmark college speech cases and thereby crippled campus freedom. As if this was not troubling enough, there appears to be no principled reason why the disqualifier would not also affect other First Amendment rights, such as the free exercise of religion, the freedom from an establishment of religion, and the freedom of association. After all, the *Hamilton* Court used the disqualifier to dispense with a free exercise challenge to a college curricular mandate.<sup>256</sup> Would not the disqualifier also permit a state college to compel a student to participate in an official prayer against the command of the Fourth Circuit or partake in a chapel service against the decree of the D.C. Circuit?<sup>257</sup> Would not a state similarly possess the authority to refuse to recognize a student group based on the group's philosophy in contravention of *Healy*?<sup>258</sup> The Eleventh Circuit's resurrection of the disqualifier provides no assurances that these questions would be answered in the negative.

Furthermore, this unraveling of campus freedom would not stop with the First Amendment, for if a university can require incoming students to waive their First Amendment rights as a condition of receiving school benefits, on what grounds can other freedoms be thought safe? Justice Rutledge made this very point in 1926: "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner compel a surrender of all."<sup>259</sup> Accordingly, high school students would have to choose their future alma maters with the motto "caveat emptor" in mind. For once a student matriculated, he would have no grounds to challenge, for example, unlawful searches or

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252. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

253. *Id.* at 822-23 (second alteration in original).

254. *Id.* at 832 ("The University's denial of WAP's request for third-party payments in the present case is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid.").

255. *Id.* at 837.

256. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 262 (1934). *See also* *Kissinger v. Bd. of Trs. of the Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 180-81 (6th Cir. 1993), wherein the Sixth Circuit stated that a university student who voluntarily matriculates at a university cannot then object to the curriculum on free exercise grounds.

257. *Mellen v. Bunting*, 327 F.3d 355, 362 (2003) (supper prayers at state military institution violates the Establishment Clause); *Anderson v. Laird*, 466 F.2d 283, 291 (D.C. Cir. 1972) (required chapel attendance at military academies violates the Establishment Clause).

258. *Healy v. James*, 408 U.S. 169, 187 (state college's refusal to recognize student group because of disagreement with the group's philosophy violated students' freedom of association).

259. *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 594 (1926).

seizures<sup>260</sup> or denials of due process.<sup>261</sup> Indeed, the “voluntary enrollment” disqualifier raises serious questions as to whether *pre-enrollment* discriminatory admissions policies themselves would be immune from an equal protection challenge.<sup>262</sup> Under this regime, the Constitution would bow to the whim of university officials and the extent of liberty experienced by students would vary from campus to campus. It is simply inconceivable that fundamental freedoms can be manipulated in this manner, particularly in the heart of the “marketplace of ideas.”<sup>263</sup>

### B. *Off-Campus Consequences*

Furthermore, taken to its broadest application, the “voluntary enrollment” disqualifier would eclipse basic liberties even beyond the collegiate context. With the increasing influence of the federal and state government over the life of the individual in employment, education, housing, welfare, and most recently, healthcare, there are innumerable ways in which the individual “voluntarily” interacts with his government.<sup>264</sup> The disqualifier permits the government to compel citizens to choose between their conscience and vital public benefits.

For one thing, the disqualifier would essentially gut the compelled speech doctrine and the free exercise of religion. For example, citizens “voluntarily” apply for driver’s licenses, and so the state could force them to serve as “mobile billboard[s]” for offensive government messages.<sup>265</sup> Similarly, as citizens choose to obtain parade permits, the state could compel the parade organizers “to propound a particular point of view.”<sup>266</sup> If a citizen voluntarily accepts a political commission, the state could force him to profess “a belief in the existence of God” against his will.<sup>267</sup> And a religious person who lost her job could be constrained to choose between her unemployment benefits and the dictates of her faith.<sup>268</sup> Plaintiffs in these situations would have no grounds to complain, for they could simply *choose* not to accept the benefits at issue. Of course, the government cannot constitutionally impose such a Morton’s Fork on its citizens. Yet, logically, such state action would be permissible if the principle of “voluntary enrollment” were the law of the land.

For another thing, the disqualifier would essentially permit a return to the narrow concept of freedom under the right-privilege distinction that reigned between *McAuliffe*

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260. *See generally*, *Washington v. Chrisman*, 455 U.S. 1 (1982) (Fourth Amendment challenge to police search of college dormitory room).

261. *See generally* *Dixon v. Ala. State Bd. of Educ.* 294 F.2d 150 (5th Cir. 1961) (procedural due process required before a student at state-supported college can be expelled).

262. *See* *United States v. Virginia*, 518 U.S. 515, 519 (1996) (holding that Virginia Military Institute’s policy of reserving admission exclusively for men violates the Equal Protection Clause); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978) (admissions program that reserved spaces for minority students discriminated based on race in violation of Equal Protection Clause).

263. *Healy*, 408 U.S. at 180.

264. Professor Van Alstyne noted this trend forty-five years ago. *See* Van Alstyne, *supra* note 100, at 1462 (“And the expansion of government with its attendant influence on the individual is not limited to employment, for the government is playing an increasingly crucial role in other areas such as housing, education, and welfare.”).

265. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

266. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995).

267. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

268. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

and *Adler*. The state would again be free to require the individual to relinquish his constitutional rights as a condition of receiving any governmental benefit he chooses to receive.

Restoring *McAuliffe* and *Adler* would require the Court to reverse its landmark decisions protecting the rights of public employees. Policemen, federal workers, and teachers alike would have no right to “talk politics,”<sup>269</sup> take part in a “political campaign[.]”<sup>270</sup> or refuse to sign a “loyalty oath.”<sup>271</sup> Similarly, the resurrection of *Davis*, would set back the well-established scope of protection for speech in public forums.<sup>272</sup> For decades now, it has been well-recognized that the “Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.”<sup>273</sup> Not so under *Davis*, wherein a state empowered to close the forum altogether, may opt to selectively permit access to certain speakers. Such selective permission contradicts the Supreme Court’s current equal access jurisprudence and grants states unbridled discretion to discriminate against unpopular viewpoints.<sup>274</sup> Of course, such censorship is anathema to the First Amendment.<sup>275</sup> Yet, these are only a few examples of the disqualifier’s collateral damage. As in the university setting, rights protecting privacy, due process, and equal protection would likewise be jeopardized. Indeed, no rights are safe under the “voluntary enrollment” disqualifier.

These consequences are severe. However, they flow logically from the Eleventh Circuit’s application of the “voluntary enrollment” disqualifier. Federal courts that consider following in *Keeton*’s footsteps must recognize the unintended consequences the doctrine is likely to produce.

#### CONCLUSION

The Eleventh Circuit erred as a matter of law and policy when it held that a student had no right to bring a compelled speech claim against her public university’s curriculum merely because she “voluntarily enrolled” in the program. The court’s holding is legally improper because it relied upon two premises taken from *Barnette* and *Hamilton* that are no longer valid. First, enrollment is in fact “voluntary” at both pre-collegiate and collegiate institutions because the state cannot constitutionally compel attendance at public schools. As federal courts have found violations of the Free Speech, Free Exercise, and Establishment Clauses inside and outside the university setting, they have inherently recognized that a citizen’s choice—including a student’s choice to enroll—does not extinguish unlawful state coercion. Second, the fact that education is a “privilege” rather than a “right” is irrelevant to the compelled speech analysis. The right-privilege distinction no longer

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269. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

270. *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 78 (1947).

271. *Wieman v. Updegraff*, 344 U.S. 183, 184 (1952).

272. *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897).

273. *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981).

274. *See Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123 (1992), wherein the Supreme Court invalidated a standardless permit policy. “Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.” *Id.* at 133.

275. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”).

permits the state to attach unconstitutional conditions to the receipt of benefits, such as a public education. With these errant premises purged from *Barnette*, the decision itself supports recognition of a compelled speech claim against a public college curriculum.<sup>276</sup> Moreover, the Supreme Court suggested this result when it recognized that the First Amendment is implicated when universities compel student speech in the curriculum-related context, and two federal courts of appeals have done so in the curricular context.<sup>277</sup> Finally, recognizing such compelled speech claims avoids the inherent policy difficulties raised by the “voluntary enrollment” disqualifier. For the disqualifier, taken to its logical conclusion, would eliminate freedom in a wide variety of situations in which the individual voluntarily interacts with his government, on or off campus.

Future courts should disregard the disqualifier that the *Keeton* court tried to resuscitate and permit judicial review of compelled speech claims against public college curricula. Anything less would darken that one fixed star of constitutional jurisprudence meant to provide expansive protection for freedom of conscience. And it would do so in the one context where First Amendment rights are supposed to be at their apex: the campuses of our public colleges and universities.

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276. See generally *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

277. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1280-81 (2004); *Ward v. Polite*, 667 F.3d 727, 730 (2012).