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The One Fixed Star in Higher Education: What Standard of Judicial Scrutiny Should Courts Apply to Compelled Curricular Speech in the Public University Classroom

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THE ONE FIXED STAR IN HIGHER EDUCATION: WHAT STANDARD OF JUDICIAL SCRUTINY SHOULD COURTS APPLY TO COMPELLED CURRICULAR SPEECH IN THE PUBLIC UNIVERSITY CLASSROOM?

Joseph J. Martins*

ABSTRACT

Virtually three-quarters of a century ago, the Supreme Court in West Virginia State Board of Education v. Barnette recognized that the First Amendment protects citizens from being forced to speak. Often, new legal doctrines are announced cautiously and narrowly in anticipation of future judicial development. Not so with Barnette. The Court boldly proclaimed that the right to be free from state-compelled affirmation is so fundamental that it stands as the one “fixed star in our constitutional constellation” that cannot be moved. State assertions of power that seek to coerce citizens to affirm government-approved ideas will inevitably fail, except when narrowly tailored to prevent “grave and immediate” danger. The Justices further signified the force of this doctrine by applying it to a curricular exercise mandated by public school teachers—those state officials who regularly require young citizens to speak in our nation’s classrooms.

While the Court has since confirmed the breadth of the compelled speech doctrine in multiple contexts outside of the classroom, its protections are now at risk of being eroded. Over the past seventy-four years, the size and scope of the government’s role in education—particularly higher education—has increased dramatically. The federal judiciary has largely accommodated this growth by granting public university officials more and more deference to their policies and curricular choices. But recently, some courts have extended this deference to dilute Barnette’s scope and force in the public university classroom. Indeed, two federal courts of appeals have held that curricular exercises that coerce college students to affirm official ideas will only face minimal judicial scrutiny when challenged in court. Another court of appeals held that such compelled speech claims are waived entirely when students choose to enroll at a public university. Not only are the circuits split, but neither of these conflicting positions properly respects the constitutional rights of students in the college classroom. Under these approaches, a public university could use its curriculum to force its students to campaign for a political party, lobby for legislation, or even pledge allegiance to a particular ideological position. This is not the legacy of Barnette.

This Article maintains that Barnette and its progeny require more rigorous and nuanced scrutiny—not deferential review—of public university curricular requirements that compel student speech. Only such an approach will permit teachers to teach while respecting the first liberties of college students in a manner consistent with compelled speech jurisprudence.

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The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritative selection."

—Keyishian v. Board of Regents¹

INTRODUCTION

Two college students each face a constitutional conundrum. Abigail is in her final semester at a state teacher's college and is in danger of failing out of the program despite having a stellar GPA. One of the college's curricular mandates requires students in a capstone course to demonstrate a "respect for diversity and a commitment to social justice."² As part of this requirement, all students must sign the college's Statement of Diversity and Social Justice. Abigail refuses to sign the statement because she disagrees with some of its tenets. Her professor will not pass her, and she will not be permitted to graduate if she will not sign the statement.

Lauren is in the first year of her Master of Advocacy and Political Leadership degree at a state university. In a course on political advocacy, her professor is requiring all students to write a persuasive letter to the state legislature supporting the passage of HB 1122. This measure, if enacted, will permit students, faculty, and visitors to carry handguns into any public university building in the state. Lauren, an ardent supporter of gun control legislation, refuses to write the letter on ideological grounds. Her professor threatens to give her an "F" in the course if she fails to write the letter.³

Abigail and Lauren both choose to file suit on the grounds that the curricular requirements at their respective state institutions violate the First Amendment by compelling them to voice an ideological message with which they disagree. Currently, the outcome of their respective lawsuits is an open question. The Supreme Court has never directly addressed the measure of judicial

¹ 385 U.S. 589, 603 (1967).

² Columbia University's Teachers College imposed a similar requirement on its students. See *Columbia University: Ideological Litmus Tests at Teachers College*, FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/cases/columbia-university-ideological-litmus-tests-at-teachers-college> (last visited July 16, 2017) (explaining Columbia University's Teachers College's mandate that "requires students to demonstrate a 'commitment to social justice'").

³ A student seeking a graduate degree in social work objected to a similar letter-writing assignment at Missouri State University. See Elia Powers, *Did Assignment Get Too Political?*, INSIDE HIGHER ED (Nov. 1, 2006), <https://www.insidehighered.com/news/2006/11/01/complaint?width=775&height=500i&frame=true> (discussing a student's lawsuit against Missouri State University on the grounds that a class assignment restricted her free speech by requiring her to support legislation making gays and lesbians eligible to become foster parents).

scrutiny courts should apply to compelled curricular speech in the public university context.⁴ Furthermore, the few circuit courts to have addressed the matter are split. In the Eleventh Circuit, neither student would have a claim.⁵ In the Sixth and Tenth Circuits, they would both have a claim, but the schools' actions would be subject to minimal judicial scrutiny.⁶ No other federal court of appeals has directly tackled the matter, and the issue has received only marginal scholarly attention. This silence in the law and scholarship is unsettling, to say the least, as higher education moves to an experiential learning model that greatly expands the college classroom.⁷ Students learning under this modern model are often required to advocate for ideological viewpoints in "real-life" opportunities both on and off campus—and in several high-profile cases, universities appear to have exploited teaching opportunities for political purposes.⁸ Thus, the question is ripe for review.

⁴ However, in *Southworth*, the Supreme Court addressed the compelled speech doctrine's application to compelled *extracurricular* speech. See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 221 (2000) (holding that "[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral").

⁵ See *Keeton v. Anderson-Wiley*, 664 F.3d 865, 878–79 (11th Cir. 2011) (explaining why plaintiff-student could not prevail on her free speech claim against defendant-university).

⁶ See *Ward v. Polite*, 667 F.3d 727, 734, 735 (6th Cir. 2012) (finding that plaintiff's First Amendment claim deserves to go before a jury even though "it is the rare day when a student can exercise a First Amendment veto" over a university's curriculum requirement); see also *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) (stating that "[n]eutral rules of general applicability ordinarily do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief," and are subject to rational basis review).

⁷ See Peter Stokes, *Job Skills Increasing Focus of Many Colleges*, INSIDE HIGHER ED (Oct. 4, 2013), <https://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.").

⁸ See, e.g., *Citrus College: Compulsory Anti-War Speech*, FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/cases/citrus-college-compulsory-anti-war-speech> (last visited July 16, 2017) ("A Citrus College professor had compelled undergraduate students to write anti-war letters to President George W. Bush, penalizing the grades of students who dissented or refused to send the letters."); *College Prof Makes Students Recite Anti-American 'Pledge of Allegiance'*, FOX NEWS (Dec. 8, 2014), <http://www.foxnews.com/us/2014/12/08/college-prof-makes-students-recite-anti-american-pledge-allegiance.html> (criticizing a Metropolitan State University of Denver professor who required his students to recite an anti-American alternative to the Pledge of Allegiance); Kate Hardiman, *Professors Tell Students: Drop Class if You Dispute Man-Made Climate Change*, THE COLLEGE FIX (Aug. 31, 2016), <http://www.thecollegefix.com/post/28825/> (recounting how "professors co-teaching an online course called 'Medical Humanities in the Digital Age' at the University of Colorado—Colorado Springs recently told their students via email that man-made climate change is not open for debate, and those who think otherwise have no place in their course"); Greg Lukianoff, *FAU College Student Who Didn't Want to Stomp on 'Jesus' Runs Afoul of Speech Code*, FORBES (Mar. 26, 2013, 8:37 PM), <http://onforb.es/14mSzGO> (discussing a Mormon student at Florida Atlantic University who was charged with violating the school's harassment policy when he refused to stomp on a piece of paper with the word 'Jesus' on it as part of a class assignment); *Missouri State University*:

This Article argues that current judicial approaches err by treating all compelled curricular speech claims the same and by subjecting them to a single standard that excessively defers to university educators. A proper and complete inquiry would be much more rigorous. A court reviewing such a claim should apply strict scrutiny when the purpose or effect of an academic exercise compels a student to affirm a belief. A court may, however, employ a more deferential standard toward university educators when they merely require students to speak information that does not implicate other constitutional rights.

Part I of this Article explores the development of the compelled speech doctrine generally and examines the few cases that attempt to apply this doctrine to compelled curricular speech in the public university classroom. Part II proposes a rigorous multi-tiered framework courts should apply when reviewing such claims, and Part III explains the legal justification for each part of the proposed analysis. Part IV addresses and rebuts the primary objections to this framework, and Part V applies the proposed framework to a variety of scenarios involving compelled speech at public universities.

I. THE COMPELLED CURRICULAR SPEECH PROBLEM

A. *The Compelled Speech Doctrine*

The Supreme Court first formally recognized the compelled speech doctrine in *West Virginia State Board of Education v. Barnette*⁹ by acknowledging that the First Amendment¹⁰ generally precludes the government from telling people what they must say. The Court has developed this doctrine in four distinct lines of cases in which the government has forced citizens or groups to “speak”

Political Litmus Test in School of Social Work, FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/cases/missouri-state-university-political-litmus-test-in-school-of-social-work> (last visited July 16, 2017) (explaining that “Emily Brooker sued Missouri State University (MSU) after she was threatened with expulsion and charged with violating MSU’s ‘Standards of Essential Functioning’ for refusing to lobby the Missouri legislature on behalf of homosexual adoption”); *Rhode Island College: Violation of Student’s Freedom of Conscience*, FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/cases/rhode-island-college-violation-of-students-freedom-of-conscience> (last visited July 23, 2017) (explaining that “[a]t Rhode Island College, graduate student Bill Felkner was asked to publicly advocate ‘progressive’ social changes that he did not believe in. [His] . . . professor . . . suggested . . . that if he did not agree with the school’s political philosophy, he should consider leaving . . .”); Nathan Rubbelke, *Student Whistleblower: Diversity Class Presents Multiple ‘isms’ as Fact Without Allowing Debate*, THE COLLEGE FIX (Feb. 10, 2017), <http://www.thecollegefix.com/post/31130> (examining a UMass Amherst course that requires students to “act out examples of racism to prove America is racist . . . [and] dominated by ‘white privilege’” without opportunity for discussions or debates).

⁹ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (stating that “the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control”).

¹⁰ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

in some manner. These case lines include instances of (1) “true” compelled speech; (2) compelled association with third parties; (3) compelled statements of fact; and (4) compelled subsidizing of the speech of others. Although the first three lines are the ones most often implicated in the public university classroom, a brief overview of all four lines is valuable for contextual purposes.

1. “True” Compelled Speech

Barnette was the first of three “true” compelled speech cases addressed by the Court. In these cases, the government requires an individual or organization to personally express an ideological, state-approved message to which the speaker objects. In *Barnette*, the Court held that the First Amendment prevented the State of West Virginia from compelling public-school children to say the Pledge of Allegiance and salute the flag.¹¹ It explained that the Bill of Rights “guards the individual’s right to speak his own mind” by precluding the state from coercing him “to utter what is not in his mind.”¹² The Court further reasoned that the compulsory pledge and salute exceeded the state’s power because it invaded the “individual freedom of mind” by forcing the students to affirm a belief.¹³ Many First Amendment controversies require the drawing of fine distinctions, but the Court made it clear that this was not such a case:

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.¹⁴

Barnette thus stands as a powerful confirmation of the limits of civil power over the realm of ideas: The state may not purposefully compel its citizenry to affirm government-approved opinions.

Thirty-three years later, in its second true compelled speech case, the Court clarified the reach of *Barnette* when it reviewed a Jehovah’s Witness couple’s challenge to a New Hampshire criminal law that required citizens to carry the State motto—“Live Free or Die”—on car license plates.¹⁵ The majority in *Wooley v. Maynard* reaffirmed that the “right to refrain from speaking” is part of the “individual freedom of mind” protected by the First Amendment.¹⁶ Accordingly, individuals may “hold a point of view different

¹¹ *Barnette*, 319 U.S. at 642.

¹² *Id.* at 634.

¹³ *Id.* at 637.

¹⁴ *Id.* at 642.

¹⁵ See *Wooley v. Maynard*, 430 U.S. 705, 707–08 (1977) (“The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto ‘Live Free or Die’ on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.”).

¹⁶ *Id.* at 714 (quoting *Barnette*, 319 U.S. at 637).

from the majority” and “refuse to foster . . . an idea they find morally objectionable.”¹⁷ Pursuant to these principles, the Court applied strict scrutiny to the law and concluded that New Hampshire could not require the Maynards to “becom[e] the courier for [the State’s ideological] message.”¹⁸ In dissent, Justice Rehnquist attempted to distinguish *Barnette* on the grounds that the passive display of the state motto was not an affirmation of belief.¹⁹ The majority disagreed, holding that being forced to carry the state’s preferred message on one’s personal property—like being compelled to salute the flag—is an invasion of “the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control.”²⁰ Thus, the government can neither compel citizens to personally affirm a belief (*Barnette*) nor force them to foster a belief to third parties such that their endorsement is reasonably presumed (*Wooley*).²¹ In other words, the prohibition on compelled speech encompasses both *actual* and *apparent* affirmations of officially coerced viewpoints.

The Court affirmed the breadth of this prohibition by holding that even *indirect* compulsion could transgress the First Amendment. In *AID v. Alliance for Open Society International, Inc.*,²² the Court reviewed a congressional funding condition that required recipients to “explicitly agree with the Government’s policy to oppose prostitution and sex trafficking.”²³ The Court found that this condition violated the basic principle in *Barnette* and *Wooley* that the “freedom of speech prohibits the government from telling people what they must say.”²⁴ The fact that the recipients could turn down the funds did not save the condition because it amounted to a “pledge [of] allegiance to the Government’s policy of eradicating prostitution.”²⁵ Furthermore, the majority reprimanded the government for crossing the constitutional red line drawn in *Barnette*—i.e., that no state official can prescribe orthodox thought and

¹⁷ *Id.* at 715.

¹⁸ *Id.* at 717.

¹⁹ *Id.* at 720–21 (Rehnquist, J., dissenting) (arguing that *Barnette* is distinguishable because the New Hampshire law did not “force[]” the Maynards to “‘assert[] as true’ the message” on the license plate).

²⁰ *Id.* at 715 (quoting *Barnette*, 319 U.S. at 642).

²¹ *Id.* at 721 (Rehnquist, J., dissenting) (“For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently to, or actually ‘asserting as true’ the message.”).

²² See generally *Agency for Int’l Dev. (AID) v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (“The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained.”).

²³ *Id.* at 2327.

²⁴ *Id.*

²⁵ *Id.* at 2332.

force a citizen to affirm it.²⁶ After *AID*, it is clear that this constitutional proscription extends to direct and indirect means of coercion.

Barnette, *Wooley*, and *AID* confirm that the government will face strict scrutiny if by direct or indirect action it forces its citizens to affirm an ideological view, whether or not that is the government's avowed purpose.

2. *Compelled Association*

In the second line of cases, the Court explained that the compelled speech doctrine also prohibits the government from forcing citizens to host or accommodate a message expressed by a private third party, absent a compelling state interest.²⁷ Thus, the Court voided a state "right of reply" statute requiring any newspaper that criticized a political candidate to publish the candidate's response free of charge.²⁸ Likewise, a plurality of the Court enjoined a state regulation that required a privately owned utility company to carry in its billing envelopes the bulletin of one of its opponents.²⁹ These compelled access provisions transgressed First Amendment limits because they "force[d] speakers to alter their speech to conform with an agenda they [did] not set."³⁰ The Court essentially treated the forced association with the objectionable message as a direct assault on the content of the speaker's message. And the First Amendment leaves the "choice[] of what to say and what to leave unsaid"³¹ to the individual, not the government or a third party.

The Justices affirmed this speaker-autonomy principle in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* wherein the state applied its public accommodation law to require parade organizers to include a lesbian, gay, and bisexual ("LGB") contingent to march in the annual St. Patrick's Day Parade.³² The Court found that this forced inclusion of the contingent

²⁶ See *id.* (declaring 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" (quoting *Barnette*, 319 U.S. at 642)).

²⁷ See, e.g., *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 19 (1986) ("Notwithstanding that it burdens protected speech, the Commission's order could be valid if it were a narrowly tailored means of serving a compelling state interest."); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 260–61 (1974) (White, J., concurring) ("To justify this statute, Florida advances a concededly important interest of ensuring free and fair elections by means of an electorate informed about the issues. But prior compulsion by government in matters going to the very nerve center of a newspaper—the decision as to what copy will or will not be included in any given edition—collides with the First Amendment.").

²⁸ *Tornillo*, 418 U.S. at 244, 258.

²⁹ See *Pac. Gas*, 475 U.S. at 20–21 (finding that the "order [was] not a narrowly tailored means of furthering a compelling state interest").

³⁰ *Id.* at 9.

³¹ *Id.* at 11.

³² *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 559–60 (1995).

group would alter the expressive content of the organizer's parade³³ and thereby compromise "the speaker's right to autonomy over the message."³⁴ The choice of a speaker not to affirm a particular belief or viewpoint is presumed to "lie beyond the government's power to control."³⁵ Failing to find a compelling governmental justification, the unanimous Court held the law unconstitutional as applied.³⁶ These cases teach us that the state cannot force a speaker to accommodate a third party's speech when it is so closely connected to the original speaker that it will alter his preferred message by making it appear that he endorses the third party's ideas.

3. *Compelled Statements of Fact*

The Court has also recognized that the speaker's right to control his speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."³⁷ The seminal "compelled facts" case is *Riley v. National Federation of the Blind of North Carolina, Inc.*,³⁸ in which the Court addressed a state law that required professional solicitors to disclose their fee to prospective patrons prior to an appeal for funds.³⁹ Holding that the provision acted as a content-based speech regulation, the Court applied strict scrutiny and voided the law.⁴⁰

On its face, the application of strict scrutiny to compelled statements of fact would seem to invalidate innumerable federal and state regulatory programs that require the disclosure of purely factual information. Examples such as tax returns, product-labeling laws, environmental disclosures, and corporate filings come readily to mind.⁴¹ Perhaps recognizing *Riley*'s breadth, the

³³ *Id.* at 573.

³⁴ *Id.* at 576.

³⁵ *Id.* at 575.

³⁶ *Id.* at 578.

³⁷ *Id.* at 573. While the difference between facts and opinions may not always be clear, the Court has made this distinction in the compelled speech context as well as other First Amendment contexts. Most notably, the law makes this distinction in the defamation setting where "statement[s] on matters of public concern must be provable as false before there can be liability under state defamation law." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990). Conversely, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Id.* at 20.

³⁸ *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797–98 (1988) (finding that both "compelled statements of opinion" and "compelled statements of fact" burden constitutionally protected speech).

³⁹ *Id.* at 784.

⁴⁰ *Id.* at 798, 803.

⁴¹ See, e.g., *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, C.J., concurring) ("So-called 'compelled speech' may under modern Supreme Court jurisprudence raise a serious First Amendment concern where it effects a forced association between the speaker and a particular viewpoint. What is at stake here, by contrast, is simply routine disclosure of economically significant information designed to forward ordinary regulatory purposes—in this case, protecting

Justices appear to have narrowed the decision's reach somewhat without overruling it. The Court has since explained that *Riley* demanded strict scrutiny because the compelled disclosure there acted as a "prior restraint[] on [speech]" that would effectively kill the solicitation before it began.⁴² And three years later, the Court applied a narrow reading of *Riley* to an Act of Congress. In *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)*, the Court upheld a funding condition that required universities receiving federal aid to provide military recruiters access to students to the same extent as other employers.⁴³ Citing to *Riley*, an association of law schools that opposed the military's antidiscrimination policies sued, claiming that the condition forced them to "speak" by sending emails and flyers on behalf of the recruiters.⁴⁴ However, the Court found these "compelled statements of fact" to be a "far cry from the compelled speech in *Barnette* and *Wooley*" because the schools were not required to endorse a "Government-mandated pledge or motto."⁴⁵ Accordingly, the Court did not apply any form of heightened scrutiny, but simply affirmed the government's choice as a reasonable one.⁴⁶

Similarly, in other cases regulating *commercial* speech, both the Supreme

covered entities from questionable PBM business practices. There are literally thousands of similar regulations on the books—such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and (most obviously) the requirement to file tax returns to government units who use the information to the obvious disadvantage of the taxpayer. The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken." (first citing *Wooley v. Maynard*, 430 U.S. 705 (1977); then citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974)); *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 849 (9th Cir. 2003) ("The State may not constitutionally require an individual to disseminate an ideological message, but requiring a provider of storm sewers that discharge into national waters to educate the public about the impacts of stormwater discharge on water bodies and to inform affected parties, including the public, about the hazards of improper waste disposal falls short of compelling such speech. These broad requirements do not dictate a specific message. They require appropriate educational and public information activities that need not include any specific speech at all." (footnote omitted) (citing *Wooley*, 430 U.S. at 713)); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) ("Finally, we note the potentially wide-ranging implications of [plaintiff's] First Amendment complaint. Innumerable federal and state regulatory programs require the disclosure of product and other commercial information. To hold that the Vermont statute is insufficiently related to the state's interest in reducing mercury pollution would expose these long-established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required." (citations omitted)).

⁴² See *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612, 616 (2003) (interpreting *Riley* to hold that requiring charities to disclose fees at the beginning of a telephone call could prompt the answerer to hang up, ending the conversation as soon as it began).

⁴³ *Rumsfeld v. Forum for Acad. & Inst'l Rights*, 547 U.S. 47, 52, 60 (2006) ("Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.").

⁴⁴ *Id.* at 62 ("As FAIR points out, these compelled statements of fact . . . , like compelled statements of opinion, are subject to First Amendment scrutiny.").

⁴⁵ *Id.*

⁴⁶ *Id.* at 59–60.

Court and courts of appeals have permitted the government to require statements of fact without a compelling justification.⁴⁷ *Riley* is still good law, but the federal judiciary seems hesitant to apply its full force unless the compelled disclosure acts as a prior restraint in a noncommercial context. Thus, compelled disclosures of fact are somewhat less likely to prompt strict scrutiny than compelled affirmations of belief.

However, even compelled factual disclosures that might not trigger strict scrutiny under the compelled speech doctrine can raise additional concerns that may require heightened scrutiny under other constitutional provisions. Indeed, the Court has provided guidance on “compelled facts” cases—although not stylized as such—in which the coercion infringed upon, among others, the rights of association, privacy, and due process. For example, in *NAACP v. Alabama*, the High Court overturned a state court order requiring the local chapter of the NAACP to disclose its membership lists to the state.⁴⁸ The unanimous Court held that the forced release of such factual information must be “subject to the closest scrutiny”⁴⁹ because it would effectively restrain the “freedom to associate” and “privacy in one’s associations.”⁵⁰ Similarly, in *Baird v. State Bar of Arizona*, the Court reviewed Arizona’s decision to deny an applicant’s admission to the bar for refusing to answer questions about whether she had, in the past, associated with certain political organizations.⁵¹ The Court paused to note that Arizona’s inquiry likely implicated several constitutional provisions, but that it clearly violated her First Amendment rights.⁵² Because the compelled factual disclosures touched upon her associations and beliefs, they had to be justified by compelling interests.⁵³

⁴⁷ See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), wherein the Court did not apply strict scrutiny in upholding ethical rules requiring attorneys to disclose clients’ potential liability for legal costs.

We do not suggest that disclosure requirements do not implicate the advertiser’s First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser’s rights are adequately protected as long as disclosure requirements are *reasonably related to the State’s interest in preventing deception of consumers*.

Id. (emphasis added); see also *supra* note 41 (noting various cases in which the courts of appeals refused to apply strict scrutiny to state-mandated factual disclosures).

⁴⁸ See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) (“[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”).

⁴⁹ *Id.* at 461. “We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner’s members of their constitutionally protected right of association. Such a . . . subordinating interest of the State must be compelling.” *Id.* at 463 (citations omitted).

⁵⁰ *Id.* at 462.

⁵¹ See generally *Baird v. State Bar of Ariz.*, 401 U.S. 1, 4–5 (1971).

⁵² *Id.* at 5 (“[W]hether or not there are other provisions [of the Constitution] that protect her, we think the First Amendment does so here.”).

⁵³ *Id.* at 6–7 (“When a State seeks to inquire about an individual’s beliefs and associations a heavy

Likewise, in *Sweezy v. New Hampshire*, the Court examined a legislative inquiry into a college professor's political associations and the content of his lectures.⁵⁴ Because these questions required him to reveal facts about his associations and beliefs, the court applied close scrutiny and voided the inquiry as a violation of the professor's right to due process.⁵⁵

NAACP, Baird, and *Sweezy* serve as just a few reminders that the deference sometimes afforded to officials who force factual disclosures under the compelled speech doctrine may give way if the coercion triggers other constitutional protections.

4. *Compelled Funding*

In the final and most extensive line of compelled speech cases, the Court has reviewed government attempts to force individuals to pay for the speech of others—for example, through mandatory union dues,⁵⁶ compelled regulatory advertising,⁵⁷ and mandatory student fees.⁵⁸ The Court has often, but not exclusively, applied heightened scrutiny⁵⁹ to such efforts based on its conclusion that the First Amendment prevents the government from “compelling certain individuals to pay subsidies for speech to which they object.”⁶⁰ Instrumental in the Court's position has been Thomas Jefferson's opinion that “to compel a man to furnish contributions of money for the propagation

burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest.”).

⁵⁴ See *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234, 235 (1957) (“This case . . . brings before us a question concerning the constitutional limits of legislative inquiry.”).

⁵⁵ *Id.* at 254; see also *Buckley v. Valeo*, 424 U.S. 1, 75 (1976) (confirming the *Sweezy* Court applied strict scrutiny by citing to the *Sweezy* decision).

In considering this provision we must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP v. Alabama* derives from the rights of the organization's members to advocate their personal points of view in the most effective way. *Id.* (citations omitted).

⁵⁶ See, e.g., *Knox v. Serv. Emps. Int'l Union Local 1000*, 567 U.S. 298 (2012); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

⁵⁷ See, e.g., *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

⁵⁸ See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

⁵⁹ See, e.g., *Knox*, 567 U.S. at 310 (“We made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met. First, there must be a comprehensive regulatory scheme involving a ‘mandated association’ among those who are required to pay the subsidy. Such situations are exceedingly rare because, as we have stated elsewhere, mandatory associations are permissible only when they serve a ‘compelling state interest[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.’” (citations omitted)); *Southworth*, 529 U.S. at 221 (holding that a public university may charge its students a mandatory fee to fund extracurricular student speech if the program is viewpoint neutral).

⁶⁰ *United Foods*, 533 U.S. at 410.

of opinions which he disbelieves, is sinful and tyrannical.”⁶¹ This line of cases provides an additional limit on the government’s power to impose objectionable ideological viewpoints upon its citizens.

This overview of cases shows just how expansive and powerful are the protections of the compelled speech doctrine. Except in rare circumstances, the courts presume that the government has acted unconstitutionally when it compels its citizens to speak. This is true of purposeful attempts to force a citizen to affirm a belief as well as seemingly innocent ones that can change a citizen’s message. The doctrine prohibits both direct and indirect government coercion, and it protects citizens who are actually speaking as well as those who communicate only through association or symbolism. The compelled speech doctrine thus provides a strict line over which the government can rarely cross.

B. Compelled Speech in the College Classroom

The principles gleaned from these cases provide broad protection for citizens to determine when and what they will speak free from government intrusion. How do these principles apply, however, when a student enters a college classroom? The Supreme Court has cautioned that the First Amendment “must be ‘applied in light of the special characteristics of the school environment.’”⁶² The judiciary has, in some cases, interpreted this maxim to permit substantial deference to the academic decisions of university faculty. And such deference might seem uniquely appropriate in the compelled speech context, given that students are regularly required to speak as a part of the educational process. Only three federal courts of appeals have sought to resolve this apparent constitutional conflict between the rights of students and the prerogatives of university educators.

The Eleventh Circuit answered this question efficiently in *Keeton v. Anderson-Wiley* by effectively foreclosing the availability of compelled curricular speech claims altogether.⁶³ Officials in Augusta State University’s graduate counseling program imposed a curricular “remediation plan” upon first-year student Jennifer Keeton in response to her classroom comments indicating that she would not provide gay-affirming therapy to homosexual clients due to her Christian beliefs.⁶⁴ The remediation plan required Keeton to attend

⁶¹ *Keller*, 496 U.S. at 10 (quoting *Abod*, 431 U.S. at 234–35 n.31).

⁶² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

⁶³ *Keeton v. Anderson-Wiley*, 664 F.3d 865, 874 (11th Cir. 2011). The author represented Jennifer Keeton at the district court level.

⁶⁴ *Id.* at 867.

sensitivity training, to study resources aimed at improving counseling effectiveness with the GLBTQ population, to interact with members of that population, and to write monthly reflection papers about “what she learned” from her experiences and how they “influenced her beliefs.”⁶⁵ Based upon these reflections, the faculty would “decide the appropriateness of her continuation in the counseling program.”⁶⁶ Keeton refused to complete the remediation plan and instead filed suit, alleging that the plan violated the First Amendment by compelling her to affirm the state’s orthodoxy on sexual ethics.⁶⁷ The Eleventh Circuit declined to enjoin the remediation plan, holding that this curricular mandate involved no coercion because Keeton “voluntarily enrolled” at ASU.⁶⁸ The court’s blunt treatment of Keeton’s claim is troubling. Logically, this principle would preempt compelled speech claims—and many other constitutional claims—as soon as any student chooses to matriculate.⁶⁹ Thus, the door appears to be tightly shut against compelled curricular speech claims in the Eleventh Circuit.

The Tenth Circuit opened the door slightly for such claims in *Axson-Flynn v. Johnson*.⁷⁰ Professors at the University of Utah threatened to remove Christina Axson-Flynn from the Actor’s Training Program for refusing to say certain offensive words when performing assigned scripts.⁷¹ Axson-Flynn sued the university, alleging that the school’s requirement that she read her lines as written—including those words offensive to her Mormon faith—constituted impermissible compelled speech.⁷² Relying on *Hazelwood School District v. Kuhlmeier*,⁷³ the court of appeals determined that Axson-Flynn’s speech was “school-sponsored speech” which the university could regulate as long as it did so for “legitimate pedagogical” reasons.⁷⁴ The court thus determined that *Hazelwood*’s minimal scrutiny would apply to all student speech claims

⁶⁵ *Id.* at 870.

⁶⁶ *Id.*

⁶⁷ *Id.* at 871.

⁶⁸ *Id.* at 878.

⁶⁹ The court emphasized that the compelled speech doctrine announced in *Barnette* is simply “inapplicable” where enrollment is optional. *Id.* at 878. Keeton was free to “choose a different career” but once she chose ASU, she lost her right to challenge any aspect of the curriculum. *Id.* “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.*” *Id.* (emphasis added). See also Joseph J. Martins, *First Amendment Enclave: Is the Public University Curriculum Immune from the Sweep of the Compelled Speech Doctrine?*, 50 TULSA L. REV. 157, 186–92 (2014) (further explaining the legal consequences of the *Keeton* court’s reasoning).

⁷⁰ See generally *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

⁷¹ *Id.* at 1282.

⁷² *Id.* at 1280.

⁷³ *Id.* at 1289–90.

⁷⁴ *Id.*

that “occur[] in a classroom as part of a class curriculum.”⁷⁵ Therefore, while the Tenth Circuit recognizes compelled curricular speech claims, college students bringing such claims can only prevail if they can show that the curricular requirement is merely a pretext for discrimination.⁷⁶

In *Ward v. Polite*, the Sixth Circuit concurred that *Hazelwood* is the proper judicial standard for courts to apply to all university curricula that compel student speech.⁷⁷ There, Eastern Michigan University (“EMU”) officials expelled Julea Ward from the graduate counseling program when she requested the option to refer a client seeking gay-affirming counseling during her third-year practicum.⁷⁸ After exhausting her administrative remedies, Ward sued, claiming that university officials violated the compelled speech doctrine by forcing her to speak EMU’s preferred ideological position on sexual counseling to a third party.⁷⁹ The Sixth Circuit concluded that the practicum was part of EMU’s curriculum and, therefore, the court would only disturb the expulsion decision if the defendants’ actions were not “reasonably related to legitimate pedagogical concerns.”⁸⁰ Consequently, “it is the rare day when a student [in the Sixth Circuit] can exercise a First Amendment veto over [the curriculum].”⁸¹

This survey of compelled curricular speech jurisprudence might cause a plaintiff’s lawyer to pause before agreeing to sue on Abigail or Lauren’s behalf. However, such concern is premature, because the heavy-handed approach taken in these appellate court cases is inaccurate and unjustified; curricular measures that compel college students to speak should be subject to a more rigorous and nuanced analysis. This Article now turns to that approach.

II. THE COMPELLED CURRICULAR SPEECH FRAMEWORK

A court reviewing a claim that a public university compelled an objecting student to speak as part of a curricular mandate should employ the following analysis:

1. Is the *purpose* of the challenged activity to compel the student to affirm a belief?

⁷⁵ *Id.* at 1289.

⁷⁶ *See id.* at 1287 (“So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.”) (quoting *Settle v. Dickson Cty. Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995)).

⁷⁷ *Ward v. Polite*, 667 F.3d 727, 733–34 (6th Cir. 2012). The author represented Julea Ward at the district court level.

⁷⁸ *Id.* at 730.

⁷⁹ *Id.* at 732.

⁸⁰ *Id.* at 732, 740–41.

⁸¹ *Id.* at 734.

If “yes,” the court must apply strict scrutiny. If “no,” go to 2.

2. Is the *effect* of the challenged activity such that the listeners would reasonably presume the student was endorsing a belief?

If “yes,” the court must apply strict scrutiny. If “no,” go to 3.

3. Does the challenged activity impinge upon another constitutional right?

If “yes,” the court must apply the scrutiny appropriate for that right. If “no,” go to 4.

4. Is the challenged activity a mere pretext for discrimination, or does it further a “legitimate pedagogical” interest?

If the former, the assignment fails, but if the latter, the assignment will be upheld.

This framework is clearly more demanding than the one employed by the Tenth and Sixth Circuits (not to mention the Eleventh). Assignments that actually (Step 1) or apparently (Step 2) compel affirmation of belief will face the most exacting scrutiny under the First Amendment. The assignment must be the “least speech-restrictive means” of furthering a “compelling—or extremely strong—governmental interest.”⁸² This is scrutiny with real teeth. Indeed, the Supreme Court mused in *Barnette* that it could not conceive of a governmental interest that would justify the school’s officially coerced endorsement of an ideology.⁸³ Similarly, in *Ward*, the Sixth Circuit concluded that EMU’s expulsion of Ward would not survive strict scrutiny.⁸⁴ Specifically, the court of appeals found the university’s interests in teaching the relevant code of ethics and maintaining its accreditation insufficient to justify its “no-referral policy.”⁸⁵ Moreover, even if the university could have proffered a sufficiently “compelling interest,” that interest would not have justified the expulsion because accommodating Ward’s religious scruples would have been a less restrictive means of furthering the school’s concerns.⁸⁶ Other universities would almost surely fail this judicial standard because, as Justice Souter has opined, such scrutiny “leaves few survivors.”⁸⁷

⁸² DAVID L. HUDSON, JR., *Legal Almanac: The First Amendment: Freedom of Speech* § 2.2, in LEGAL ALMANAC SERIES (2012).

⁸³ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there are any circumstances which permit an exception, they do not now occur to us.”).

⁸⁴ *Ward*, 667 F.3d at 740 (“The university does not argue that its actions can withstand strict scrutiny, and we agree. Whatever interest the university served by expelling Ward, it falls short of compelling.”).

⁸⁵ *Id.* at 740.

⁸⁶ *Id.* at 740 (“Allowing a referral would be in the best interest of Ward (who could counsel someone she is better able to assist) and the client (who would receive treatment from a counselor better suited to discuss his relationship issues).”).

⁸⁷ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

Curricular exercises that implicate constitutional interests beyond compelled speech (Step 3) may also face heightened scrutiny. As discussed above, even when a university compels mere statements of fact, it may trample the rights of association, privacy, and due process. A curricular exercise that operates in this manner will also rarely survive.

However, this framework need not be insurmountable. Public educators may require students to state facts or opinions as long as such curricular mandates do not compel affirmation of belief, violate other constitutional rights, or target students for discrimination. Indeed, the majority of curricular interactions and assignments would easily survive this analysis. The deferential approach employed by the Sixth and Tenth Circuits was surely motivated by a desire to prevent unduly burdening the teaching methods of university educators. But this obtuse methodology overlooks a body of legal precedent confirming that curricular measures that compel college students to speak should be subject to a more demanding and detailed analysis. This Article will now address that precedent.

III. PRECEDENT SUPPORTING THE PROPOSED FRAMEWORK

This Article's primary contribution to this issue relates to Steps 1 and 2, because they reverse the circuit courts' presumption of the constitutionality of university curricula. These steps subject curricular exercises to strict scrutiny when they force students to actually or apparently affirm a belief. Accordingly, the majority of this section will be dedicated to discussing the precedent that justifies such exacting scrutiny. Moreover, these two inquiries will be considered together because—as will be discussed below—they are simply different forms of the same type of constitutional invasion. This section will also discuss the legal support for Step 3, simply to point out that a court must be aware that compelled statements of fact or opinion could implicate other constitutional concerns beyond compelled speech. Finally, because *some* compelled curricular speech directives do not implicate the constitutional interests protected by Steps 1 through 3, this section will partially concur with the Sixth and Tenth Circuits' application of *Hazelwood* for Step 4 claims.

A. Steps 1 and 2: Compelled Affirmations of Belief

1. *Barnette and Wooley*

The pre-eminent precedent supporting the application of strict scrutiny to curricula that compel students to affirm a belief is *Barnette* itself. In fact, the case is on all fours, so to speak. *Barnette* addressed a compelled speech claim in which a public educational institution forced students to affirm an ideological viewpoint as part of a curricular mandate. In this context, the Court made it

clear that judges must apply no less than the most rigorous judicial scrutiny.

While the *Barnette* decision addressed a grade-school compulsion, the decision applies even more forcefully to public institutions of higher learning, due to the unique nature of the university and the maturity of the students.⁸⁸ It is axiomatic that universities hold a distinctive place in our constitutional heritage that requires special constitutional protection. The “college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’”⁸⁹ This marketplace is necessary to generate new ideas to drive both innovation and public policy so that our society will not “stagnate and die.”⁹⁰ For this environment to function properly, college students are granted *maximum* freedom of thought and inquiry.⁹¹ Indeed, the “vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”⁹² There is simply no room for the view that such freedoms “apply with less force on college campuses” than they do in primary and secondary school classrooms.⁹³ Moreover, minors roam the halls of K-12 public schools while university campuses are inhabited almost exclusively by adults. The First Amendment rights of schoolchildren “are not automatically coextensive with the rights of adults in other settings.”⁹⁴ For this reason, public secondary and elementary schools “are granted more leeway” to regulate student speech than public colleges and universities.⁹⁵ The rights of the former serve as a constitutional floor under which *no* government schools may tread. Therefore, if public school administrators have any power to compel speech, their university counterparts have less. Speech regulations that fail in the pre-collegiate school context *must* fail in the university setting. Consequently, if *Barnette* is good law for primary and secondary schools, by logical extension, it must be good law for public universities.⁹⁶

⁸⁸ See Martins, *supra* note 69, at 182 (“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.”).

⁸⁹ Healy v. James, 408 U.S. 169, 180 (1972) (quoting Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)).

⁹⁰ Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

⁹¹ Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995) (“[The] danger [of chilling speech] 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 philosophical tradition.”).

⁹² Healy, 408 U.S. at 180 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

⁹³ *Id.* at 180.

⁹⁴ 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)).

⁹⁵ DeJohn v. Temple Univ., 537 F.3d 301, 316 (3d Cir. 2008) (emphasis removed) (quoting Sypniewski v. Warren Hills Reg’l Bd. of Educ., 307 F.3d 243, 260 (3d Cir. 2002)).

⁹⁶ Furthermore, it is not uncommon for federal courts to apply pre-collegiate precedent to the collegiate environment. For example, the *Axon-Flynn* and *Ward* courts of appeals utilized *Hazelwood v.*

Barnette also explains the limits the compelled speech doctrine imposes upon state-mandated curriculum. While some subsequent courts and commentators have attempted to characterize *Barnette* as noncurricular, such attempts falter in light of the facts of the case and the Supreme Court's current, broad understanding of what constitutes a school's "curriculum."⁹⁷ In *Barnette*, West Virginia specifically adopted the pledge in response to the *Gobitis* decision in which the Supreme Court previously upheld the ceremony as a permissible application of Pennsylvania's "educational policy."⁹⁸ The West Virginia legislature amended its education statutes to require all schools to include "courses of instruction in history, civics, and in the Constitutions of the United States and of the State 'for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government.'"⁹⁹ The Board of Education then implemented the flag salute as "a regular part of the *program of activities* in the public schools" in order to comply with this directive.¹⁰⁰ When the board created its "program of activities" in order to "teach[], foster[], and perpetuat[e]"¹⁰¹ patriotic principles for the purpose of "increasing . . . knowledge,"¹⁰² it was patently employing its curriculum. The Supreme Court has since implicitly confirmed this conclusion by explaining that a school's curriculum is broadly defined: "[A]ctivities 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

Kuhlmeier—a decision rendered in the high school context—to derive a judicial standard for compelled speech claims in the university setting. See, e.g., *Hazelwood*, 484 U.S. at 262; *Ward v. Polite*, 667 F.3d 727, 733–34 (6th Cir. 2012); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004). This specific application was flawed, as explained more fully in Subpart IV.B., *infra*, because the Tenth and Sixth Circuits applied *Hazelwood* as a ceiling—rather than a floor—on the rights of college students. Nevertheless, these decisions demonstrate that court opinions applicable to secondary school students can be pertinent to university students as long as the unique nature of the university and the maturity of its students is appropriately considered.

⁹⁷ See, e.g., *Ward*, 667 F.3d at 734. The *Ward* court opined that First Amendment protection for student speech varies depending upon how closely it is related to the curriculum. *Id.* The more student speech has to do with the curriculum, the less it is protected. *Id.* Conversely, the less speech has to do with the curriculum, the less likely it is that schools will be able to justify its restriction. *Id.* The Sixth Circuit then concluded that the speech involved in *Barnette* was essentially noncurricular, and was for that reason entitled to greater constitutional protection. *Id.* "*Barnette* involved forced individual expression that happened to occur in a school, while *Hazelwood* involved restricted student expression through the school's newspaper." *Id.*

⁹⁸ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 598 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) ("The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the *educational process* is not for our independent judgment. . . . [T]he courtroom is not the arena for debating issues of *educational policy*." (emphasis added)).

⁹⁹ *Barnette*, 319 U.S. at 625 & n.1 (emphasis added) (quoting W. VA. CODE § 1734 (1941)).

¹⁰⁰ *Id.* at 626 (emphasis added) (citation omitted).

¹⁰¹ *Id.* at 625 n.1 (quoting W. VA. CODE § 1734 (1941)).

¹⁰² *Id.* (quoting W. VA. CODE § 1734 (1941)).

impart particular knowledge or skills to student participants and audiences.”¹⁰³ The pledge and salute imposed upon the *Barnette* children plainly fit this description. Pennsylvania and West Virginia school officials, as well as the Justices in *Gobitis*¹⁰⁴ and *Barnette*, all recognized the pledge and salute ceremony for what it was: a mandatory curricular exercise.¹⁰⁵

The curricular nature of the pledge, however, did not constrain the majority from applying strict judicial scrutiny. Unlike the *Axson-Flynn* and *Ward* courts, the High Court plainly rejected any form of deferential analysis:

The right of a State to regulate, for example, a public utility may well include . . . power to impose all of the restrictions which a legislature may have a ‘rational basis’ for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction *only to prevent grave and immediate danger* to interests which the state may lawfully protect.¹⁰⁶

The Justices went even further by reasoning that when the state *compels* speech it must provide “even more immediate and urgent” justification than

¹⁰³ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

¹⁰⁴ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 599 (1940) (“But it is a very different thing for this Court to exercise censorship over the conviction of legislatures that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country.”).

¹⁰⁵ At least one commentator has challenged the notion that the pledge was an academic exercise because the *Barnette* majority “made a point of indicating that the school board ‘did not adopt the flag salute because it was claimed to have educational value.’” See James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1413 (2000) (quoting *Barnette*, 319 U.S. at 631 n.12). Yet, this position overlooks the immediate and overall context in which the footnote was given, both of which confirm the Court was addressing the state’s power to educate. Regarding the former, the Court placed the footnote in the middle of its explanation that the school could not “short-cut” the process of “teaching by instruction and study” with a “compulsory salute and slogan.” *Barnette*, 319 U.S. at 631. And the footnote itself cited to research challenging the effectiveness of the pledge as an educational tool. *Id.* at 631 n.12. Moreover, the *Barnette* Court framed the entire context of its opinion as a re-visitation of the decision in *Gobitis* to defer to the state’s “educational policy.” *Gobitis*, 310 U.S. at 598, *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

The *Gobitis* decision, however, *assumed*, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. . . . The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, *re-examine specific grounds assigned for the Gobitis decision*.

Barnette, 319 U.S. at 635–36 (second emphasis added). If *Barnette* addressed a non-curricular exercise, there would have been no need to re-examine *Gobitis*. *Barnette*, however, expressly addressed the constitutional limits to public schools’ authority over curricular policy. Therefore, the position that West Virginia did not adopt the pledge as part of the curriculum is simply untenable. Footnote twelve, in this light, simply stands for the proposition that the *Barnette* Court recognized the mandatory pledge as an ineffective educational method.

¹⁰⁶ *Barnette*, 319 U.S. at 639 (emphasis added); see also *id.* at 633–34 (“But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression.”).

when it *silences* speech.¹⁰⁷ And the Court confessed that it was unaware of *any* instance in which the state could coerce adoption of a belief in the educational context.¹⁰⁸ *Barnette* thus commands the application of at least strict scrutiny to curricula that impel student speech.

Of course, this is not entirely surprising given that, historically, most compelled speech regulations have faced heightened examination.¹⁰⁹ What is critical for purposes of this Article is to discern what precisely triggers this standard in the public university curricular context—a context in which three federal circuit courts have found little or no scrutiny to be appropriate. The *Barnette* majority explained that this threshold question must be addressed as a matter of power, and the state generally lacks the power to compel its citizens to affirm a belief.¹¹⁰ In other words, any authority the state may have to educate terminates at the point at which the state forces someone to affirm an ideology.¹¹¹ It is at this point that the state impermissibly “invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control.”¹¹²

While intrusions of this sort may take many forms, the Supreme Court has categorized two forms of compelled affirmations that presumptively violate the First Amendment. These invasions are represented in Steps 1 and 2, respectively, of the proposed framework. The first form was present in *Barnette* itself because West Virginia purposefully coerced its students to revere the United States government by word and symbol.¹¹³ The school system was free to teach the students *about* American history and government, but it was not at liberty to intentionally command patriotism through a mandatory pledge and

¹⁰⁷ *Id.* at 633.

¹⁰⁸ *Id.* at 642 (“If there are any circumstances which permit an exception, they do not now occur to us.”).

¹⁰⁹ *See supra* Subparts I.A.1–4.

¹¹⁰ *Barnette*, 319 U.S. at 642 (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their *power* . . .”) (emphasis added).

¹¹¹ *Id.* at 635–36. As the Court stated in *Barnette*:

It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty. The *Gobitis* decision, however, *assumed*, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, re-examine specific grounds assigned for the *Gobitis* decision.

Id.

¹¹² *Id.* at 642.

¹¹³ *Id.* at 633 (“Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks.”).

salute backed by administrative and criminal penalties. The school's purpose to force each student to affirm a belief was plain in that each student who did not "*pledge allegiance to the Flag*"¹¹⁴ faced expulsion and rendered their parents liable to prosecution for truancy.¹¹⁵ But this official purpose was fatal because it "transcend[ed] constitutional limitations" on the state's authority.¹¹⁶ Similarly, a public university presumptively may not employ its curriculum for the *purpose* of coercing a student to affirm an ideological view.

The second type of presumptively invalid coercion (represented in Step 2) arose in *Wooley* where the law required drivers to serve as "mobile billboard[s]" for the state's motto.¹¹⁷ The *Wooley* Court held that the regulation failed to advance any compelling state interest.¹¹⁸ The majority explained further that New Hampshire's regulation would fail even if it was supported by a legitimate purpose¹¹⁹ because it was simply another form of the compulsion prohibited in *Barnette*.¹²⁰ This state mandate forced the Maynards to disseminate the state's ideological motto in a way that others would reasonably perceive as conveying the Maynards' endorsement.¹²¹ This often occurs

¹¹⁴ *Id.* at 628 (emphasis added).

¹¹⁵ *Id.* at 629 (stating that students who failed to conform would be expelled and their parents would be subject to criminal prosecution for truancy).

¹¹⁶ *Id.* at 642.

¹¹⁷ *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

¹¹⁸ *Id.* at 716–17.

¹¹⁹ *Id.* As the Court stated in *Wooley*:

Even were we to credit the State's reasons and "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

Id. (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

¹²⁰ *Id.* at 715 ("Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree.").

¹²¹ This is not to be confused with the "reasonable observer" in Justice O'Connor's "endorsement" test for Establishment Clause cases. See *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). In the compelled speech context, the concern is that viewers will mistakenly associate the plaintiff with a government-imposed message which the plaintiff opposes. While the Court has not fully developed this reasonable association principle, it has provided a guidepost and a few examples of its application. In *Hurley*, the Court explained that this misattribution can occur when the plaintiff is "intimately connected" with the government-imposed message. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 576 (1995). The Court has found sufficient potential for misattribution present to trigger strict scrutiny when speakers were forced to carry the government's message on their private property (*Wooley*), distribute another's message in their envelopes (*Pacific Gas*), and include an unwelcome contingent of marchers within their private parade (*Hurley*). On the other hand, the Court has explained that persons are not likely to associate government messages on United States currency with the carrier, *Wooley*, 430 U.S. at 717 n.15, nor would the private messages expressed by patrons at a shopping mall be attributed to the mall's owner. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980). Additionally,

when the “dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced.”¹²² In the Court’s view, forcing a citizen to “be an instrument for fostering public adherence”¹²³ to an offensive viewpoint gives the *appearance* of endorsement. And such forced association is as constitutionally objectionable as if the government overtly intended to compel the citizen to adopt that viewpoint, because, in the eyes of the listeners, the speaker has in fact adopted that viewpoint.¹²⁴ Strict scrutiny is thus also triggered when government action has the *effect* of compelling a citizen to convey the government’s ideology to others where it might be reasonably perceived to be the citizen’s own message.

Barnette and *Wooley*, therefore, provide the threshold inquiries for reviewing compelled curricular speech claims at public universities. In *Barnette*, the Court explained that public schools will face strict scrutiny when they utilize their curriculum for the purpose of compelling affirmation of an orthodoxy. Likewise, *Wooley* clarified that the government will face this same scrutiny, notwithstanding the government’s purpose, when it impels a citizen to speak an orthodox view to others if that message could be reasonably attributed to the citizen. The *Wooley* Court’s extension of *Barnette* to public highways implies that this type of forced association could occur both inside and outside the traditional classroom. The First Amendment therefore requires courts to examine both the *purpose* (Step 1) and the *effect* (Step 2) of curricular mandates that compel student speech. When such mandates compel students either to *actually* or *apparently* affirm a state-preferred position on a matter of opinion, the reviewing court must apply strict scrutiny.

2. Companion First Amendment Provisions

The strict scrutiny standard is likewise supported by companion provisions contained in the Constitution. Indeed, the *Barnette* majority refused to limit its decision to the free exercise claim brought by the plaintiffs, but rather decided to rest its decision on broader First Amendment principles.¹²⁵ Federal courts often consider related provisions of the First Amendment when

the Court found that simply permitting military recruiters on campus could not be viewed as endorsement of the military’s antidiscrimination policies. *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 64–65 (2006). These cases suggest that the Court’s threshold for potential misattribution is set quite low in order to prevent the risk of endangering speaker autonomy.

¹²² *Hurley*, 515 U.S. at 576.

¹²³ *Wooley*, 430 U.S. at 715.

¹²⁴ See *Rumsfeld*, 547 U.S. at 63 (“The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate.”).

¹²⁵ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634–35 (1943) (“While religion supplies appellees’ motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.”).

addressing a First Amendment claim.¹²⁶ Accordingly, it is entirely appropriate to examine companion lines of First Amendment jurisprudence to determine how courts should address compelled curricular speech claims. An analysis of the religion clauses, their historical roots, and the freedom of association confirms that strict scrutiny is the appropriate standard for reviewing curricular mandates that compel college students to affirm a belief or profess a belief to others.

a. The religion clauses

The religion clauses preclude the government from “mak[ing] [a] law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹²⁷ The Establishment Clause stops the civil government from engaging in activities that fall within the realm of religion, while the Free Exercise Clause “protects against the danger that civil government will interfere with or even persecute those exercising their religious liberties.”¹²⁸ Scholars and judges have fiercely debated for decades the precise protections encompassed by these clauses. However, the Supreme Court has provided at least one immovable guidepost: The right to believe and profess a religious belief is absolute. “The free exercise of religion means, first and foremost, the right to *believe and profess* whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all ‘governmental regulation of religious *beliefs* as such.’ The government *may not compel affirmation of religious belief*. . . .”¹²⁹ The Court has said the same with respect to the Establishment Clause: “The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . *force [a person] to profess a belief or disbelief in any religion*. No person can be punished for entertaining or professing religious beliefs or disbeliefs”¹³⁰

This point deserves emphasis. While the government may sometimes infringe upon religiously motivated conduct when regulating private citizens, it may not punish mere belief or the profession of belief.¹³¹ Government actions

¹²⁶ See, e.g., *Baird v. State Bar of Ariz.*, 401 U.S. 1, 5–6 (1971) (noting that the free exercise of religion, the freedom of conscience, the freedom of speech, the right peaceably to assemble and petition, and the freedom of association were considerations in the Court’s analysis).

¹²⁷ U.S. CONST. amend. I.

¹²⁸ Jeffrey C. Tuomala, *The Casebook Companion* pt. 9, ch. 1, at 1 (Feb. 13, 2017) (unpublished manuscript) (on file with author).

¹²⁹ *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1993) (emphasis added) (quotations and citations omitted).

¹³⁰ *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15–16 (1947) (emphasis added).

¹³¹ *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (“Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.”). Of course, there are spheres in which it might be necessary, and thus appropriate, for the government to regulate some beliefs to a limited extent. For example, when a citizen leaves the private sphere and becomes a public official, the Constitution itself requires the public

that compel belief or profession of belief are thus subject to the strictest judicial scrutiny under the religion clauses. It would seem that the same scrutiny would be appropriate for government actions that compel affirmation of belief under the Free Speech Clause. Indeed, this is the central holding of *Barnette*.

This principle can be traced back to the efforts of Thomas Jefferson and James Madison to secure religious liberty in Virginia. The Supreme Court and most legal scholars have recognized their writings in this context as being foundational to the protections embodied in the First Amendment religion clauses.¹³²

Jefferson wrote the Bill for Establishing Religious Freedom in order to disestablish the Anglican Church in Virginia. He opened his draft bill with a fundamental tenet: “Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations . . . are a departure from the plan of the holy author of our religion”¹³³ Jefferson reasoned from this principle that the Virginia government could not compel its citizens to support the Anglican Church because the government has no authority whatsoever to govern in the realm of opinions. Indeed, Jefferson argued, the civil magistrate who does so immediately “destroys all religious liberty.”¹³⁴ Significantly, Jefferson leaves no room for any potential governmental interest that might justify such a severe intrusion into the conscience.

Madison concurred with Jefferson’s views in his efforts to prevent Virginia from adopting a bill to provide public support to “teachers of the Christian religion.”¹³⁵ In his famous “Memorial and Remonstrance,” Madison asserted, “[W]e 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.’”¹³⁶ Madison argued that this “unalienable right” to religious liberty extended to the “opinions of men” and thus encompassed “a freedom to embrace [and]

servant to take an oath or affirmation that he will uphold and defend the Constitution. See U.S. CONST. art. II, § 1, cl. 8 (requiring the President of the United States of America to take an oath or affirmation prior to entering office); U.S. CONST. art. VI, cl. 3 (stating that Senators and Representatives, as well as all members of the state legislatures and “all executive and judicial [o]fficers” are “bound by [o]ath or [a]ffirmation.”).

¹³² Tuomala, *supra* note 128, pt. 9, ch. 1, at 2.

¹³³ Thomas Jefferson, 82. *A Bill for Establishing Religious Freedom*, FOUNDERS ONLINE (June 18, 1779), <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082>.

¹³⁴ *Id.*

¹³⁵ JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON, 1784–1786, 298–99 (Robert A. Rutland et al., eds., 1973). This principle is now enshrined in Article I, § 16 of the Virginia Constitution. VA. CONST. art. I, § 16.

¹³⁶ *Id.* at 299.

to profess” one’s religion free from government interference.¹³⁷ Consequently, Madison contended that Virginia lacked the power to compel men to furnish financial support for the teachers of one religion or religion in general.¹³⁸ Like Jefferson, Madison shut the door on any potential for legitimate government rule over the opinions of men.

Jefferson and Madison, therefore, both concluded that religious liberty exists because the civil government does not have *jurisdiction* over the beliefs and opinions of men. This maxim finds even deeper roots in classical schools of jurisprudence. Thomas Jefferson famously relied upon the “Laws of Nature and of Nature’s God” in the Declaration of Independence as the justification for breaking with England and the foundation of our unalienable rights.¹³⁹ Under this classical view, government authorities are empowered to protect society by “*execut[ing]* wrath on him who practices evil.”¹⁴⁰ However, governing officials are consequently limited in that they may only punish evil *works*. Matters of the heart or mind—including the opinions of men—are not external actions, and therefore simply lie beyond the authority of the government to punish. In Jefferson’s own words, “the opinions of men are not the object of civil government nor under its jurisdiction.”¹⁴¹ The jurisdiction of the civil government does not begin until “principles break out into overt acts against peace and good order.”¹⁴²

¹³⁷ MADISON, *supra* note 135, at 299–300.

¹³⁸ *See id.* at 300.

Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? [T]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Id.

¹³⁹ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). According to Sir William Blackstone, “[u]pon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.” 2 WILLIAM BLACKSTONE, COMMENTARIES *42. Blackstone clarified that the “the revealed or divine law [is] to be found only in the holy scriptures” and that it takes precedence over man’s law. *Id.*

This law of nature, being co-equal with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately from this original.

Id. at *41.

¹⁴⁰ *Romans* 13:1–4 (NKJV).

¹⁴¹ Tuomala, *supra* note 128, pt. 9, ch. 2, at 11.

¹⁴² *Id.* The jurisdictional limits on forms of compelled speech were not foreign to the founders. In fact, the religious test clause expressly prevented the new government from excluding persons from federal office who did not profess the religion of the majority. *See* U.S. CONST. art. VI, cl. 3. Such

The Supreme Court has adopted the jurisdictional approach supported by Jefferson and Madison when reviewing governmental action that compels one to profess a religious belief or doctrine. In *Torcaso v. Watkins*,¹⁴³ for example, the Court reviewed a provision in the Maryland Constitution that required public officers to “declar[e] [a] belief in the existence of God.”¹⁴⁴ The Court first reaffirmed that both religion clauses bar the government from “forc[ing] a person to profess a belief or disbelief in any religion.”¹⁴⁵ The Court then held that this clear prohibition doomed the enforcement of the Maryland provision.¹⁴⁶ It is significant that the Court did not apply a balancing test but simply struck the provision as a patently “unconstitutional[] inva[sion] [of] the appellant’s freedom of belief and religion.”¹⁴⁷ This is a textbook example of the most stringent form of judicial scrutiny.

The sources referenced above—the Bill for Establishing Religious Freedom, the Memorial and Remonstrance, ancient Scriptures, and the *Torcaso* opinion—all have obvious implications for judicial scrutiny over compelled speech claims. Jefferson, Madison, and *Torcaso* addressed religious liberty violations that mirrored classic instances of compelled speech. While Jefferson and Madison battled forms of compelled subsidies, *Torcaso* involved “true” compelled speech. Moreover, neither the historical authors nor the Justices seemed to permit any government justification for these intrusions. In fact, they have spoken with one voice when the state has sought to coerce a citizen to believe or profess a belief. All such compulsions—whether they force one to pay for a church, support religious teachers, or profess a belief in God—transgress the freedom of religion because the government has no power to regulate the mind or the opinions of men.

This principle would seem to operate with similar force when a public school compels a citizen to affirm an ideological belief or to profess that belief to others. Indeed, the *Barnette* Court said as much when it explained that the

religious loyalty tests have been condemned even by ancient writers. For example, the Bible records the story of Daniel, who refused to obey King Darius’s law mandating that all persons must pray only to the King. See *Daniel* 6:6–9 (NKJV). Daniel was cast into the lion’s den for disobeying this archetypical compelled speech law. See *id.* at 6:16. After being released, Daniel explained to King Darius: “My God sent His angel and shut the lions’ mouths, so that they have not hurt me, because I was found innocent before Him; and also, O king, *I have done no wrong before you.*” *Id.* at 6:22 (emphasis added). Daniel explained to Darius that he had done no civil wrong because the King had no jurisdiction to command the duty of worship from him; this duty was owed only to God, and as Madison would affirm, could “be directed only by reason and conviction, not by force or violence.” MADISON, *supra* note 135, at 299.

¹⁴³ *Torcaso v. Watkins*, 367 U.S. 488 (1961).

¹⁴⁴ *Id.* at 489 (quotations omitted).

¹⁴⁵ *Id.* at 495 (quotations omitted).

¹⁴⁶ *Id.* at 496.

¹⁴⁷ *Id.*

plaintiffs' religious scruples were part of a broader "liberty of the individual,"¹⁴⁸ and the *Torcaso* Court cited to *Barnette* for support.¹⁴⁹ The West Virginia Board of Education thus had no more power to compel religious students to affirm a belief than it did students who merely objected on philosophical grounds. Therefore, when public education officials invade the mind in this manner, their actions must be subject to the strictest judicial scrutiny, whether the plaintiff brings a free exercise, establishment clause, or compelled speech claim.

b. Freedom of association

The Supreme Court's freedom of association jurisprudence also supports the application of strict scrutiny to compelled affirmations of belief, whether actual or apparent. The Court has recognized that implicit in the First Amendment is the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends."¹⁵⁰ This right is burdened when the government "forces [a] group to accept members it does not desire," and the forced inclusion "impair[s] the ability of the group to express those views, and only those views, that it intends to express."¹⁵¹ This type of government interference can only be justified when the action "serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."¹⁵² In this respect, the freedom of association operates as a bar to prevent group compelled speech. Essentially, the freedom of association mirrors the compelled speech doctrine by preventing the government from coercing a group to express an unwanted message. That this type of intrusion into the inner structure of a group is presumed to be unconstitutional strongly implies that the same principle can be applied when the state invades the mind of an individual.

Hurley clearly illustrates this point. There, the Court explained why the forced inclusion of an unwanted LGB contingent into a private parade violated the speech rights of the parade organizers. The lower state courts concluded that the public accommodations law did not seek to burden expression but simply to prevent discrimination based on sexual orientation.¹⁵³ The Justices unanimously disagreed. The forced participation of the LGB contingent "would likely be perceived" as a message of support for its cause,¹⁵⁴

¹⁴⁸ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 635 (1943).

¹⁴⁹ *Torcaso*, 367 U.S. at 492 n.7.

¹⁵⁰ *Boy Scouts of America v. Dale*, 530 U.S. 640, 647 (2000) (quotation and citation omitted).

¹⁵¹ *Id.* at 648 (quotation and citation omitted).

¹⁵² *Id.* (quotation and citation omitted).

¹⁵³ *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp.*, 515 U.S. 557, 563 (1995).

¹⁵⁴ *Id.* at 575.

and this apparent association violated the parade organizers' right to autonomy over their own speech.¹⁵⁵ Moreover, the Court considered that the state might have applied its public accommodation law to the parade for the purpose of "produc[ing] speakers free of . . . biases."¹⁵⁶ But if this were the state's objective, then it was a "decidedly fatal" one.¹⁵⁷

The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.¹⁵⁸

Accordingly, the *Hurley* Court held that the freedoms of speech and of association were implicated whether the *purpose* of the law was to require the speakers to adopt a pro-LGB viewpoint or whether the mere *effect* was to communicate such a view to others. Either way, the state's attempts to impose an ideology upon the parade organizers were presumptively unconstitutional.¹⁵⁹

Hurley's lessons for compelled speech jurisprudence are palpable. The state has no more power to compel a group to affirm a government-approved idea than it does an individual. The textbook example of this occurs when the purpose of state action is to compel private citizens to affirm an ideological belief with which they disagree (Step 1). But this also occurs when the government forces private citizens to disseminate an offensive idea to others such that it reasonably appears that those citizens endorse the idea (Step 2). *Hurley* thus prohibited *actual* and *apparent* imposition of an orthodoxy, and it relied heavily on *Barnette* to reach this conclusion. This citation signifies that the compelled affirmation ban applies just as potently in the public school classroom as it does in the public square.

A review of the principles underlying the compelled speech doctrine, the religion clauses, and the freedom of association yields but one conclusion: The government presumptively lacks the power to compel affirmation of an idea. From Jefferson to Madison and from *Barnette* to *Hurley*, the authoritative voices interpreting the principles of the First Amendment have consistently condemned state action that either (a) compels dissenters to affirm a belief or (b) coerces them to associate with a belief in a way that makes it appear that they have adopted that belief as their own. Whether the state has applied such

¹⁵⁵ *Id.* at 576 ("Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.").

¹⁵⁶ *Id.* at 579.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 574–75 (1995) ("The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").

force to secondary school students, taxpayers, car drivers, public servants, or members of a parade, the law has demanded the strictest judicial scrutiny.

College students are entitled to no less protection in the college classroom. Consequently, a court reviewing a compelled curricular speech claim must apply strict scrutiny if the curricular measure purposefully or effectively compels a student to affirm an ideology under Step 1 or 2.

B. Step 3: Other Constitutional Provisions

Of course, many curricular exercises that require student speech will bypass Steps 1 and 2 of the proposed analysis because they do not force students to affirm a belief. Nonetheless, such exercises can still severely impinge upon other precious constitutional liberties. For example, an assignment in a human sexuality course that requires students to write a paper discussing the number of sexual partners they have had would likely survive Steps 1 and 2. Likewise, a political philosophy professor who requires his students to stand up in class and reveal who they voted for in the last election could also escape these steps.¹⁶⁰ Neither exercise forces the students to adopt an orthodoxy, yet these assignments would certainly implicate—at a minimum—the “freedom to associate” and “privacy in one’s associations.”¹⁶¹

These exercises are readily analogous to the type of coerced inquiries the Supreme Court condemned in *NAACP*, *Baird*, and *Sweezy*, discussed *supra* in Subpart I.A.3. In each of those cases, the Court reviewed the compelled disclosure under the scrutiny appropriate to the relevant constitutional provision. Likewise, the *Ward* and *Axson-Flynn* courts followed this approach

¹⁶⁰ There could be some debate here whether this question compels statements of fact or opinion. On the one hand, the student’s choice of candidate in the last election is a verifiable fact. On the other hand, that “fact” is related to the student’s political opinions and beliefs. This question would be similar to the inquiry in *Baird* in which the state bar applicant was asked if “she had ever been a member of the Communist Party or any organization ‘that advocates overthrow of the United States Government by force or violence.’” *Baird v. State Bar of Ariz.*, 401 U.S. 1, 4–5 (1971). The plurality characterized the question as an inquiry about her “beliefs and associations.” *Id.* at 6–7. Therefore, it is safe to say that compelled disclosures of fact *about one’s beliefs, opinions, and/or associations*, can activate other constitutional protections.

¹⁶¹ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). A public institution may not require a student to reveal intimate medical or sexual facts to the class as part of an academic exercise. The Third Circuit touched on this privacy limitation when it addressed a school survey that sought “intimate and private” information from students regarding “sexual activity, drug and alcohol use and relationships.” *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 180 (3d Cir. 2005). The court rejected the school’s threshold argument that, because it was mandated by the state to teach about many of these topics, no constitutional claim could be made. “The scope of the right to privacy is defined by the Constitution and may not be restricted by a state legislature or by state education officials.” *Id.* at 178. However, the court ultimately concluded that no privacy interests were implicated because there was no official compulsion and the survey results were completely anonymous. *Id.* at 189. This liberty from compelled private facts in the curricular context is significant and requires further inquiry by the court when it is raised.

when addressing the plaintiffs' claims that their respective universities forced them to speak words that violated their religious freedom. The Sixth¹⁶² and Tenth¹⁶³ Circuits appropriately subjected the challenged exercises to the scrutiny required by the Free Exercise Clause. One can easily imagine a number of other rights that could be at risk from such curricular mandates. Consequently, a complete framework for analyzing compelled curricular speech claims must encompass the protection of these additional freedoms.

C. Step 4: *Catchall*

Curricular exercises that require students to speak but do not force them to affirm beliefs and do not implicate other liberties may be subject to *Hazelwood* as held by the *Ward* and *Axson-Flynn* courts.¹⁶⁴ Most assignments will fall into this category. These curricular exercises will satisfy this step as long as they further "legitimate pedagogical" purposes and are not employed as a "pretext for punishing the student for her race, gender, economic class, religion or political persuasion."¹⁶⁵ However, *Hazelwood* cannot be blindly applied to the university classroom. This standard operates as a constitutional baseline for liberty of speech in the university context. As discussed in Subpart III.A.1., the freedom of inquiry and thought available to adults in the university classroom can be no less than the liberty afforded to minors in primary and secondary schools. If high school teachers cannot target students for discrimination, then neither can college professors. So, for example, a teacher who required an African-American student to use a racial slur in a class exercise would likely fail this test whether the assignment took place in a grade school or university classroom.

While this standard is quite deferential to educators in general, a stricter version of it must be utilized in academia to account for the special nature of the university and the maturity of its students. University professors have significantly less control over student speech than their grade-school colleagues do.¹⁶⁶ A legitimate pedagogical concern in a high school government

¹⁶² *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012) (holding that strict scrutiny was appropriate because the university's "no-referral policy" was not "neutral and generally applicable").

¹⁶³ *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297–99 (10th Cir. 2004) (holding that summary judgment on plaintiff's free exercise claim was not appropriate because plaintiff adequately raised a genuine issue as to whether the university maintained a policy of "individualized exemptions").

¹⁶⁴ *Ward*, 667 F.3d at 733–34; *Axson-Flynn*, 356 F.3d at 1289.

¹⁶⁵ *Axson-Flynn*, 356 F.3d at 1287 (citations omitted); *see also Ward*, 667 F.3d at 734 ("Although educators may 'limit[]' or 'grade[]' speech in the classroom in the name of learning,' and although they may control their own speech and curriculum, the First Amendment does not permit educators to invoke curriculum 'as a pretext for punishing [a] student for her . . . religion.'" (citations omitted)).

¹⁶⁶ *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 247 (3d Cir. 2010) ("Public universities have significantly less leeway in regulating student speech than public elementary or high schools."). Due to the substantial differences between the university and the primary/secondary school context, the

class may not be legitimate in a college political science course. So while *Hazelwood* offers teachers some discretion when regulating student speech, the standard has more teeth in the university classroom.¹⁶⁷

IV. CONCEPTUAL OBJECTIONS

The proposal that a curricular requirement can face strict scrutiny when it compels a student to affirm a belief (Steps 1 and 2) obviously has its challengers, and in this case those challengers include three federal courts of appeals. The opposing arguments raised by these courts and other commentators calling for minimal or deferential judicial review roughly fall into four categories. The first and most radical argument maintains that students waive their right to challenge the curriculum when they voluntarily accept the benefit of a state-supported education. The second and more modest position insists that the state should have greater control over the curriculum—including student responses to curricular assignments—because it is a form of government speech. A related, pragmatic challenge maintains that the educational process itself would collapse if public educators cannot compel student speech. The final challenge asserts that judges should defer to academic decisions that oblige student speech because they lack the expertise to adequately review such decisions. However, any surface appeal to these various arguments vanishes upon closer examination because they fail to overcome the aforementioned weight of authority demanding strict scrutiny for curricular mandates that force students to affirm an ideology.

A. *No Cause of Action*

In *Keeton v. Anderson-Wiley*, the Eleventh Circuit asserted the position that students simply have no grounds to bring a compelled speech claim against a

McCauley court emphasized that the Third Circuit has not adopted *Hazelwood* as a stand-alone measure for addressing student speech claims in the university setting. *Id.* The Ninth Circuit has similarly refused to apply *Hazelwood's* student speech test to the university setting. See *Oyama v. Univ. of Haw.*, 813 F.3d 850, 863 (9th Cir. 2015).

¹⁶⁷ See *McCauley*, 618 F.3d at 247.

Public universities have significantly less leeway in regulating student speech than public elementary or high schools. Admittedly, it is difficult to explain how this principle should be applied in practice and it is unlikely that any broad categorical rules will emerge from its application. At a minimum, the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.

Id.

public university's curriculum.¹⁶⁸ The *Keeton* court reasoned that public universities condition access to state-supported education upon fulfilling the curriculum, and a student who "voluntarily enroll[s]" in a public university "does not have a constitutional right to refuse to comply with those conditions."¹⁶⁹ The Eleventh Circuit's ruling effectively forecloses compelled curricular speech claims and directly challenges the entire model proposed in this Article.

The first problem with the *Keeton* court's "voluntary enrollment" theory is that it violates over half a century of constitutional jurisprudence. It was true in the first half of the twentieth century that citizens might waive some of their constitutional rights as a condition of receiving certain government privileges, such as funding, employment, or education.¹⁷⁰ But this so-called "rights-privilege" doctrine eventually yielded to the rule that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech."¹⁷¹ The triumphant "unconstitutional conditions" doctrine is now firmly established and serves as a bedrock of First Amendment freedom.¹⁷² The voluntary enrollment theory is simply a thinly veiled return to the rights-privilege jurisprudence that the Supreme Court has repeatedly rebuffed in multiple settings, including the academic context. Indeed, in the landmark *Tinker* decision, the Court explained that the state is not free to "impose and enforce any conditions that it chooses upon attendance at public institutions of learning."¹⁷³ If the state cannot impose a constitutional waiver on high school students, it surely cannot do so to prospective college students. The voluntary enrollment concept simply fails as a viable solution because it lacks the force of law.

The second fatal flaw in the *Keeton* position is that, taken to its logical conclusion, it would jeopardize all constitutional freedoms in academia.¹⁷⁴ For the voluntary enrollment notion has no principled limitation, nor did the Eleventh Circuit suggest one. If by enrolling at a public university a student automatically waives her right to be free from compelled speech, then the university could force her to lobby for legislation, campaign for a political candidate, or pledge allegiance to a particular state-endorsed viewpoint. And why does her enrollment decision not also effectively waive all of her other First Amendment rights, like her freedom to worship, her right to assemble

¹⁶⁸ *Keeton v. Anderson-Wiley*, 664 F.3d 865, 878–79 (11th Cir. 2011).

¹⁶⁹ *Id.* at 878.

¹⁷⁰ See generally Martins, *supra* note 69, at 171–75.

¹⁷¹ *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

¹⁷² By 1972, the Supreme Court stated this principle had been firmly established for "at least a quarter-century." *Id.* Accordingly, the doctrine has been a constitutional fixture for at least seventy years.

¹⁷³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 n.2 (1969).

¹⁷⁴ See generally Martins, *supra* note 69, at 186–92.

peaceably, and her right to petition her government for redress of grievances?¹⁷⁵ Moreover, on what grounds would other rights—such as due process, privacy, and equal protection—be safe? The simple answer is that no liberty would be secure, for “[i]f 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.”¹⁷⁶ Such a constitutional forfeiture would be unthinkable anywhere, but it is particularly so on the public university campus, which is the quintessential “marketplace of ideas.”¹⁷⁷

The Eleventh Circuit erred when it held that compelled curricular speech claims should receive no federal remedy. The holding violates established First Amendment law and calls into question virtually all student liberty on campus. For these reasons, the *Keeton* court’s voluntary enrollment theory cannot stand as a viable challenge to the model proposed in this Article.

B. Government Speech

A more serious contender may be found in the assertion that a public university’s curriculum is a form of government speech¹⁷⁸ over which educators may exercise substantial control.¹⁷⁹ This argument relies heavily on the Supreme Court’s decision in *Hazelwood*. This contention recognizes that student

¹⁷⁵ See 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.”).

¹⁷⁶ *Frost & Frost Trucking Co. v. R.R. Comm’n of Cal.*, 271 U.S. 583, 594 (1926).

¹⁷⁷ *Healy v. James*, 408 U.S. 169, 180 (1972) (quotation omitted).

¹⁷⁸ See *Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012) (“Curriculum choices are a form of school speech . . .”).

¹⁷⁹ A more extreme form of this argument contends that the government has *total* control over the curriculum, including student responses thereto. But this argument is quickly laid to rest. Some federal courts have recognized that the curriculum is a form of government speech. And the Supreme Court has strongly implied that First Amendment protection for *extracurricular* student speech would not be the same were the government speaking through its curriculum.

Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. See *Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983). The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play.

Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 234–35 (2000).

However, student *responses* to curricular requirements are *student* speech, not government speech, and are therefore not subject to total state control. Logic alone tells us that students do not become state speakers simply by attending public schools. If this were the case, students would become the mouthpiece of the state every time they spoke pursuant to a class assignment. Accordingly, when the professor grades such speech, she would actually be evaluating the institution rather than the student. This is simply not the reality of the college classroom. Instead, the law has followed logic and courts have recognized that “[t]hings that students express in class or in assignments

responses to curricular assignments are a form of student speech but maintains that the school must be free *not to promote* certain student speech related to the curriculum because it bears the “imprimatur” of the university.¹⁸⁰ Federal courts, under this view, must only apply minimal judicial scrutiny when public university officials exercise editorial control over the content of such “school-sponsored” student speech.¹⁸¹ Applying this standard broadly, the *Axson-Flynn* and *Ward* appellate courts ruled that a university official may compel curricular student speech as long as that decision is “reasonably related to legitimate pedagogical concerns”¹⁸² and not a “pretext” for discrimination.¹⁸³

when called upon to express their own views . . . do not represent ‘the [school’s] own speech.’” See *C.H. v. Oliva*, 226 F.3d 198, 214 (3d Cir. 2000) (Alito, J., dissenting) (citation omitted); accord *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988) (recognizing both that the production of the student newspaper was part of the school’s curriculum but also that the articles written by the students were “student speech”); *Ward v. Polite*, 667 F.3d 727, 734–35, 738 (6th Cir. 2012) (recognizing that a student’s request for a referral to not provide counseling in a university counseling clinic that contradicted her religious beliefs was student speech); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004) (recognizing that lines delivered in a student play were student speech); *Brown v. Li*, 308 F.3d 939, 947, 949 (9th Cir. 2002) (recognizing that a master’s thesis was student speech). And the law has accordingly not granted schools absolute authority over such speech, requiring instead that public educators justify curricular decisions with at least “legitimate pedagogical concerns.” See *Hazelwood*, 484 U.S. at 273; *Ward*, 667 F.3d at 733; *Axson-Flynn*, 356 F.3d at 1285; *Brown*, 308 F.3d at 948. Consequently, a public university does not have absolute curricular authority to force its students to affirm offensive beliefs.

¹⁸⁰ The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

Hazelwood, 484 U.S. at 270–71.

¹⁸¹ The third type of speech is “school-sponsored speech,” which is “speech that a school ‘affirmatively . . . promotes,’ as opposed to speech that it ‘tolerates.’” “Expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school’ constitute school-sponsored speech, over which the school may exercise editorial control, ‘so long as [its] actions are reasonably related to legitimate pedagogical concerns.’” We conclude that *Axson-Flynn*’s speech in this case constitutes “school-sponsored speech” and is thus governed by *Hazelwood*.

Axson-Flynn, 356 F.3d at 1285 (citations omitted).

¹⁸² *Ward*, 667 F.3d at 733 (“Public educators may limit ‘student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.’”); see also *Axson-Flynn*, 356 F.3d at 1289 (“Accordingly, we hold that the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum.”).

¹⁸³ See *Axson-Flynn*, 356 F.3d at 1287 (“So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.” (quoting *Settle v. Dickson Cty. Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995))); see also *Ward*, 667 F.3d at 734 (“Although educators may ‘limit[]’ or ‘grade[]’ speech in the classroom in the name of learning,’ and although they may control their own speech and curriculum, the First Amendment does not permit educators to invoke curriculum ‘as a pretext for punishing [a] student for her . . .

The Tenth and Sixth Circuits erred by applying this deferential test as the standard for *all* compelled curricular speech claims because they failed to recognize the critical difference between compelled speech and compelled silence. The courts adopted this test from *Hazelwood*, in which the Supreme Court rebuffed a claim that high school officials violated the First Amendment when they refused to publish various student essays in the school newspaper.¹⁸⁴ *Hazelwood*, however, addresses curricular *censorship* rather than curricular *compelled speech*. The circuit courts erred by assuming that the two were equivalent, and in doing so, overlooked controlling authority holding that they are conceptually distinct.¹⁸⁵ Indeed, *Barnette* expressly distinguished between compelled silence and compelled speech when it overturned West Virginia's curricular pledge requirement:

It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. *It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.*¹⁸⁶

religion.' Even in the context of a secular university, religious speech is still speech, and discriminating against the religious views of a student is not a legitimate end of a public school." (citations omitted)).

¹⁸⁴ *Hazelwood*, 484 U.S. at 263–64 (holding that school officials deleting two pages of the school newspaper because of decency concerns did not violate the First Amendment).

¹⁸⁵ It is true that the Supreme Court has paid lip service to the idea that compelled speech and compelled silence are constitutionally equivalent. In *Riley*, the Court stated the following:

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.

Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796–97 (1988).

However, the Court here was not eliminating the conceptual differences between compelled speech and compelled silence. Rather, the Court made this comment in direct response to North Carolina's contention that it had greater power to compel speech than to silence it. Understood in this context, the Court's statement simply affirmed that the freedom from compelled speech is entitled to no less protection than the freedom from censorship. See also 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, 156 (2010). Nora Sullivan has adeptly noted that *Wooley* also contradicts the presumption that the "power to compel and the power to censor are coextensive." Nora Sullivan, *Insincere Apologies: The Tenth Circuit's Treatment of Compelled Speech in Public High Schools*, 8 FIRST AMEND. L. REV. 533, 547–48 (2010). The *Wooley* Court explained that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Sullivan notes that the "term complementary [is] defined as 'mutually supplying each other's lack.'" Sullivan, *supra* note 185, at 548. Therefore, she concludes, "the Supreme Court's description of compelled speech in *Wooley* signals that the First Amendment safeguards against compulsion and censorship are not the same, but rather are two different pieces of a puzzle that fit together to form complete protection for free speech." *Id.* The *Axson-Flynn* and *Ward* appellate courts should have recognized that the right to remain silent is protected at least as much and often to a greater degree than the right to speak.

¹⁸⁶ *Barnette*, 319 U.S. at 633 (emphasis added).

The circuit courts did not need to stretch *Hazelwood* to manufacture a standard for compelled speech in the college classroom, for the Supreme Court already provided the proper standard in *Barnette* for compelled affirmations of belief. There, the Court rejected the idea that public educators have as much latitude to compel student speech as they do to suppress it. *Barnette* is thus more precisely applicable than *Hazelwood*. And *Barnette* demands rigorous scrutiny when public schools utilize their curricula to compel students to affirm a belief.

This is not to say that *Hazelwood* teaches nothing about how courts should handle clashes between student speech and state curricula. As discussed in [Subpart III.C. *supra*](#), it can be a helpful baseline standard to consider when university educators have not implicated Steps 1 through 3 of the proposed framework. Moreover, the opinion actually *supports* the application of strict scrutiny to compelled speech claims falling under Steps 1 and 2. *Hazelwood* and *Barnette* together affirm the rule that both the government and its citizens must be able to disassociate from objectionable speech in the application of public school curricula. *Hazelwood* addresses the first part of this equation, while *Barnette* addresses the second. Thus, the two opinions complement one another.

The chief concern of the *Hazelwood* majority was protecting the school from being forced to promote speech that it did not want to endorse. This is why the Court opened its legal analysis by distinguishing between student speech that happens to occur on campus and “school-sponsored” student speech that is “part of the school curriculum.”¹⁸⁷ Regarding the latter, the Justices explained that the First Amendment does not require public schools to “promote particular student speech.”¹⁸⁸ Consequently, a public school can refuse to sponsor student speech that is “inconsistent with its ‘basic educational mission’”¹⁸⁹—such as speech that “might reasonably be perceived to advocate . . . conduct otherwise inconsistent with ‘the shared values of a civilized social order,’” or that would “associate the school with . . . matters of political controversy.”¹⁹⁰ The Justices opined that public educators have some power to regulate the content of such student speech so that “the views of the individual speaker are not erroneously attributed to the school.”¹⁹¹ In other words, the government has some authority to “disassociate itself” from objectionable school-sponsored student speech.¹⁹²

¹⁸⁷ *Hazelwood*, 484 U.S. at 270–71.

¹⁸⁸ *Id.* at 270–73.

¹⁸⁹ *Id.* at 266 (holding that “a school need not tolerate student speech that is inconsistent with its ‘basic educational mission’”).

¹⁹⁰ *Id.* at 271–72 (citations omitted).

¹⁹¹ *Id.* at 271.

¹⁹² *Id.*; see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986) (holding that it was appropriate for a public school to discipline a student in order to disassociate itself from the “vulgar and lewd speech” the student gave in a school assembly).

Hazelwood's holding thus provides corollary support for students to likewise separate themselves from offensive curricular affirmations. For if the government has the right to distance itself from certain student views, certainly students—who are protected by the First Amendment—have no less right to disassociate themselves from odious government ideas. In this light, *Hazelwood* stands as a kind of “reverse compelled speech” case that generally prohibits a student, in the context of a curricular assignment, from compelling the school to endorse her ideas. And this prohibition extends beyond actual endorsement even to student speech that “might reasonably be perceived” to carry the school’s approval.¹⁹³ The *Hazelwood* court gave public educators wide latitude to disassociate from such classroom speech. Federal courts will only overturn those school decisions that lack a “legitimate pedagogical concern.”¹⁹⁴ This places a heavy legal burden on any student wishing to use a curricular exercise to bootstrap school endorsement (or apparent endorsement) of her ideas.

Likewise, if *Hazelwood* is correct, the government should face no less of a constitutional burden when it either seeks to compel a student to affirm a belief or requires that student to speak a message that could be “erroneously attributed” to the student.¹⁹⁵ This heavy presumption against forced association is akin to the strict scrutiny standard explicitly applied in *Barnette* and *Wooley*. Accordingly, *Hazelwood*, *Barnette*, and *Wooley* complement each other by providing heightened protection from compulsory affirmation for both the public school and the student.

If this were not the rule, we would have a serious anomaly in the law. The government would have greater ability to disassociate itself from views it does not want to endorse than private citizens would, even though private citizens are expressly granted the freedom of speech. It is entirely inconsistent that the government would have more power to protect its speech than the citizens who are specifically shielded from government overreach by the Constitution.¹⁹⁶ Consequently, *Hazelwood*'s minimal judicial scrutiny

¹⁹³ *Hazelwood*, 484 U.S. at 272 (holding that a school can “refuse to sponsor student speech that might reasonably be perceived to advocate . . . ‘conduct otherwise inconsistent with the shared values of a civilized order’”).

¹⁹⁴ *Id.* at 273 (holding 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”).

¹⁹⁵ *Id.* at 271 (holding that educators have wider latitude in controlling student expression to make sure that the “views of the individual speaker are not erroneously attributed to the school”).

¹⁹⁶ The *Barnette* majority made this point precisely when it sought to resolve the question raised in *Gobitis*: “Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636–37 (1943). The Court’s answer was that individual liberty must prevail:

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel

is not the appropriate standard for courts to apply to all compelled speech claims, and particularly not when public university curricula compel students to affirm ideas—whether directly or apparently.

C. *Educational Necessity*

Notwithstanding *Hazelwood*, one could see how judges could conclude that a deferential standard is necessary because the educational process requires professors to compel some student speech.¹⁹⁷ The *Axson-Flynn* and *Ward* appellate courts justified applying *Hazelwood*'s judicial standard on this basis. The alternative, in their opinion, would grant individual students a “veto” over the school’s curriculum.¹⁹⁸ “[S]chools must be empowered at

safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

Id. at 636–37.

¹⁹⁷ See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004) (claiming “that schools must be empowered at times to restrict the speech of their students for pedagogical purposes is not a controversial proposition”); see also *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (“All educators must be able ‘to assure that participants learn whatever lessons the activity is designed to teach.’ Just as a junior high school English teacher may fail a student who opts to express her thoughts about a once-endangered species, say a platypus, in an essay about *A Tale of Two Cities*, so a law professor may fail a student who opts to express her views about Salvador Dali and the fourth dimension in a torts exam. That the First Amendment protects speech in the public square does not mean it gives students the right to express themselves however, whenever and about whatever they wish on school assignments or exams. ‘A school need not tolerate student speech that is inconsistent with its basic educational mission.’” (quoting *Hazelwood*, 484 U.S. at 271; then citing *Settle v. Dickson Cty. Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995); then quoting *Hazelwood*, 484 U.S. at 266). A Supreme Court Justice and at least two other courts of appeals concur with this position. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 242–43 (2000) (Souter, J., concurring in the judgment) (noting that at a university, “students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach”); *Brown v. Li*, 308 F.3d 939, 953 (9th Cir. 2002) (“*Hazelwood* . . . establish[es] that—consistent with the First Amendment—a teacher may require a student to write a paper from a particular viewpoint, even if it is a view-point with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose.”); *Marinello v. Bushby*, No. CIV. A. 1:95CV167–D–D, 1996 WL 671410, at *14 (N.D. Miss. Nov. 1, 1996) (“it is part of the function of schools to compel speech from students to some degree so that officials can ensure that the students are in fact learning what is taught”), *aff’d*, 163 F.3d 1356 (5th Cir. 1998).

¹⁹⁸ See *Axson-Flynn*, 356 F.3d at 1292.

The school’s methodology may not be *necessary* to the achievement of its goals and it may not even be the most effective means of teaching, but it can still be “reasonably related” to pedagogical concerns. A more stringent standard would effectively give each student veto power over curricular requirements, subjecting the curricular decisions of teachers to the whims of what a particular student does or does not feel like learning on a given day. This we decline to do.

Id. (citations omitted); see also *Ward*, 667 F.3d at 734 (“When a university lays out a program’s

times to restrict the speech of their students for pedagogical purposes.”¹⁹⁹ Consistent with this power, schools “routinely require students to express a viewpoint that is not their own in order to teach the students to think critically.”²⁰⁰ The *Axson-Flynn* court provided the following examples of such permissible compulsion:

[A] college history teacher may demand a paper defending Prohibition, and a law-school professor may assign students to write “opinions” showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment question. . . . Such requirements are part of the teachers’ curricular mission to encourage critical thinking . . . and to conform to professional norms²⁰¹

Certainly, the teaching process would stall if students had a constitutional right to refuse to respond to such questions and assignments. The First Amendment does not permit individual students to hold the learning process hostage. This conclusion, at least partially, drove the *Axson-Flynn* and *Ward* courts to conclude that all compelled curricular speech claims are presumptively invalid.²⁰²

However, what this educational-necessity argument fails to recognize is the critical difference between compelled *comprehension* and compelled *affirmation*. A constitutional chasm exists between “I understand” and “I believe.” Absent a discriminatory motive and invasion of other rights, public universities may generally require the former, but they may not mandate the latter, even to achieve curricular goals. *Barnette* explained this distinction explicitly:

[T]he 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.²⁰³

Educators can thus teach *about* a concept, such as the American flag, in order to increase student learning. This power implies they may also expect students to show through words that they comprehend the given subject matter

curriculum or a class’s requirements for all to see, it is the rare day when a student can exercise a First Amendment veto over them.”).

¹⁹⁹ *Axson-Flynn*, 356 F.3d at 1290.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1290–91 (quoting *Brown*, 308 F.3d at 953).

²⁰² As discussed in Subpart III.B., *supra*, the *Ward* and *Axson-Flynn* courts both recognized that compelled student speech can raise interests protected by other constitutional rights. Because this Article agrees with that position, this Subpart will not emphasize it again here. Instead, this Subpart will focus on challenging the position held by those courts that compelled curricular assignments should never face strict scrutiny under the compelled speech doctrine.

²⁰³ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (citation omitted) (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 604 (1943)).

in order to verify curricular objectives have been met and knowledge has been obtained. For example, teachers may insist students provide facts about the flag on an exam to confirm their grasp of history. Likewise, they may require students to orally defend a viewpoint in class regarding the flag that is contrary to their own to demonstrate persuasive communication skills. But professors are not free to “short-cut” this “slow and easily neglected” process of persuasion by commanding students to adore the flag or the principles it represents.²⁰⁴ This is where the forced pledge went too far.²⁰⁵ While teachers may have authority to insist their students recite facts or even opinions to teach a lesson, *Barnette* makes clear that the line between education and indoctrination is crossed when teachers force students to affirm a belief.²⁰⁶ And

²⁰⁴ *Id.* at 631.

²⁰⁵ *Id.* at 640 (“National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.”).

²⁰⁶ There is some precedent indicating that First Amendment protection is the same whether the government compels statements of fact or statements of opinion. Indeed, the *Axson-Flynn* appellate court chastised the district court for holding that “statements of fact” were not entitled to protection from disclosure under the First Amendment. See *Axson-Flynn*, 356 F.3d at 1284 n.4. The Tenth Circuit based its conclusion on *Riley v. National Federation of the Blind of North Carolina, Inc.*, in which the Supreme Court reviewed a state law requiring professional solicitors to disclose to potential donors—before requesting funds—the percentage of such donations actually turned over to the charity in the last twelve months. See *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 795 (1988). The Court voided the law under strict scrutiny, explaining that both “compelled statements of opinion” and “compelled statements of fact” “burden[] protected speech.” See *Riley*, 487 U.S. at 797–98. But, as Laurent Sacharoff explains, *Riley* did not hold that facts always receive the same disclosure protection as ideas:

Rather, [*Riley*] held that the government could not compel canvassers to reveal facts at the doorstep. But the Court expressly said the government could compel charities to reveal facts in a more general venue, such as directly to the state, which could then publicize them to the public:

Further North Carolina may constitutionally require fundraisers to disclose certain financial information to the State, as it has since 1981. . . . [And] as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation.

Riley does not prohibit compelled disclosure of facts generally; rather, it only prohibits compelled disclosures that are likely to suppress speech immediately as will occur on the doorstep or telephone solicitation.

Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 409–10 (2008) (footnotes omitted) (second alteration in original).

However, this is not to say that the government has a blank check to compel factual disclosures. The Tenth Circuit was correct in concluding that compelled statements of fact are not exempt from constitutional protection. In the public school context, surely teachers must demonstrate, at a minimum, a “legitimate pedagogical” interest in compelling students to reveal facts they may wish to hide. A school that targets a student for disclosure based on his race, gender, religion, or political affiliation would collide with *Hazelwood*, if not the Equal Protection Clause. Additionally, *Riley* mandates that the state must not require factual disclosures that act as a prior restraint on speech. The *Ward* court concurred in holding that educators may not target a student to suppress his speech. See *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012) (“Even in the context of a

as explained above in Subpart III.A.1., *Wooley* confirms that this threshold is not only breached when the state purposefully impels a student to affirm an idea, but also when it otherwise requires her to “disseminate an ideology” such that her endorsement thereof is reasonably presumed.²⁰⁷ Therefore, an assignment that requires a student to deliver a “Why I Love the Flag” speech to a school assembly or a PTA meeting would—like the forced pledge—presumptively violate the First Amendment.

Understanding the line between comprehension and affirmation reveals the incomplete logic in the reasoning of the Tenth and Sixth Circuits. They reasoned that universities must have broad authority under the First Amendment to compel *all* student speech in order to teach effectively, subject only to “legitimate pedagogical concerns.”²⁰⁸ This is only partially true. Public educators have some latitude to obligate student responses as long as they do not compel students actually or apparently to affirm an ideological belief under Steps 1 and 2.²⁰⁹ When teachers merely insist that students comprehend a lesson—as long as they do not violate other rights under Step 3—they are generally entitled to a more lenient standard of review.²¹⁰ However, when affirmation is compelled, state educators must justify their assignments under strict scrutiny, as required by *Barnette* and *Wooley*.

secular university, religious speech is still speech, and discriminating against the religious views of a student is not a legitimate end of a public school.”). As discussed in Subpart III.B., *supra*, individuals and organizations may remain silent to protect other liberty interests such as privacy and association. See *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (“[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”).

²⁰⁷ *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

²⁰⁸ *Ward*, 667 F.3d at 733 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (quotations omitted); *Axson-Flynn*, 356 F.3d at 1290 (citations and quotations omitted)).

²⁰⁹ At least one federal court of appeal has implicitly recognized this limitation on a public school’s curricular authority to compel student speech. See *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 187 (3d Cir. 2005) (“[W]hile a public educational institution may not demand that a student profess beliefs or views with which the student does not agree, a school may in some circumstances require a student to state the arguments that could be made in support of such beliefs or views.”). However, because the court found that no official compulsion was present, the statement is largely dicta. *Id.* at 189.

²¹⁰ The *Hazelwood* standard prevents the state from using its curriculum as a pretext to discriminate based on “race, gender, economic class, religion or political persuasion.” See *Axson-Flynn*, 356 F.3d at 1287. By roughly mirroring the Equal Protection Clause of the Fourteenth Amendment, it acts as a baseline of constitutional protection under which the government may not tread. However, the *Hazelwood* standard does not adequately address additional constitutional concerns that may arise when public universities compel student speech. As discussed in Subpart III.B., *supra*, forcing students to speak can easily trespass onto the freedom of association and the right to privacy, for example, even when no discriminatory purpose is present. Therefore, even if a public educator compels student speech for “legitimate pedagogical” reasons, the reviewing court must still be mindful of other constitutional interests. This is simply one more reason why the blind application of *Hazelwood* to all curricular compelled speech claims is unacceptable.

Applying this more comprehensive approach to the *Axson-Flynn* court's hypotheticals, we can see how the prediction that heightened scrutiny will hamstring public education is greatly exaggerated. The theoretical history teacher and law professor may indeed require their respective students to write papers defending Prohibition, or analyzing how various justices might evaluate the Fourth Amendment. Neither assignment (from the facts given) indicates that the professors required their students to personally affirm any ideological belief about Prohibition or the Fourth Amendment. Nor are the assignments given under auspices where others might reasonably perceive student endorsement of any such belief, for everyone understands that these classroom assignments are academic in nature. And these exercises do not (on their face) trespass on any other rights, such as privacy or association. The same reasoning would justify most questions that elicit student opinions in a quiz, examination, or class discussion. The *Axson-Flynn* and *Ward* courts are correct that when student opinions are compelled under these circumstances, strict scrutiny is not triggered. However, when the school goes further and strong-arms a student into endorsing an idea, it treads on constitutional thin ice.

The model proposed in this Article strikes a workable balance that respects the public university's curriculum as well as students' constitutional rights. In contrast, the one-size-fits-all employment of *Hazelwood* proposed by the Tenth and Sixth Circuits fails to respect *Barnette* and *Wooley* by treating all compelled student speech the same. In doing so, the appellate courts ignored the Supreme Court's admonishment that "[o]bservance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise."²¹¹

D. University Deference

A related counterargument contends that judges should defer to professors on academic matters, including, but not limited to, the implementation of curricular objectives. The Supreme Court asserted this position as a general proposition in *Regents of the University of Michigan v. Ewing*, in which the court upheld the university's decision to remove a student from its medical school for academic reasons.²¹²

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.²¹³

²¹¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

²¹² *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 227–28 (1985).

²¹³ *Id.* at 225 (footnote omitted).

Several other cases²¹⁴ and commentators²¹⁵ affirm this general principle—that judges should tread lightly when reviewing scholastic decisions. This is due to the presumption that faculty members have greater training and competence in the academic field and thus are better suited than judges to assess the validity of educational judgments.²¹⁶ Instead, judges should avoid “substitut[ing] their own notions of sound educational policy for those of . . . the school authorities.”²¹⁷ The *Axson-Flynn* court relied on both *Ewing* and *Hazelwood* to conclude that this same academic deference must apply when schools compel speech as part of a curricular assignment.²¹⁸

Whatever the merits of such deference might be in the academy, the Supreme Court has never granted it to teachers in a compelled speech case. To

²¹⁴ See *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 687 (2010) (“[The University’s] decisions about the character of its student-group program are due decent respect.”); *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (“The Law School’s educational judgment that [racial] diversity is essential to its educational mission is one to which we defer. . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”); *Bd. of Curators v. Horowitz*, 435 U.S. 78, 89–90 (1978) (“The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking. Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing.”); *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) (“[W]e cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators. In this regard, we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom.”).

²¹⁵ See Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom*, 97 GEO. L.J. 945, 996 (2009) (“Courts should defer to a decision made by an institution of higher education if the institution can show that it was made on academic grounds.”); David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS., Summer 1990, at 227, 287 (“[C]ourts should afford broad deference to professional expertise. Academic decisions are necessarily subjective and beyond the competence of judges. Courts cannot . . . ‘evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions.’”) (quoting *Ewing*, 474 U.S. at 226); Emily Gold Waldman, *University Imprimatur on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 412 (2013) (“Indeed, even skeptics of broad claims of university autonomy tend to agree that universities should receive substantial deference in making core academic decisions.”).

²¹⁶ Joseph J. Martins, *Tipping the Pickering Balance: A Proposal for Heightened First Amendment Protection for the Teaching and Scholarship of Public University Professors*, 25 CORNELL J. L. & PUB. POL’Y 649, 687 (2016).

²¹⁷ *Martinez*, 561 U.S. at 686 (citation and quotations omitted).

²¹⁸ *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004) (explaining that courts must “give ‘substantial deference’ to ‘educators’ stated pedagogical concerns”) (quoting *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 925 (10th Cir. 2002) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)); see also *Axson-Flynn*, 356 F.3d at 1292–93 (“[W]e do not second-guess the pedagogical wisdom or efficacy of an educator’s goal . . .”).

the contrary, the Supreme Court has flatly rejected the notion that such deference would be appropriate when educators prescribe orthodox thought. In *Barnette*, the majority took pains to condemn *Gobitis*' assertion that "this is a field 'where courts possess no marked and certainly no controlling competence.'"²¹⁹ Respect for school authorities had been the cornerstone of the Court's initial stance upholding the mandatory pledge.²²⁰ The *Barnette* majority proceeded to ignore the state's asserted interests in "increasing [students'] knowledge of . . . the government" and applied its harshest scrutiny to the pledge.²²¹ This is a far cry from deferential jurisprudence.

The Court has likewise withheld deference from other state compulsory efforts where even the *risk* of misattribution was present. As discussed *supra*, the Court refused to defer to New Hampshire's interest in categorizing motor vehicles in *Wooley*²²² and Massachusetts's interest in preventing discrimination in *Hurley*.²²³ In neither case were the plaintiffs personally required to mouth objectionable ideological messages. However, because the state forced these plaintiffs to associate "intimately"²²⁴ with personally objectionable ideas, endorsement could easily be attributed to them.²²⁵ By applying strict scrutiny in both cases, the Court signaled that freedom of the mind is one liberty too precious to expose to minimal judicial review.

Withholding deference from such curricular decisions would be consistent with the courts' current refusal to show any special respect, in the related Establishment Clause context, for curricular decisions that compel students to participate in religious activities. For example, the Supreme Court invalidated a public school curricular exercise that forced students to recite a

²¹⁹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 597–98 (1943)).

²²⁰ *See Gobitis*, 310 U.S. at 598 (stating that "[t]he wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. . . . [T]he courtroom is not the arena for debating issues of educational policy.").

²²¹ *Barnette*, 319 U.S. at 626 n.1.

²²² *Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

²²³ *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557, 578–79 (1995).

²²⁴ *Id.* at 576 (explaining that a speaker who has an intimate connection with a particular view or communication loses the autonomy of his speech if he is forced to express ideas relating to that view which are contrary to his own).

²²⁵ *Id.* at 575 ("GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well."); *Wooley*, 430 U.S. at 715 ("New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty, as Maynard already has. As a condition to driving an automobile—a virtual necessity for most Americans—the Maynards must display 'Live Free or Die' to hundreds of people each day. . . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.").

school-prescribed prayer²²⁶ as well as one that required Bible reading and recitation of the Lord's Prayer.²²⁷ In neither case did the Court give any weight to the schools' asserted pedagogical justifications,²²⁸ and in the latter case, the majority specified that it was explicitly reversing the prior "governing principle of nearly complete deference to administrative discretion."²²⁹ Likewise, the U.S. Court of Appeals for the D.C. Circuit refused to grant federal educators any deference when it voided mandatory chapel attendance at three of the nation's preeminent military academies.²³⁰ This is particularly significant given that the federal government is often granted deference over matters pertinent to military training.²³¹ The coerced prayers and forced participation in religious activities in these cases are directly analogous to the mandatory pledge in *Barnette*.²³² In each case, however, while these exercises were part of the curriculum, none of the respective courts subjected them to deferential review or even mentioned the need to defer to educators.

²²⁶ *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding that "New York's program of daily classroom invocation of God's blessings" constituted "a practice wholly inconsistent with the Establishment Clause").

²²⁷ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (explaining that the Bible reading and recitation of the Lord's Prayer was "prescribed as part of the curricular activities of students" and holding that such "exercises and the law requiring them are in violation of the Establishment Clause").

²²⁸ *See id.* at 223–24 (ignoring the state's contention that the prayers were justified by secular purposes, including the "promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature"); *see also Engel*, 370 U.S. at 425 (ignoring the Board of Regents of New York's attempt to justify the prayer as a shared part of the community's "spiritual heritage").

²²⁹ *Schempp*, 374 U.S. at 275.

²³⁰ *See Anderson v. Laird*, 466 F.2d 283, 284 (D.C. Cir. 1972) (holding unconstitutional mandatory chapel attendance at the U.S. Military Academy at West Point, New York, the United States Naval Academy at Annapolis, Maryland, and the United States Air Force Academy at Colorado Springs, Colorado). In reversing the district court, the court of appeals noted that the district court's grant of deference "to the unique role of the military" was inappropriate. *Id.* at 293.

²³¹ *See id.* at 294–95 ("Personal freedoms of conduct and appearance have been accommodated to the military's perceived need to establish procedures best suited to regulate its day-to-day operations, duty assignments and call-up orders; to determine a reservist's discharge of his duties; to regulate physical appearance; and to ascertain 'the essential characteristics of fitness for duty.' This deference to military decisionmaking has been justified by the military's role, its mandate to prepare for the waging of war, and the necessity of this mandate for our national security. However, deference has inherent limitations which have also been fully recognized in judicial decision. . . . Individual freedom may not be sacrificed to military interests to the point that constitutional rights are abolished." (footnotes omitted)).

²³² In *Anderson*, the court flatly rejected the government's attempt to distinguish "compelling attendance at church and compelling worship or belief." *Id.* at 291.

Neither appellees, nor the dissenting opinion *infra*, reveal how a government could possibly compel individual worship or belief other than by compelling certain overt actions—for example, profession of belief in God; recitation of prayers; or mere presence during Bible readings. Attendance during chapel services is indistinguishable from these other overt actions, the compulsion of which has been declared unconstitutional in *Torcaso v. Watkins*, *School District of Abington Township v. Schempp*, and *Engel v. Vitale*.

Id.

Therefore, the appeal to university deference, like the related appeals for lower scrutiny, is simply not persuasive when public educators compel affirmation of ideas either actually or apparently.

V. THE PROPOSAL IN PRACTICE

This Article proposes a sound and comprehensive method for addressing compelled curricular speech claims in the public university setting. Contrary to the standards proposed by some commentators and the three appellate courts that have addressed the issue, this Article maintains that courts should apply a nuanced standard that affords universities much less deference when they compel student speech. Accordingly, a court hearing a student's claim that her public university employed its curriculum to force her to speak against her will should utilize the framework explained in Part II.

This framework is obviously far less deferential to university officials than the blanket *Hazelwood* standard applied by the *Axson-Flynn* and *Ward* courts. Yet this model is justified because it more fully respects the constitutional rights of the student and more carefully delineates the limits on state power over the mind. Its true impact can be seen when it is applied to the hypothetical students Abigail and Lauren introduced at the beginning of the Article, and to the plaintiffs in *Axson-Flynn* and *Ward*.

A. Abigail and Lauren

Over her objections, Abigail's college has required her to sign its "Statement of Diversity and Social Justice" as a condition of receiving her teaching degree. The college is clearly using its curriculum to force her to endorse certain ideas she opposes. Moreover, this statement and its tenets are patently ideological in nature, as reasonable minds would likely disagree on what constitutes "diversity" and "social justice." If Abigail challenged this requirement in court, she would likely prevail under the model proposed in this Article. By forcing Abigail to demonstrate her "respect" for diversity and her "commitment" to social justice, as understood by college officials, the college has transgressed the threshold inquiry by purposefully compelling her to affirm an ideology—the approach explicitly condemned by *Barnette*. This is the quintessential example of a government-imposed orthodoxy that no government officials—including educators—are permitted to enforce under the First Amendment.

In contrast, Lauren's professor of political advocacy would likely survive the first step of the proposed framework, even though he has compelled her to support legislation that she personally opposes. He could convincingly argue that he has required his students to petition the state legislature not to force them to affirm any ideas about guns, but rather to provide them with

real-life experience in grassroots political advocacy. While his purpose may be legitimate, the assignment should still trigger strict scrutiny under the second step of the proposed model because it has the effect of communicating her support for HB 1122 to others. Any legislator receiving Lauren's letter would reasonably perceive that she endorses the bill, because the letter bears her name and is thus intimately associated with her. Lauren's university cannot defend on the grounds that she does not actually endorse the viewpoint in the letter. *Wooley* and *Hurley* presumptively condemn the letter-writing activity because it forces Lauren to serve as a "courier for [the State's] message."²³³ Indeed, this can easily occur anytime assignments require students to communicate to third parties unaffiliated with the school, such as in a clinic or internship. Lauren's professor might try to justify the intrusion, but this would be a tall order. If EMU's interests in teaching professional ethical codes and avoiding loss of accreditation were insufficiently weighty in *Ward*, it is difficult to imagine what interest Lauren's university could offer to satisfy this step.²³⁴ Even if the professor could conceivably produce a compelling interest, the assignment would still fail because accommodating Lauren's objections by permitting her not to send the letter to the legislature would surely be a less restrictive means of achieving the professor's goals.

Therefore, under the first two steps of the proposed framework, it is highly unlikely that either curricular mandate would survive judicial review. In fact, a federal court applying this analysis would likely grant summary judgment in favor of Abigail and Lauren, respectively.

B. *Ward and Axson-Flynn*

While the facts in the *Ward* case are more complex, EMU's expulsion of Julea Ward would also likely fail the second step. EMU expelled Ward for refusing to voice the university's preferred message on sexual ethics to a third party in the school's counseling clinic. Sexual ethics and other values-based matters are clearly ideological, and as the Sixth Circuit noted, they have generated significant debate even within the mental health profession itself.²³⁵ Furthermore, any person receiving counsel on sexual issues from Ward at EMU (i.e., counseling in line with EMU's imposed values) would reasonably conclude that Ward supports the guidance she is providing—first, because of the fact that Ward herself is speaking (and absent confounding circumstances,

²³³ *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (finding that the state interest in disseminating a particular ideology "cannot outweigh an individual's First Amendment right[s]").

²³⁴ *See Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012) (confirming that the state interests articulated by EMU could not satisfy strict scrutiny).

²³⁵ *See id.* at 735–36 (noting disagreement among various counseling professionals on the permissibility of referrals when the counselor disagrees with the values of the client, specifically those related to sexual orientation).

people usually assume that others believe what they verbalize), and second, because of the unique standards of speech in a counseling environment (counselors are bound by ethical codes to avoid causing harm and to always promote the good of the client).²³⁶ Any client can thus rationally presume that the speaking professional endorses her own counsel, at least to the extent that it is beneficial and not harmful. Because Ward's client would likely perceive that Ward was personally endorsing the position on sexual ethics that she provided (the one forced on her by EMU), the university infringed upon her freedom of mind. Consequently, the judges should have applied strict scrutiny to the expulsion decision and ruled in Ward's favor, given that the university effectively conceded its interests were not compelling.²³⁷ Thus, the university would not have even reached Step 4 in the proposed analysis.

Unlike the examples above, Christina Axson-Flynn's compelled speech claim would have satisfied the first two inquiries of the proposed framework. University of Utah officials could pass the threshold inquiry on the grounds that they did not assign the offensive script for the purpose of forcing her to endorse any ideas contained in it. The Tenth Circuit found no evidence to the contrary. The script requirement would also survive the effect step, because no one would reasonably assume Axson-Flynn's affirmation of the ideas in the script for the simple reason that she was acting.²³⁸ The very nature of acting inherently dilutes the association between the speaker and the views expressed by his or her character; consequently, there was no reasonable risk that others might presume that Axson-Flynn endorsed the objectionable lines. Thus, there was no need to apply strict scrutiny under the second step.

The Court appropriately considered whether the script requirement jeopardized other constitutional rights, and concluded that Axson-Flynn had raised a colorable free-exercise claim that entitled her to a jury trial.²³⁹ The proper scrutiny then depended upon the nature of the script requirement.

²³⁶ See, e.g., CODE OF ETHICS, at 3 (AM. COUNSELING ASS'N 2014) (stating that among "[t]he fundamental principles of professional ethical behavior are . . . *nonmaleficence*, or avoiding actions that cause harm [and] *beneficence*, or working for the good of the individual and society by promoting mental health and well-being . . .").

²³⁷ See *Ward*, 667 F.3d at 740 (stating that "[t]he university does not argue that its actions can withstand strict scrutiny, and we agree. Whatever interest the university served by expelling Ward, it falls short of compelling").

²³⁸ Of course, even in the acting context, a university's acting curriculum has constitutional limits. For example, a school could not require an objecting student to disrobe as part of her performance as this mandate would likely infringe upon the student's right to privacy. This is one more example that shows the importance of Step 3 in the proposed analysis.

²³⁹ See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293–94 (10th Cir. 2004) (holding that the factfinder needed to resolve the issue of whether or not the law requiring Axson-Flynn "to say words whose utterance would violate her religious beliefs" was neutral, which would elicit a rational basis review, or pretextual, which would require strict scrutiny).

The Free Exercise Clause would permit rational-basis review if the script obligation was “neutral and generally applicable”—but the clause would impose strict scrutiny if the school permitted “individualized exemptions.”²⁴⁰ This is yet another example of the importance of Step 3 in protecting the rights of dissenting university students.

Only after considering these inquiries, however, should the Tenth Circuit have proceeded to the fourth and final step in the proposed analysis. And even then, the court should have applied a more potent version of *Hazelwood* scrutiny that accounted for the nature of the university and the adult students that study there. These analytical errors aside, the court properly concluded that Axson-Flynn was entitled to a trial because there was sufficient evidence for a jury to conclude that the script mandate was motivated by religious animus.²⁴¹ The outcome of the script requirement would then have been resolved at trial. If the jury trusted Axson-Flynn, the curtain would close, so to speak, but if the jury believed the university, the show would go on.

Applying the proposed framework to the foregoing hypotheticals and cases reveals that the real potency of the proposed model exists in the first two steps. Indeed, Lauren and Abigail would likely have lost if their respective universities had needed only to produce any “legitimate pedagogical” interest. Likewise, the Sixth Circuit probably would have granted summary judgment to the plaintiff in *Ward* given the university’s concession that it could not survive strict scrutiny. Even if there were genuine factual issues to be resolved by a jury, the proposed model would have drastically improved Ward’s chances of prevailing at trial by raising the university’s burden significantly. Finally, the proposed model would have had little effect, if any, upon the appellate decision or any subsequent trial in *Axson-Flynn*, given the unique nature of the University of Utah’s curricular speech assignment. However, what cannot be gainsaid is the effect this framework would have on the litigation expectations of both students and universities by effectively reversing the presumption of deference (i.e., away from the university). Adoption of this framework would produce a seismic shift in expectations, with the result that public universities would have to tread more carefully when they require

²⁴⁰ See *id.* at 1294–95; 1297–98 (discussing the appropriate level of scrutiny to apply to the plaintiff’s claim under the free exercise of religion clause, and finding that a rule that is discriminatorily motivated is not a rule of general applicability; that even if the rule is one of general applicability, it may still require strict scrutiny if it falls under one of two exceptions: a hybrid rights exception, for which a plaintiff must demonstrate a “fair probability or a likelihood” of success on an accompanying constitutional claim, and an individualized-exemption exception, for which a plaintiff must demonstrate that she is forced to choose between “following the precepts of her religion” and complying with a legal requirement).

²⁴¹ See *id.* at 1293 (concluding that “[v]iewing the evidence in a light most favorable to Axson-Flynn, . . . there [was] a genuine issue of material fact as to whether Defendants’ justification for the script adherence requirement was truly pedagogical or whether it was a pretext for religious discrimination. Therefore, summary judgment was improper.”).

students to advocate for potentially offensive ideological positions. And if colleges were to tread on such shaky constitutional soil, they could anticipate more settlements, summary judgments, and jury verdicts . . . in favor of the objecting students.

CONCLUSION

When a public university uses its curriculum to force a student to affirm an ideology that the student finds personally offensive, that assignment must be subject to the strictest judicial scrutiny. The Supreme Court directly affirmed this position in *Barnette* and expanded the doctrine in *Wooley* to include even apparent affirmations of belief. The Court has further confirmed this high standard in other cases—cases in which a citizen forced to profess a belief claimed violations of the Free Exercise Clause, the Establishment Clause, and the freedom of association. Moreover, the foundational principles supporting the First Amendment yield a similar conclusion: the opinions of men are presumed to lie beyond the state's power to control.

Even when a public university does not purposefully employ its curriculum to coerce students, it may still trigger heightened constitutional review. Forced disclosures of fact or opinion can easily tread upon, among other rights, the rights of association, privacy, due process, and religious freedom. Historically, official mandates that activate one of these freedoms have faced close judicial scrutiny.

A few courts, namely the Sixth, Tenth, and Eleventh Circuits, appear to have reversed this presumption in favor of a more lenient standard that overtly defers to the curricular decisions of public educators. However, the justifications for more deferential standards are simply unpersuasive. Students who choose to attend state universities do not waive their rights under the compelled speech doctrine any more than they waive other First Amendment freedoms. In addition, a blanket application of *Hazelwood* to compelled curricular speech claims ignores the fundamental differences between compelled speech and compelled silence. Such overbroad use of this test also overlooks the fundamental differences in the constitutional protection afforded to minors in grade schools and adults in universities. Likewise, those who prophesy that demanding scrutiny will doom public education fail to understand the distinction between permissible comprehension and unconstitutional affirmation. Finally, any presumption that judges are incompetent to review academic decisions simply does not apply when state educators compel affirmation of belief.

Overall, these objections fail because they miss the larger picture. While a state university provides an education, it is ultimately an arm of the gov-

ernment, and the Constitution imposes fundamental limitations on that entity's power.²⁴² When the state tries to compel citizens to adopt its views as orthodox, it "invades the sphere of the intellect and spirit which . . . [is] reserve[d] from all official control."²⁴³ This is true whether the government official is a prince, a president, or a professor. We recognize this principle when officials violate the rights of those driving in cars and marching in parades. It is time to recognize anew that this principle also covers those studying in the college classroom. The one fixed star in our constitutional constellation demands no less.

²⁴² See *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring) ("The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State . . .").

²⁴³ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (finding that the State requirement of a "flag salute and pledge" violated the First Amendment).