INTRODUCTION

Courts and commentators have failed to clearly articulate the constitutional meaning, if any, of West Virginia State Board of Education v. Barnette's holding that "[n]o 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." As one scholar put it, Barnette's prohibition has produced "a jurisprudence of deception and inconsistency" that "has become renowned for its haphazard quality."
Part of the latter half of the proscription—the state cannot "force citizens to confess by word . . . their faith therein"—established itself in the constitutional doctrine. The First Amendment's ban on compelled ideological speech is now undisputed. The proscription as a whole resonates with and supports various constitutional doctrines but those doctrines remain opaque and unstructured, and with the exception of the most egregious cases, the outcomes of the cases governed by this proscription vary widely. By reexamining the proscription as a whole, and identifying what exactly it proscribes, these divergent constitutional doctrines may be interpreted more coherently.

Much confusion has arisen out of commentators' and courts' failure to recognize that the state "prescribing what shall be orthodox" is not equivalent to the state offering an ideological position. Orthodoxy is not to be questioned and debated, and the state can take and espouse an ideological position without prescribing that position as orthodoxy. Prescribing orthodoxy occurs when the state attempts to coerce—as opposed to persuade or engage in a dialogue with—citizens into believing particular ideological views.

Coercion of ideological belief is not limited to use of criminal punishments and significant fines, as might be assumed. Rather, it consists of any intentionally nonrational method of changing a person's ideological beliefs. This includes, for example, offering tax or other benefits to those who endorse the correct ideological belief. The state may offer a thousand dollars to every citizen who agrees premarital sex is wrong or, alternatively, revoke the driver's licenses of the citizens who disagree with that claim. In both cases, the state attempts to coerce citizens into endorsing an ideological belief by offering a material incentive for adopting the belief. While most would agree such cases would violate citizens' right to private conscience—the right that prohibits the state from prescribing orthodoxy—it is far from obvious which constitutional rules determine that outcome.

---

3 See Barnette, 319 U.S. at 642.

4 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding it unconstitutional for states to require newspapers to print a reply to their political criticisms); Wooley v. Maynard, 430 U.S. 705 (1977) (holding that the state cannot require citizens to distribute its ideological messages).

Coercion can also rely on psychological irrationalities. Propaganda, for example, is misleading, deceptive or emotionally-charged expression that seeks to alter citizens' ideological beliefs by deploying impressive images, heuristic frames and vague, emotional slogans, while at the same time limiting and obscuring access to information.\(^6\) Monopolizing a market for ideological information, which ensures citizens are exposed primarily to one ideological perspective, is also coercive, as it attempts to change citizens' beliefs by shouting down other perspectives, leaving the citizen with limited information and potentially, with the false impression that a consensus among private individuals has developed.

This prohibition on prescribing orthodoxy, articulated most famously in \textit{Barnette}, arises from numerous constitutional principles: the right to free speech, the freedom of conscience and privacy protected by the First, Ninth and Fourteenth Amendments, and the guarantee of a republican form of government.\(^7\) Prescribing orthodoxy involves the state, elected to represent the public and use public resources, manipulating and distorting the ideological marketplace for the purpose of invading the minds of its citizens. This fails to treat citizens as free and autonomous, and essentially appoints the state itself as the supreme judge of ideological truth, reproducing its ideological views in the citizenry by deploying coercion.

Interpreting coercion broadly, rather than narrowly, not only prevents the state from engaging in acts a liberal democracy cannot legitimately engage in, but also gives the right to private conscience room to breathe. When the state purposefully uses its powers to mold citizens'

\(^6\) As one communications scholar put it, "[propaganda] poses as genuine information and knowledge, when, in fact, it generates little more than ungrounded belief and tenacious convictions ... it skews perceptions; it systematically disregards superior epistemic values such as truth, understanding and knowledge; and it discourages reasoning and a healthy respect for rigor, evidence and procedural safeguards." Stanley B. Cunningham, \textit{Responding to Propaganda: An Ethical Enterprise}, 16 J. Mass Media Ethics 138, 139 (2001).

\(^7\) The Supreme Court has not clarified when courts may enforce this clause. See, e.g., Reynolds v. Sims, 377 U.S. 533, 582 (1964) (holding "some questions raised under the Guarantee Clause are nonjusticiable"); Ohio ex rel. Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 79-80 (1930) (holding clause enforceable by the political branches). Scholars have argued for a reconsideration of the tendency for the courts not to enforce the clause on this basis. See, e.g., Erwin Chemerinsky, \textit{Cases Under the Guarantee Clause Should Be Justiciable}, 65 U. Colo. L. Rev. 849 (1994); Laurence Tribe, \textit{American Constitutional Law} 398 (2d ed. 1988); John Ely, \textit{Democracy and Distrust: A Theory of Judicial Review} 118-19 (1980). Regardless, in this context, it can be used to illuminate the scope of the right of private conscience, a right clearly enforced by the courts.
ideological beliefs, even in subtle ways, citizens may self-censor and conform their beliefs to the state ideology out of fear of official punishments.

Part I will iterate the theory underlying the article, namely that prescribing orthodoxy consists in the government acting coercively—intentionally relying on nonrational methods—to purposely shape citizens' ideological beliefs.

Part I will then examine the first major way that the government may prescribe an orthodoxy: by imposing unconstitutional conditions. Conditions—benefits or penalties—imposed on the basis of citizens' ideological beliefs are unconstitutional if they are intentionally imposed for the purpose of changing citizens' minds. Attempting to buy citizens' ideological allegiance deploys a nonrational method to produce ideological conformity. The doctrine's germaneness requirement provides the government a chance to offer a different justification for an ideologically-based condition. For example, requiring citizens in the President's cabinet to embrace an ideology similar to the President's is germane to the legitimate governmental purpose of running a representative democracy.

Part II will apply this understanding of the Barnette proscription to the second major way the government can prescribe an orthodoxy: through its speech. Though the Supreme Court has recently stated in dicta that the government's speech is unrestrained, a close study of the doctrine reveals a more complicated picture. Drawing on these cases, I

---

8 See, e.g., Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 59 (2006) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.").

9 See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 725 (1996) (stating the government may condition employment on ideological beliefs only when it is germane to a legitimate government purpose).


PRESCRIBING ORTHODOXY

will argue that while the government speaking ideologically does not itself pose a constitutional problem, the government may use its speech to unconstitutionally prescribe an orthodoxy. The government inserting its speech into citizens' private ideological speech, requiring captive citizens to listen to its ideological speech, forcing private citizens to distribute its ideological message and the issuance of propaganda are all government speech acts that work coercively on citizens' ideological beliefs.\footnote{See infra Part II.}

Understanding these various constitutional doctrines in light of a broader ban on prescribing orthodoxy clarifies much of the extant doctrinal confusion.

I. UNCONSTITUTIONAL CONDITIONS

The ban on the coercion of ideological belief arises from the structure of the government delineated in the Constitution, not only its guarantee of a republican,\footnote{U.S. CONST. art. IV § 4.} as opposed to authoritarian, form of government, but also its requirement that the government not abridge citizens' free speech or free exercise of religion. Further, of the rights reserved to the People, the right of private conscience, insofar as it affects only the right to believe in particular ideologies as opposed to the right to act on those beliefs, is a well-established, fundamental right.\footnote{See, e.g., Stanley v. Georgia, 394 U.S. 557 (1969).}

The more specific constitutional doctrines governing the ban on prescribing orthodoxy are largely unstructured, and have produced a great deal of confusion in the courts and among commentators.\footnote{See infra Parts I.B-C, II.} Interpreting them in light of this overriding principle provides much-needed ideological message, which violates right of private conscience); Anderson v. Martin, 375 U.S. 399 (1964) (government speech on the ballot violates the equal protection clause).
coherence. The relevant doctrines include: government speech;\(^{17}\) the subsidization of private speech;\(^{18}\) unconstitutional conditioning\(^{19}\) of a benefit or a penalty on certain ideological speech or beliefs; compelled ideological speech;\(^{20}\) and the right of private conscience.\(^{21}\) In surveying these doctrines, many of which are fractured and unprincipled, I will focus on the elements of the opinions that can be tied together coherently to construct a constitutional prohibition on prescribing orthodoxy.

A. Coercion

The Court has stated, "an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."\(^{22}\) The Court has struggled, however, to define what qualifies as coercion.\(^{23}\)

Coercion is an irreducibly normative concept\(^{24}\) and it depends on the rights and relative status of the parties involved in the act. Coercion has long been understood in contrast to persuasion, which is an attempt to change people's minds through argument or rhetoric.\(^{25}\) Social scientists have found that brainwashing, propaganda and similar manipulations are coercive rather than persuasive.\(^{26}\)

In the context of the state and citizens' right to private conscience, the threshold for coercion is relatively low. If the state offers nonratio-

---


\(^{23}\) Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1433-42 (1989) (covering the unconstitutional conditions doctrine's various understandings of the coercion of individual constitutional rights).

\(^{24}\) Id. at 1442-43, 1446-50; see also Mitchell N. Berman, Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions, 90 Geo. L.J. 1, 17 (2001); Penny Powers, Persuasion and Coercion: A Critical Review of Philosophical and Empirical Approaches, 19 HEC FORUM 125, 125 (June 2007).

\(^{25}\) Powers, supra note 24, at 125.

\(^{26}\) Id. at 132 (stating such methods have been defined by social scientists as coercion or "destructive persuasion").
nal inducements in order to change the ideological views of citizens, then it acts coercively.

In attempting to coerce ideological belief in citizens, the state may deploy different forms of inducements. The most obvious is material penalties—imposing financial, legal or other penalties on people who hold the wrong ideological views—and, conversely, rewarding those who hold the favored ideological views with material benefits. In other words, fining, imprisoning, or depriving citizens of a right if they adopt or espouse the wrong views; paying or offering a benefit to those who adopt the right views. These material inducements—from imprisonment to minor payments—exercise coercive force on people’s beliefs because they seek to change minds not through persuasion, but by making it in people’s material interest to change their minds.27

A more invidious type of inducement is psychological. Psychological inducement involves the state attempting to manipulate people’s minds for the purpose of citizens adopting the state’s favored ideological views. For example, the state requiring citizens to take oaths or pledges affirming the favored views, attend counseling that aims to rid them of their erroneous beliefs, listen to rallies or lectures espousing the right views, and bombarding citizens with propaganda, are all methods which deploy psychologically coercive tactics in order to change citizens’ ideological beliefs.

Prescribing orthodoxy, understood as coercion aimed at producing particular ideological beliefs, in its extreme form can become like “the massive public indoctrination programs used in Chinese society during the Cultural Revolution.”28 It may include propaganda, “oral recitation, public confessions, personal diaries, required reading and group discussion,” as well as the “controlling [of] the content and supply of information.”29

27 As the Court has explained,

[Justice Brennan] analyzed the impact of a political patronage system on freedom of belief and association. Noting that in order to retain their jobs, the Sheriff’s employees were required to pledge their allegiance to the Democratic Party, work for or contribute to the party’s candidates, or obtain a Democratic sponsor, he concluded that the inevitable tendency of such a system was to coerce employees into compromising their true beliefs.


28 Powers, supra note 24, at 134.

29 Id.
The constitutional prohibition on prescribing orthodoxy lacks clear grounding in the law in part because courts have had few occasions to address it holistically. Prescribing orthodoxy has occurred most notably in public grade schools. The debate over whether public schools can inculcate values in their charges has been well-explored, but not resolved. The resolution of that tension is not likely to illuminate the general question, though, as children have diminished constitutional rights; a state action that is permissibly exercised against children may be unconstitutionally invasive if exercised against adults.

The constitutional prohibition on prescribing orthodoxy is particularly muddled in the Court doctrine. In some contexts—the government's own ideological speech, for example—it is difficult to separate an act of ideological coercion from a legitimate government act. While the Court has developed rules to separate the two—the most important being the germaneness requirement extant in many of the doctrines to identify when the state acts with the illegitimate purpose of mind control—the failure of the Court to recognize the underlying principle has resulted in confusing legal doctrine. A lack of rigorous analysis on the less obvious ways that the state can coerce ideological beliefs has only compounded the problem.

This Article, though arguing for a broad understanding of coercion when it comes to the state deploying force for the purpose of altering citizens' ideological views, stops well short of the more expansive interpretations backed by some scholars. Abner Greene, for example, argues that the state cannot espouse ideological views that support the current administration or ruling party. Robert Kamenshine's classic article, arguing for an implied political establishment clause similar to the relig-

---


32 Abner S. Greene, Government of the Good, 53 VAND. L. REV. 1, 37-38 (2000) (arguing additionally that the state cannot speak in a way that "favors views extolling the virtues of a
ious establishment clause, claims that the state taking stands on political issues is generally impermissible. If these positions were to fit into the paradigm in this Article, it would have to be argued that the state merely espousing controversial ideologies exercises coercion over its citizens. That is not persuasive. Additionally, it misses the point of Barnette’s proscription. Respecting a citizen’s right of private conscience does not preclude a dialogue or engagement with the state; it simply precludes the state from deploying coercive methods to change citizens’ ideologies.

The unconstitutional conditions doctrine dictates that the state cannot use its resources to deprive citizens of their constitutional rights. As the Court recently wrote, “[t]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.”34 The scope of this doctrine, however, is unclear.35 The use of direct penalties to mold citizens’ ideological beliefs is paradigmatically proscribed by the First Amendment. It is widely agreed that the state cannot, consistent with the Constitution, imprison a citizen or fine her for expressing or believing in particular ideological speech. That much is clear. The growth of the state apparatus, however, has made it easier for the state to use its vast resources to shape its citizens’ ideological beliefs in ways much less obvious, but no less illegitimate.

B. Employment, Government Contracts and Other Benefits

One area in which the doctrine is clear, at least in principle, concerns the use of government employment—including “promotion, transfer, recall, and hiring decisions”36—as well as government contracts,37 to induce ideological beliefs by requiring that the recipients of those positions or contracts hold particular ideological beliefs. The

35 Id. (writing that the Court did not have to decide the scope of the doctrine in this case); see also Oren Bar-Gill & Omri Ben-Shahar, Credible Coercion, 83 TEX. L. REV. 717, 769 (2005) ("[D]espite its broad application and correspondingly great practical importance, courts and scholars have yet to agree on the theoretical underpinnings of the unconstitutional conditions doctrine.").
36 O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 724 (1996).
37 Id.
practice falls under "the rule of cases like [West Virginia] Board of Education v. Barnette, that condemn the use of governmental power to prescribe what the citizenry must accept as orthodox opinion." Accordingly, the Court has "settled" that making any of these benefits contingent on a person’s political affiliation or beliefs "would impose an unconstitutional condition on government employment" or contracts.

As in other arenas, the germaneness requirement serves to adjudicate between a legitimate government function and the attempt to use coercion to mold citizens’ ideological beliefs. Only when “political affiliation is an appropriate requirement for the effective performance of the task in question," can the government condition the job or contract on citizens’ political beliefs.

The Court interprets the germaneness requirement in a way that precludes the state from expanding job descriptions for the purpose of coercing particular ideological beliefs. In one case, for example, the Court held that an assistant public defender could not be dismissed for his political affiliations because his duty was only to “represent individual citizens in controversy with the State.” His duty did not include a broader conception of, say, seeking justice that might justify his having a particular political affiliation or belief.

This same logic may be extended to other material benefits. Although the Court’s doctrine is muddled on this point, it has stated that membership in the bar—the right to practice law—cannot be con-

39 O’Hare Truck Serv., Inc., 518 U.S. at 720; see also Cole v. Richardson, 405 U.S. 676, 680 (1972) (“Nor may employment be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities such as the following: criticizing institutions of government; discussing political doctrine that approves the overthrow of certain forms of government; and supporting candidates for political office.”); Keyishian v. Bd. of Regents, 385 U.S. 589, 606 (1967) (holding state cannot condition public teacher employment on lack of membership in political parties that advocate unlawful means); Baggett v. Bullitt, 377 U.S. 360, 373-74 (1964) (holding state cannot require the taking of a vague political oaths as a condition of public employment); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 287 (1961) (holding state cannot require the taking of a vague political oaths as a condition of public employment).
40 O’Hare Truck Serv., Inc., 518 U.S. at 725 (internal citations omitted).
41 Branti, 445 U.S. at 519.
42 See, e.g., Theresa Keeley, Comment, Good Moral Character: Already an Unconstitutionally Vague Concept and Now Putting Bar Applicants in a Post-9/11 World on an Elevated Threat Level, 6 U. PA. J. CONST. L. 844, 847-57 (2004) (covering the Court’s bar cases and detailing the confusion and contradictions in the doctrine).
conditioned on a person's ideological views. Because most states require bar members to have "moral character," admission to the bar has been a tool ripe for ideological coercion. As the Court opinions have stated, the character requirement should be limited to determining an applicant's ability to engage in the actions required for the ethical practice of law. States, however, have used the character requirement to prohibit those with the wrong ideological beliefs from practicing. This essentially denies them an important material benefit—a license to practice law—in an attempt to coerce people to adopt the right ideological beliefs.

In *Baird v. State Bar of Arizona*, the plurality opinion explained the constitutional principle behind limiting the bar requirements to a person's willingness to engage in the appropriate actions. The Court wrote, "[t]hus the [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute . . . . This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience."46

The *Baird* opinion rejected Arizona's refusal to admit Ms. Baird to the bar because she would not respond to a question asking her whether she had ever been a member of the Communist Party. In an earlier case, *Schware v. Board of Bar Examiners of New Mexico*, the Court held that the state could not prevent a person from joining the bar on account of his "political faith" in the Communist Party. In *Baird*, the Court went further and concluded that the state could not even inquire into a person's ideological beliefs without a legitimate justification, writing, "[a]nd whatever justification may be offered, the state may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."49

---

43 *Baird v. State Bar of Ariz.*, 401 U.S. 1, 5-6 (1971) (stating political views cannot be considered in judging a person's aptitude for the bar).


45 *Id.*

46 *Baird*, 401 U.S. at 5-6 (internal quotations and citations omitted).

47 *Id.* at 5-9.


49 *Baird*, 401 U.S. at 7; *see also* Speiser v. Randall, 357 U.S. 513, 535-36 (1958) (Douglas, J., concurring) ("What one thinks or believes, what one utters and says have the full protection of the First Amendment. It is only his actions that government may examine and penalize.").
The reason for this is a chilling effect on ideological speech and beliefs. When the state makes "inquiries into these protected areas," the Baird Court wrote, "as Arizona has engaged in here, [it] discourage[s] citizens from exercising rights protected by the Constitution." As a result, states must demonstrate that such inquiry is necessary to a legitimate state interest. Notably, a legitimate state interest does not include the determination and regulation of citizens' ideological beliefs.

C. Subsidies

Abner Greene suggests that the state cannot act coercively with its funds. Regarding National Endowment of the Arts' (NEA) subsidies provided on the basis of, among other things, whether the art was decent, he asks:

If some artists shift their work from indecent to decent, from dissenting to mainstream, should we say they were coerced into doing so? Even if their only source of funds was from the NEA, should we say that such economic pressure is tantamount to coercion? This seems an improper extension.

This logic overlooks the fact that an act can be coercive without being compulsive. The state, for example, could issue fifty-dollar fines for those artists who produced indecent art. This would constitute an attempt to coerce the creation of decent art even though, given the fine's small size, it would not likely result in most artists ceasing the production of indecent art. The fine for producing indecent art, as well as the

50 Baird, 401 U.S. at 6.
51 Id. at 6-7; see also Whalen v. Roe, 429 U.S. 589, 600 n.25 (1977) (constitutional interest in keeping certain matters private from the government); Aid for Women v. Foulston, 441 F.3d 1101, 1116-17 (10th Cir. 2006) (constitutional right of privacy also dictates that the government must have a compelling justification to inquiry into personal information); Anderson v. Blake, 469 F.3d 910, 914 (10th Cir. 2006) (same).
52 See also Sweezy v. New Hampshire, 354 U.S. 234, 249-50 (plurality opinion) (holding the investigation of a professor's political beliefs unconstitutional).
53 This is also the position of Justice Scalia, who has written, "The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that—unlike direct restriction or prohibition—such a denial does not, as a general rule, have any significant coercive effect." Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting).
54 Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (addressing the constitutionality of NEA subsidies allocated partially on whether the art was decent).
55 Greene, supra note 32, at 47.
offer of funds for producing decent art, applies economic pressure in order to control the viewpoint expressed in private art. Economic pressure, depending on the magnitude of it, can be more coercive than a threat of, say, a misdemeanor conviction.

The right conception of acting coercively, in this context, is whether a state act intentionally seeks to change citizens' ideological positions through nonrational factors. A citizen changing her ideological views to the state's prescribed views in order to acquire a financial subsidy certainly fits that description. Furthermore, the state conditioning a government contract on a citizen's ideology—clearly prohibited by the Court doctrine—cannot be distinguished from conditioning a subsidy on a citizen's ideology.

The *Baird* plurality's statement that the state may not use benefits to try to change citizens' ideological beliefs is important because it entails an endorsement of a broad understanding of coercion. In dealings between private citizens, in normal circumstances, offering a benefit in exchange for endorsing or renouncing a particular ideology would not be thought of as coercion. A private citizen could enter a deal with another citizen where each time the citizen voiced a particular ideological sentiment she was "fined" five hundred dollars. The poorer the citizen, the more coercive this deal would seem. However, the balance of power between the state and the citizen is so disparate, and marked by the constitutional obligation to respect a citizen's right of private conscience, as to alter the bar as to what counts as coercive. When such an ideologically based deal is offered from the state—say, for the benefit of property tax exemptions—it is coercive.

Subsidizing citizens, like fining them, for engaging in particular ideological speech is doubly coercive. First, it exercises a materially coer-

---

56 Indeed, the Court has written that "to contribute money to be used to further policies with which they do not agree . . . had been recognized by this Court as "tantamount to coerced belief." Rutan v. Republican Party, 497 U.S. 62, 69-70 (1990) (emphasis added). The Court has also stated that "[t]he coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job," Branti v. Finkel, 445 U.S. 507, 516 (1980) (emphasis added), and "Elrod and Branti establish that patronage does not justify the coercion of a person's political beliefs and associations." O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 718 (1996) (emphasis added). More generally, the Court has held, "[o]ur precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." Turner Broad. Sys. v. FCC, 512 U.S. 622, 642-43 (1994).

57 The greater the need for the subsidy, the more coercive this is. For example, being required to work spreading a particular ideological message in order to receive welfare assistance.
cive effect on the citizen-speakers as it pays or fines people for endorsing a particular ideology and thus provides a potentially valuable reward or financial punishment for engaging in one vein of ideological speech. It is not rational to believe in an ideology because one was paid to believe it. Second, subsidizing citizens exercises a psychologically coercive effect on the citizen-audience because it distorts the private ideological marketplace toward the government-approved ideological view.58

There are two classes of subsidies. First, there are direct subsidies that fund private speech of a particular ideological viewpoint, such as offering funds for library books endorsing a Republican, but not Democratic, perspective. Second, indirect subsidies give citizens a benefit, such as property tax exemptions or unrestricted cash payments, if they express or endorse a particular type of ideological speech.

While both classes of subsidies are coercive of citizens’ ideological beliefs, only the doctrine of direct subsidies is muddled. The indirect subsidy gives unrelated rewards to citizens with certain ideological views and thus transparently aims to coerce citizens into adopting a particular belief. Accordingly, the Court has recognized it as unconstitutional. The direct subsidy—offering funding for private speech expounding a particular ideological view—on the other hand, is easily confused with legitimate government speech and the funding of private speech on nonideological criteria. The Court doctrine has thus far failed to offer a principled approach to judging the constitutionality of direct subsidies.

i. Indirect Subsidies

In one of the earlier subsidy cases, Hannegan v. Esquire, Inc., a federal statute granted a cheaper postal rate to periodicals that contained “information of a public character, or [was] devoted to literature, the sciences, arts, or some special industry.”59 The Postmaster General interpreted this statute to include a determination of which periodicals would serve the public good, and Esquire sued when the Postmaster determined that Esquire did not meet this requirement. The Court held that the statute included the power to determine which periodicals contained these subjects, but it did “not include the further power to determine whether the contents meet some standard of the public good

or welfare" because such a power "smacks of an ideology foreign to our system."

Hannegan was decided as a statutory interpretation case, and the constitutionality of affording a postal subsidy to "good" publications was not addressed. However, the Court later referred to Hannegan as if it established a constitutional principle prohibiting Congress from using the "withdrawal of mailing privileges [to] place limitations upon the freedom of speech which if directly attempted would be unconstitutional." The subsidy in Hannegan was indirect as it offered mailing discounts rather than direct funding for the production of the magazines with the right views.

In Speiser v. Randall, the Court addressed another indirect subsidy when it held that the state could not, consistent with the Constitution, withhold property tax exemptions for citizens who engaged in anti-American speech. The Speiser Court wrote, "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." Following Speiser, in Arkansas Writers' Project v. Ragland, the Court held that granting a sales tax exemption to magazines that published on "religion, sports, and professional and trade matters"—but not to magazines that published on other topics—was unconstitutional. It found that the state "has advanced no compelling justification for selective, content-based taxation of certain magazines and the tax is therefore invalid under the First Amendment." Giving a sales tax exemption to a content-based segment of the press skews the marketplace of ideas toward certain subjects and provides a material incentive for writers to enter that segment of the market. It would only aggravate the offense if the tax distinctions were ideologically, rather than subject, based.

---

60 Id. at 158-59.
61 Id. at 158.
63 Id.
64 Id.
66 Id. at 232.
67 Id. at 234.
68 In contrast, general taxes that happen to fall on expressive activities are permissible because they are ideologically-neutral and thus do not run the risk of distorting the ideological marketplace or applying material pressure on citizens to adopt particular ideological views. Leathers v. Medlock, 499 U.S. 439, 449 (1991).
It is important to note that rewarding citizens for engaging in particular private expressions—granting a sales tax exemption to particular magazines in *Arkansas Writers' Project*, for example—is often functionally indistinguishable from fining other views in that market. If the state wishes to skew the ideological marketplace, it could impose a special sales tax on Republican magazines or grant a sales tax exemption to Democratic magazines and reach similar results. Yet, because of their closer relationship with the funding of legitimate government speech and because they are most likely perceived as inherently less coercive, indirect subsidies, even indirect ones, present the thornier area of the doctrine. In contrast, it is rare, if ever, that taxing or fining particular ideological speech or beliefs will seem legitimate. However, indirect subsidies, as opposed to direct subsidies, have been consistently struck down.69

ii. Direct Subsidies

In *Speiser*, the state revoked all general tax exemptions for those citizens who expressed or held anti-American views.71 Its clear purpose in doing so was to suppress the expression of bad ideologies among private parties.72 In *Rosenberger v. University of Virginia*, a public college created an activities fund for the purpose of distributing the money to a wide variety of student groups.73 The school then denied monies out of this fund to a student group on account of the group’s Christian viewpoint.74 The Court conceived of this fund, which was designed to enable students to engage in a wide variety of private association and expression, as a metaphorical limited public forum.75 Accordingly, the Court held that the school violated the Christian group’s rights when it denied them funding on the basis of the group’s ideological viewpoint.76

Both these cases—the former an indirect subsidy and the latter a direct subsidy—illustrate the twofold coercive nature of illegitimate

---

69 The reason for this is likely because the status quo is usually privileged as the proper baseline. A ten-thousand dollar fine for a Republican speech is likely seen, for example, as more coercive than a ten-thousand dollar payment for a Democratic speech. Both have coercive effects; it is most likely assumed that the former is worse as it is more likely to put someone in an untenable position.

70 See Parts I.C.i.-ii.
72 *Id.* at 518.
74 *Id.* at 823-28.
75 *Id.* at 830.
76 *Id.* at 831-37.
funding. First, illegitimate funding distorts the ideological marketplace by funding private ideological speech except for one selected viewpoint, thereby making it appear to the audience as if the market itself excluded or marginalized that particular ideological view. For example, in 

Rosenberger, the school excluded a student magazine from the general fund because of its Christian viewpoint; this would falsely lead other students to believe that there is less support among students for the Christian viewpoint, and it would also mute the Christian viewpoint in the college community, putting it at a disadvantage vis-à-vis other viewpoints at the school. Second, illegitimate funding exercises coercion by providing a material incentive for speakers to avoid adopting that viewpoint. The students who wished to run the Christian magazine would be able to get funding for adopting any other viewpoint for their magazine, and thus they would feel material pressure from the state to abandon their particular ideological viewpoint in favor of another. Similarly, the citizens in Speiser would be pressured to abandon their anti-American ideologies in order to qualify for the general tax exemptions.

The metaphorical public forum of funding occupies one end of the direct subsidy spectrum. On the other end is the state funding a private individual to deliver the state’s message. This is not coercive as long as it is disclosed as the government’s message, and arises in the course of a legitimate government purpose, such as voicing the government’s stance. Under such circumstances, it does not falsely shape the ideologi-

---

77 See, e.g., Gregory Klass, The Very Idea of a First Amendment Right Against Compelled Subsidization, 38 U.C. Davis L. Rev. 1087, 1089-91 (2005) (arguing the skewing of the marketplace should be the primary concern with regard to determining the constitutionality of compelled subsidies).

78 Rosenberger, 515 U.S. at 823-28.


80 As the Court explained it, "[u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).
cal marketplace\textsuperscript{81} or provide material incentive for individuals to \textit{personally} adopt particular ideological beliefs. Offering citizens monies to voice particular ideologies in their own voice, in contrast, has no purpose other than to induce, with the incentive of money, citizens to adopt an ideological view. That purpose is wholly illegitimate.

\textit{Rust v. Sullivan}, for example, involved a challenge to a federal program that funded family planning services and specifically excluded those providing the services from recommending or suggesting abortion as a method of family planning.\textsuperscript{82} The Court rejected the complaint and later explained:

The Court in \textit{Rust} did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained \textit{Rust} on this understanding. We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like \textit{Rust}, in which the government “used private speakers to transmit information pertaining to its own program.”\textsuperscript{83}

In contrast, in \textit{Legal Services Corp. v. Velazquez},\textsuperscript{84} the federal government funded lawyers to represent indigent clients with the proviso that the lawyers could not challenge the constitutional validity of applicable statutes in the course of those cases.\textsuperscript{85} The Court invalidated this restriction on the grounds that lawyers were speaking on behalf of their private clients, and thus restricting their speech in that capacity falsely distorted their speech in order to favor the government’s position.\textsuperscript{86} In other words, if a government funds private speech, especially when it is of an ideological nature, it cannot then place particular viewpoint limitations on it, thereby skewing the ideological marketplace,\textsuperscript{87} and provid-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{81} Lee, \textit{supra} note 79, at 997-1005 (detailing social science evidence on how government failing to reveal its status as author distorts the marketplace of ideas and gives people the impression that a particular view is more supported than it is).
  \item \textsuperscript{83} \textit{Legal Servs. Corp. v. Velazquez}, 531 U.S. 533, 541 (2001) (internal citations omitted).
  \item \textsuperscript{84} \textit{Id.}
  \item \textsuperscript{85} \textit{Id.} at 536-40.
  \item \textsuperscript{86} \textit{Id.} at 542-49.
  \item \textsuperscript{87} \textit{See, e.g., Robert Post, Subsidized Speech}, 106 \textit{Yale L.J.} 151, 154-64 (1996) (arguing that the government cannot distort public discourse through subsidies).
\end{itemize}
\end{footnotesize}
ing material incentive for citizens to personally adopt particular ideologies.

The line between the government using private parties to deliver its own message, and subsidizing private parties' delivery of their own private messages is not always clear. Federal circuits have split over the constitutional status of states providing specialty license plates to a wide variety of groups and then denying one group the ability to have a specialty plate because of the viewpoint of its proposed slogan. The specialty license plates, given the wide variety of slogans available, are best conceived of as a subsidized forum for private speech, much like the activities fund in *Rosenberger*.

A case in the Fourth Circuit illustrates how the government can use subsidies of private speech to distort the ideological marketplace. South Carolina generally allowed nonprofits to apply for specialty license plates displaying their logos. When the South Carolina legislature circumvented the normal process and passed a statute authorizing a "Choose Life" specialty license plate, but not a pro-choice plate, Planned Parenthood filed suit, claiming this violated their First Amendment rights.

The Fourth Circuit held that the special "Choose Life" license plate was "mixed" speech—both private and government—and found in Planned Parenthood's favor, conceiving the situation as the state creating a forum for private speech, and then inserting its own speech into that forum without making clear that the speech was the government's. The court so held in large part because the state passed a law to authorize it. The court explained the unconstitutional distorting effect of such cloaked government speech:

> The government speech doctrine was not intended to authorize cloaked advocacy . . . . *T*he State's role in promoting the Choose Life message is obscured from the public. When a certain viewpoint dominates a speech forum, it should be clear to the public whether

---

88 Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (determining whether a monument donated to the government by a private party and kept permanently in a public park was government or private speech).


91 Id.
that dominance reflects the prevailing view or whether it results from a government restriction. . . . Those who see the Choose Life plate displayed on vehicles, and fail to see a comparable pro-choice plate, are likely to assume that the presence of one plate and the absence of another are the result of popular choice. . . . The State can thereby mislead the public into thinking that it has already won support for the position it is promoting.92

This distortion not only reflects a subtle but real form of coercion, but also occurs whether one conceives of the situation as the government covertly subsidizing private parties to deliver its message, or the government subsidizing private speakers to deliver a particular ideological message in an open forum. When the state hosts a wide variety of private messages on its license plates, and then specially authorizes one private message without declaring its role in doing so, the state has created a public forum and then secretly manipulated the forum in favor of its own ideological view.

Academic freedom as a constitutional value serves, among other functions, this same function—to shield against the government secretly coercing the marketplace of ideas.93 It prohibits the state from dictating the content of professorial speech even though the state directly funds public college professorial speech. The Court has not fully addressed the scope of academic freedom as a constitutional right, but at a minimum, it protects professorial speech and research—which is the private speech of the individual professor, not the school94—from the external ideologically driven interference of the state. This is in no small part

92 Id. at 795-98; see also Kidwell v. City of Union, 462 F.3d 620, 627 n.1 (6th Cir. 2006) (Martin, J., dissenting) ("[T]he government, when it speaks, ought to be required to make clear that it is in fact the government that is speaking. Government speech ought to be labeled as such to prevent confusion and subliminal governmental propaganda in the marketplace of ideas.").

93 See, e.g., Healy v. James, 408 U.S. 169, 180-81 (1972) ("We break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."); see also Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

94 As one court wrote in a similar context,

[to argue that every volume on the shelves of a public school library bears the imprimatur of the school and is government speech is directly in conflict with First Amendment limitations. As the District of Columbia remarked in PETA v. Gittens, 414 F.3d 23, 28 (D.C. Cir. 2005), "[t]hose who check out a Tolstoy or Dickens novel [from a public library] would not suppose they will be reading a government message." To argue that every book in the library bears a government-endorsed message is patently without merit.

because professorial speech is understood as the speech of the professor and not the speech of the government. If the legislature or the university were to only fund professorial speech that was, say, in support of Republican values, or not critical of democracy, this would covertly skew the marketplace of ideas as well as exercise coercion over professors.

In *Garcetti v. Ceballos*, the Court held that the state could regulate its employees' speech if the speech was made in the course of the employee's official duties. The Court explicitly noted, without explanation, that, due to academic freedom as a constitutional value, college professors might be exempted from that rule. The best way to understand that exemption is as arising from the fact that, in contrast to the standard government employee, professors are paid to speak for themselves, not for the state. In other words, professors' speech is subsidized private speech, not dictated government speech.

The Court has struggled to define the limits of ideological provisos on the state's direct subsidization of private speech, but reading the cases carefully reveals a general acceptance that funding private speech—as opposed to paying private citizens to deliver the government's message, as in *Rust*—cannot be limited by its ideological viewpoint. In *National Endowment for the Arts v. Finley*, the Court held that the state could give subsidies to individual artists on the basis of artistic excellence, but not for the purpose of suppressing bad ideas. The Court wrote that in contrast to a provision that prohibits funding on "disfavored viewpoints," "the considerations that the [NEA] provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face." In other words, the *National Endowment for the Arts* Court drew a constitutional line between funding private speech based on artistic excellence and funding it based on ideological considerations.

---

96 *Id.* at 425.
98 *Id.* at 587.
99 *Id.*
100 *Id.* at 583.
101 Despite its stated principles, the *National Endowment for the Arts* Court's analysis of the statute at issue was convoluted. The statute at issue required the decency of the art to be taken into consideration when offering subsidies. *Id.* at 581-83 (arguing this requirement is merely advisory and that decency is incapable of being defined in any particular way), 588 (implying the art produced with NEA might be government speech). Decency is clearly an ideological criterion, not an artistic one, and the art, which is in complete control of the artist, is unlikely to
This distinction follows from the ban on prescribing orthodoxy drawn out in this article—namely, funding private speech for its artistic excellence is not an attempt to prescribe a particular orthodoxy, while funding private speech for its ideological view constitutes just such an attempt.\textsuperscript{102} This principle also guides academic freedom, which dictates that colleges can choose which professorial speech to fund on the basis of academic excellence, but not on the basis of ideological viewpoint.

Further revealing its confusion over direct subsidies, in \textit{Board of Education, Island Trees Union Free School District No. 26 v. Pico},\textsuperscript{103} the Court produced seven different opinions on whether a school board could pull books from a public school library on account of their content. The plurality opinion claimed that the school board could not remove books based on the board’s ideological perspectives.\textsuperscript{104} What can be done in grade school libraries, of course, may differ from what can be done in public libraries, as children have diminished constitutional rights.\textsuperscript{105} In \textit{United States v. American Library Ass’n},\textsuperscript{106} the Court similarly failed to come up with a majority opinion on whether public libraries could block pornography sites on their computers without violating their patrons’ rights.

In the leading \textit{Pico} opinion, Justice Brennan correctly argued that the state acts unconstitutionally when its purpose in removing books from a public library is to shield patrons from the expression of particular ideologies. As he wrote, “[t]o permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in \textit{Barnette}.”\textsuperscript{107} Much like the fund in \textit{Rosenberger}, libraries are designed to host a wide variety of private ideas and expressions. While librarians must limit their selections according to space and funding, and thus can make qualitative decisions, removing or choosing books on an ideological basis skews the marketplace of private ideological speech. Once a library is opened as a

\begin{thebibliography}{10}
\bibitem{102} \textit{Id.} at 579 (stating that the Court of Appeals found that the statute functioned to fund private speech and was viewpoint discriminatory).
\bibitem{103} \textit{Id.} at 587 (“[E]ven in the provision of subsidies, the Government may not aim at the suppression of dangerous ideas, . . . and if a subsidy were ‘manipulated’ to have a ‘coercive effect,’ then relief would be appropriate.” (internal quotations omitted)).
\bibitem{105} \textit{Id.} at 863-82.
\bibitem{106} \textit{See} Scott, \textit{supra} note 31, at 557-79.
\end{thebibliography}
forum for a multiplicity of private voices, the removal and selection of books should not be ideologically driven.

The artistic funding in National Endowment for the Arts, the funding of professorial speech, and the library selection cases highlight the difficulty of identifying the line between funding private speech on the basis of ideology and funding it on the basis of nonideological criteria like artistic or educational quality. Indeed, ideological worldviews undoubtedly influence and form one’s perception of what constitutes artistic and educational quality.

Nevertheless, such distinctions are not fundamentally ideological, and a similar distinction—one between content and viewpoint—has been applied in the Court’s limited public forum cases. Such a distinction has also been applied in the Court’s public employment cases in determining whether an ideologically-based condition is germane to a legitimate government purpose, of which ideological conformity in the citizenry is excluded. These lines must be drawn, and the murkiness between them may be reason to defer to the political branches in the margins, but it is not sufficient reason to abandon the constitutional ban on ideological orthodoxy altogether. The government’s funding apparatus appears to be only growing larger. Thus giving it a free pass to remove Communist books from the library, only fund art that promotes conservative values, and fund Democratic newspapers but not Republican newspapers, would pose a great threat to the right to live in a society free from government orthodoxy. The government can fund and commission its own speech, which will often be ideological, but when it comes to funding the speech of private parties, it should not do so on the basis of its correct ideological content.

---


109 See Redish & Finnerty, supra note 30, at 94 (arguing for the same distinction between ideology and educational quality in public grade schools).

110 See Post, supra note 87, at 167 (arguing distinction between content and viewpoint is used to ask whether the condition is legitimately related to the benefit offered).

111 For example, regarding the grade school context, two scholars wrote, “[w]hen, however, the inculcation of values is accomplished not as an inherent by-product of pedagogical choices but rather as a gratuitous effort by school officials to influence the future political, social, or economic views of their students, the constitutional limitations imposed by the anti-indoctrination model would be triggered.” Redish & Finnerty, supra note 30, at 103-04.
D. Compelled Speech

One of the clearest methods of unconstitutional psychological coercion is to force citizens to make ideological statements or commitments for no reason other than to induce them, and other citizens, to subscribe to the ideology. *Barnette* is the most straightforward and most recognized example of this. In *Barnette*, the Court held that a public school could not expel its students for refusing to say the pledge of allegiance and salute the American flag.

Even in the area of compelled ideological speech, which is rarely justified, the germaneness requirement exists as a way to distinguish the prescription of orthodoxy from legitimate government action. Persons in the President's cabinet, for example, can be dismissed, or not hired, if they do not express agreement with a particular ideology; in contrast, the students in *Barnette* could not be expelled for failing to express agreement with a particular ideology. The former requirement is germane to a legitimate government purpose—the operation of a republican democracy—and the latter is not, as its only justification is to shape citizens' ideological beliefs through the coercion of ideological affirmations, which is a nonrational method of seeking to change citizens' ideological beliefs.

In most cases, the government may only require public employees to promise to uphold the Constitution as part of their official duties, as the employees' actions in their official capacities are legitimately a concern of the government. It is rare that an ideological commitment is necessary to a legitimate government purpose—an attempt to produce the right ideological beliefs in citizens is not a legitimate government purpose—and, as a result, ideological oaths are usually struck down as unconstitutional.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court moved beyond the prohibition of coerced ideological aff-

---

113 Id. at 641-42.
114 O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 725 (1996) (stating the government may condition employment on ideological beliefs only when it is germane to a legitimate government purpose).
115 *Barnette*, 319 U.S. at 641-42.
firmations and prohibited the government from putting citizens in the position of appearing to endorse an ideology when it was for the purpose of changing citizens' ideology.\textsuperscript{118} In \textit{Hurley}, Massachusetts required the South Boston Allied War Veterans Council (Council) to allow the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) to march in the Council's parade under a public accommodations law that prohibited discrimination on the basis of sexual orientation.\textsuperscript{119} The Court found that this violated the Council's First Amendment rights, as requiring the Council to include GLIB in its parade made it appear as if the Council endorsed GLIB's message.\textsuperscript{120} The Court explained, "in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole."\textsuperscript{121} The Council was not required to personally affirm or utter GLIB's message; rather, if GLIB was a unit in the Council's parade, it would appear to those watching the parade that the Council was endorsing GLIB's message,\textsuperscript{122} and thus such an imposition interrupted the Council's speech to other citizens, distorting its preferred ideological message in favor of the state's approved ideology.

The state manufacturing the perception of its citizens by endorsing an ideological position, rather than requiring them to issue an actual endorsement, still constitutes an attempt to coerce ideological belief. It does so, for one, by duping a private audience into believing other citizens are propounding that ideological belief. This distorts the ideological marketplace as citizens falsely believe more citizens endorse the ideology than is the case. It thus seeks to convert citizens' beliefs by manipulating private speech. The \textit{Hurley} Court explained that creating the perception of citizen endorsement of ideological speech in order to "produce a society free of the corresponding biases" has a "decidedly fatal objective" and "promot[es] an approved message or discourag[es] a disfavored one" in "the service of orthodox expression."\textsuperscript{123}

\footnotesize
\begin{itemize}
  \item \textsuperscript{119} \textit{id.} at 564-66.
  \item \textsuperscript{120} \textit{id.} at 577.
  \item \textsuperscript{121} \textit{id.}
  \item \textsuperscript{122} \textit{id.}
  \item \textsuperscript{123} \textit{id.} at 578-79.
\end{itemize}
The second coercive element forces citizens to appear as if they are endorsing the ideological belief. Similar to directly compelled ideological affirmations, the requirement that one appear to other citizens as endorsing an ideology is psychologically coercive. It aims to change citizens' minds by directly implicating them in the chosen ideological message—in Hurley, the belief that homosexuality is unobjectionable—with the intention of that forced entanglement creating an actual change in their beliefs. This may not be successful, just as a required oath may not have any effect on the oath-taker. But it still attempts to change minds by forcefully targeting nonrational elements—in this case, the effect of a forced association with an ideology. Not only does the association itself have a psychologically coercive effect, the attendant awareness that the state will seek to interfere with those who fail to express the chosen ideology has a further coercive effect, as citizens reasonably fear official state action in response to expressing the wrong ideology.

The other side of compelling people to affirm or appear to affirm particular approved ideologies is preventing people from accessing disapproved ideological speech. This too seeks to shape minds by a nonrational method—it aims to change minds by preventing access to opposing ideological positions. The Court stated this clearly in Stanley v. Georgia, where it overturned a law proscribing the possession of obscenity. The Court wrote:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argu-

---

124 In contrast, the Court allowed California to force private malls to allow the public to engage in ideological solicitations on mall property, in large part because “[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.” Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

125 See Sec'y of Md. v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984) (stating that the mere passage of laws prohibiting vague categories of speech will cause citizens to self-censor); Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (stating that citizens will fear official punishment if they have to come pick up their mail labeled propaganda by the government).

ment amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts.\textsuperscript{127}

In general, the Court recognizes a citizen's right to receive willingly communicated ideological expressions. Censorship of ideological communications thus presents constitutional problems from the side of the speaker and the listener. In \textit{Lamont v. Postmaster General}, the Court invalidated a law that required the recipient of what the government labeled communist political propaganda to verify in writing that she wished to receive the materials before the postmaster would deliver it.\textsuperscript{128} The Court held that the statute unconstitutionally abridged the First Amendment rights of the receiver, as it placed a burden on her ability to willingly read one stripe of ideological speech for no other reason than to discourage her from reading disapproved ideological speech.\textsuperscript{129}

\section*{II. Government Speech}

The Court has explicitly recognized the ability of the government to illegitimately skew the marketplace of ideas by methods other than penalizing citizens for engaging in protected speech. I will argue that the second major way that the government can unconstitutionally prescribe an orthodoxy is through its power to speak.

In \textit{R.A.V. v. City of St. Paul}, the Court held that the government could not proscribe unprotected speech expressing particular ideological viewpoints.\textsuperscript{130} The government cannot, for example, ban Republican-hating obscenity, or racist fighting words, even though it can ban all obscenity and all fighting words.\textsuperscript{131} The infirmity in a law that bans a certain ideological subset of unprotected speech is not that it is violating the individual's right to speak, say, fighting words, as the individual has no such right. Rather, the infirmity is that the government's purpose in designing the law is to mark certain ideological views as particularly heinous by throwing the criminal law down upon those thoughts, and no others.\textsuperscript{132} This impermissibly "raise[s] the specter that the Govern-

\textsuperscript{127} Id. at 565.
\textsuperscript{128} \textit{Lamont}, 381 U.S. at 302-06.
\textsuperscript{129} Id. at 306-07.
\textsuperscript{131} Id. at 388-89.
\textsuperscript{132} Id. at 386-87.
ment may effectively drive certain ideas or viewpoints from the marketplace."133

Even though the Court clearly recognizes the per se illegitimacy of using government power for the purpose of suppressing particular ideological perspectives, the Court has, at times, stated that the Constitution places no limitation on government speech. Recently, it found that a government-owned monument of the Ten Commandments, which had been donated by a private party and was installed in a public park, constituted government speech and therefore did not create an obligation for the government to install monuments expressing other viewpoints.134 In so finding, the Court made a broad claim, writing: “The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to ‘speak for itself.’ . . . Indeed, it is not easy to imagine how government could function if it lacked this freedom.”135 And in Board of Regents of the University of Wisconsin System v. Southworth, the Court further explained its reasoning, writing: “When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.”136

These statements are dicta—going much further than the actual disputes before the Court—and so they cannot be taken as absolute principles. The rationales the Court offers for allowing government to speak without any constitutional restraint make sense when applied to the disputes before the Court, but they are faulty when extended into a general rule. The Court claims, first, that the government could not function without having the ability to speak.137 It is no doubt true that the government must speak to function properly; however, it is not clear, and indeed, it is unlikely, that the government needs to have zero constraints on its speech in order to function properly.

133 Id. at 387 (internal citations omitted).
135 Id. at 1131. In Rosenberger v. University of Virginia, for example, the Court opined, “[w]e recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.” Rosenberger v. Univ. of Va., 515 U.S. 819, 833 (1995).
137 See, e.g., Summum, 129 S. Ct. at 1131.
The second argument—that the people can elect different public officials if they do not like the message espoused by the government—is somewhat beside the point. The people can also elect new public officials if they do not like the government’s censorship of a particular strand of speech; that does not mean censorship is constitutional. As with censorship, government can use its speech to coerce the ideological marketplace in its favor, thereby undermining the democratic process by which citizens choose whether to reelect the public officials in power. And, in fact, the Court itself has recognized this in other cases, rebutting its own broad claims that government may, in all instances, speak without constitutional restraint.

The specific examples the Court offers of permissible government speech—speaking to promote its policies, putting up a monument in a park—pose no threat to citizens’ right to be free from the prescription of orthodoxy, as the government merely espousing an ideology is not, of course, the prescription of orthodoxy. However, illegitimate acts of prescribing orthodoxy can occur through the government’s speech. As one First Amendment scholar put it, “[t]he government is surely under a constitutional obligation not to use its power of expression, any more than any power, to abridge freedom of expression.”

Government speech becomes illegitimate when it is used as a tool to coerce particular ideological beliefs in citizens. When the government participates openly in the marketplace of ideology on equal footing with any other participant, it is rarely acting coercively.

When the government offers inducements or penalties to citizens for listening to its nongermane ideological speech, it attempts to change citizens’ minds by nonrational means. The requirement that the benefit or penalty be germane to the ideological speech stems from the fact that the government speaks ideologically in the course of many legitimate programs and that speech is justified by the purposes of those programs. However, when the ideological speech is nongermane to the offered benefit or penalty—when all postal workers are required to listen

---

139 See, e.g., Rodney A. Smolla & Stephen A. Smith, Propaganda, Xenophobia, and the First Amendment, 67 Or. L. Rev. 253, 280 (1988) (arguing based on analogy to commerce clause that when government assumes participatory role in marketplace of ideas it is more free to speak without constitutional constraint).
140 See also Emerson, supra note 138, at 698, 710, 713 (arguing that the government using captive audience to propound its views, especially in order to perpetuate itself, is unconstitutional).
to the government speak on the virtues of the traditional family, for example—the government moves from running a legitimate program involving ideological speech to specifically aiming to change citizens' ideological beliefs as an end in itself. In other words, imposing ideological speech in the course of unrelated benefits strips the speech of any legitimate purpose and leaves only an intention to change citizens' ideologies by the nonrational method of saturating them with one ideological point of view.\textsuperscript{141}

The germaneness requirement occurs frequently in the right of private conscience jurisprudence as a way to identify when the government's only purpose is to prescribe an orthodoxy.\textsuperscript{142} It is a well-established rule, for example, that the government can condition government employment on a person's political beliefs only if the beliefs are germane to the employee's official duties. An administration cannot, consistent with the Constitution, require all postal workers to endorse its conservative political beliefs, then, but it can require employees in policy-setting positions to endorse its conservative beliefs.\textsuperscript{143} The compelled speech doctrine also prevents the government from punishing citizens who refuse to voice ideological statements of the government's choosing\textsuperscript{144} unless that speech arises in the course of a legitimate government purpose, such as running the military. Even compelled funding for ideological speech must be germane to a legitimate government purpose, such as a union engaging in collective bargaining\textsuperscript{145} or a bar regulating lawyers' professional responsibilities.\textsuperscript{146} In all of these areas, the germaneness requirement serves to differentiate a government which seeks to change citizens' ideological beliefs through coercion and one that merely seeks to run a government program aimed at a legitimate

\textsuperscript{141} See, e.g., Justice Douglas, writing, "[a]s I indicated in my dissent in Public Utilites Comm'n v. Pollak, 'liberty' within the purview of the Fifth Amendment includes the right of 'privacy,' a right I thought infringed in that case because a member of a 'captive audience' was forced to listen to a government-sponsored radio program." Poe v. Ullman, 367 U.S. 497, 517 (U.S. 1961) (Douglas, J., dissenting) (internal citations omitted) (case concerning the regulation of birth control dismissed for lack of justiciable controversy).

\textsuperscript{142} See also EMERSON, supra note 138, at 699 (arguing government expression should be limited to those times when it has a legitimate government purpose).


\textsuperscript{145} Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977) (holding that union could not use mandatory fees for ideological purposes outside of collective bargaining).

\textsuperscript{146} Keller v. State Bar of Cal., 496 U.S. 1, 13-14 (1990) (holding that bar could not use mandatory bar fees for ideological purposes outside regulating the legal profession).
purpose. The state is prohibited from applying a coercive pressure on citizens for the sake of coercing beliefs as opposed to applying that same pressure incidentally in the course of a legitimate government purpose.

The Court has failed to articulate when the government imposing ideological speech on a captive audience crosses a constitutional line, but a few of its cases have grazed the issue. In *Cook v. Gralike*, Missouri enacted a provision into its constitution that required the statement “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS” be placed on election ballots next to the name of any U.S. representatives who failed to complete eight particular legislative acts relating to term limits, and the statement “DECLINED TO PLEDGE TO SUPPORT TERM LIMITS” next to any nonincumbent candidates who refused to pledge to complete the same acts once in office. The Court wrote:

In describing the two labels, the courts below have employed terms such as “pejorative,” “negative,” “derogatory,” “intentionally intimidating,” “particularly harmful,” “politically damaging,” “a serious sanction,” “a penalty,” and “official denunciation.” . . . Indeed, it seems clear that the adverse labels handicap candidates “at the most crucial stage in the election process—the instant before the vote is cast.” At the same time, “by directing the citizen’s attention to the single consideration” of the candidates’ fidelity to term limits, the labels imply that the issue “is an important—perhaps paramount—consideration in the citizen’s choice, which may decisively influence the citizen to cast his ballot” against candidates branded as unfaithful.

The majority found that putting these statements on the ballot went beyond the state’s power to regulate elections for the U.S. House and Senate under the Elections Clause, and thus was unconstitutional. Although the majority did not discuss the First Amendment, it did recognize, as the above passage indicates, the ability of the government to use its power to speak ideologically to illegitimately induce citizens’ ideological beliefs. Chief Justice Rehnquist’s concurrence, joined by Justice O’Connor, found the provision unconstitutional under the First Amendment precisely for this reason, writing:

148 Id. at 524-25 (internal citations omitted).
149 Id. at 526-27.
150 Id. at 526 (describing the requirement as “an attempt to dictate electoral outcomes”).
The State injects itself into the election process at an absolutely critical point—the composition of the ballot, which is the last thing the voter sees before he makes his choice—and does so in a way that is not neutral as to issues or candidates. The candidates who are thus singled out have no means of replying to their designation which would be equally effective with the voter. . . . Although uttered in a different context, what we said in Police Department of Chicago v. Mosley . . . is equally applicable here: “[Government] may not select which issues are worth discussing or debating.”151

In other words, the government is using its power to speak—nobody perceives the statement, “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS” as the speech of the candidate—to monopolize a crucial and closed market for ideological speech. It imposes its ideological view on a captive audience of voters for the purpose of altering their ideological outlook. In an earlier case, Anderson v. Martin, the Court overturned a Louisiana law that required the listing of every candidate’s race on election ballots.152 Although the Court overturned the Louisiana law for violating the equal protection clause, the Court’s construal of the ballot was identical to that in Cook, and it emphasized that the case had nothing to do with the citizens’ ability “to receive all information concerning a candidate” or to vote for any reason she chose. Rather, the problem arises “in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls” and the state’s “requir[ing] or encourag[ing] its voters to discriminate upon the grounds of race.”153 Notice the terminology—“induce” and “require or encourage”—strongly suggests something more than the state issuing its ideological opinion on the matter is afoot. As in Cook, putting ideological statements on the ballot illegitimately serves to “induce,” rather than to persuade, citizens to adopt particular ideological views. Anderson clearly establishes that government speech can be used to violate constitutional rights.

A. Imposing Ideological Speech on Captive Audiences

In his Cook concurrence, Chief Justice Rehnquist made the distinction between merely speaking ideologically and speaking coercively for

151 Id. at 532 (Rehnquist, C.J., concurring) (quoting Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).
153 Id. at 402.
the purpose of producing an ideological shift in citizens clear. He concluded his opinion by affirming the state’s right to espouse its support for term limits in a different context—say, at a press conference—where the candidates could respond in a similar manner if they so desired. The government speaking ideologically on the ballot, though, gives it a nonrational advantage in the marketplace of political ideas. Only the government can place ideological statements on the ballot, and everyone who votes has to read it. By privileging its own position in a crucial and closed market, the government counts on the psychological framing that results from having one piece of ideological information to move citizens’ ideological position in a particular direction.

Placing ideologically-motivated speech on the ballot is only one instance of the government imposing its speech on a captive audience for the purpose of molding those citizens’ ideological beliefs. Most of the Court’s analysis on the captive audience has addressed the government’s right to restrict citizens’ speech to other citizens. A state preventing citizens from picketing in a residential area serves as the paradigmatic example. Of this, the Court wrote, “[t]he State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.” The Court has “repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.”

In allowing states to regulate the level of noise on residential streets, the Court wrote:

The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.

The Court has used the rationale of protecting citizens from speech they cannot reasonably avoid to uphold speech restrictions on sending mail

---

154 Cook, 531 U.S. at 532 (Rehnquist, C.J., concurring).
to citizens’ houses, speaking on the radio, and approaching people entering an abortion clinic.

These holdings reflect the compelling nature of privacy and its intersection with the right to free speech. In the home, one might be able to avoid listening to the picketers outside, but the state can still prohibit residential picketing because of its compelling interest in the “protection of residential privacy.” This conceptualizes a geographical space where citizens have a right to expect freedom from unwanted intrusions, including speech. In most public places, in contrast, the citizen has no such right and thus bears the burden of averting his eyes or walking away from unwanted speech.

The Court has not directly addressed the question of whether the government can speak ideologically to captive audiences. But the fact that the Court has allowed the government to stop citizens from speaking to other citizens—an action only permissible with the most compelling of reasons—illustrates a constitutional level of importance afforded to citizens’ right to private conscience. When it comes to the government speaking to captive audiences, the government, unlike other citizens, lacks the free speech rights that may counterweigh the citizens’ right to choose which ideological speeches to listen to.

In *Lehman v. City of Shaker Heights*, the Court held that the city of Shaker Heights could prohibit political advertisements while allowing other advertisements on its public buses. The plurality opinion wrote that such a ban was permissible “in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.” This case is important because it recognizes the dangers of

---

161 *Frisby*, 487 U.S. at 484.
163 One scholar, at least, has argued that citizens have a right not to be forced to listen to the government speak ideologically. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. Rev. 939 (2009).
164 See text accompanying notes 156-59.
165 Such cases demand delicate balancing because, as the Court described it, “[i]n th[e] sphere of collision between claims of privacy and those of [free speech or] free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society.” *Erznoznik v. Jacksonville*, 422 U.S. 205, 208 (1975).
167 Id. at 304.
the government imposing, even if only through an apparent endorsement, its ideological speech on captive audiences.

Even closer to the point is *Public Utilities Commission v. Pollak.*\(^{168}\) In *Pollak,* a citizen complained about the music playing on a public bus, charging, among other things, that it violated his First Amendment rights. The Court wrote of this, ""[i]t is suggested also that the First Amendment guarantees a freedom to listen only to such points of view as the listener wishes to hear.""\(^{169}\) The Court dismissed this charge, explaining, ""[t]here is no substantial claim [in this case] that the programs have been used for objectionable propaganda.""\(^{170}\) The Court denied the claim because the public buses were playing music, not ""objectionable propaganda,""\(^{171}\) implying without deciding that if the state were playing propaganda on the public bus, a First Amendment challenge might succeed.

In a separate opinion, Justice Black essentially adopted the position in this article, opining that playing music did not violate the First Amendment, but that ""subjecting Capital Transit's passengers to the broadcasting of news, public speeches, views, or propaganda of any kind"" would.\(^{172}\) The one potential difference between Justice Black's opinion and the theory espoused in this Article is his inclusion of broadcasting the news, which, if defined simply by the provision of factual information, would not violate the theory proffered in this article.

In a dissent, Justice Douglas went even further and claimed that playing music violated the First Amendment.\(^{173}\) This was primarily for prophylactic reasons, as he argued that the line between benign cultural programs and pernicious political programs was too fine to draw.\(^{174}\) He explained his reasoning behind the position as follows:

> The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. . . . The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice. . . . When we force people to listen to another's ideas, we give

---

169 *Id.* at 463.
170 *Id.*
171 *Id.*
172 *Id.* at 466 (Black, J., concurring).
173 *Id.* at 467-69 (Douglas, J., dissenting).
174 The Court adopted the same reasoning in a later opinion, holding, ""[t]he line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all."" Stanley v. Georgia, 394 U.S. 557, 566 (1969).
the propagandist a powerful weapon. . . . If liberty is to flourish, government should never be allowed to force people to listen to any radio program. . . . The right of privacy, today violated, is a powerful deterrent to any one who would control men's minds.175

This nails down how government can use its power to speak ideologically to violate citizens' rights of private conscience. The government imposing ideological speech on a captive audience differs importantly from the government preventing private citizens from imposing their private speech on a captive audience. The latter requires a delicate balancing between the rights of the private citizens to speak and the rights of the private citizens in the captive audience not to listen to ideological speech they do not wish to hear. In contrast, the government has no First Amendment right to speak. When the government imposes its ideological speech on a captive audience, the scale quickly tips in favor of the captive audience's right not to listen.

*Pollak* raises but does not directly address the issue of when an audience becomes captive. The majority, concurrence and dissent agreed that passengers on the public bus constituted a captive audience, even though citizens were not required to take the bus. It is generally agreed that captivity attaches when any reasonably important government benefit or punishment requires a person to be in a particular place for a duration of time.176 In this case, for example, the justices that addressed the possibility of the state broadcasting ideological views on a public bus, found that the benefit of cheaper transportation was sufficient to produce captivity.177

The State of Minnesota, for example, required that lawyers take classes in which teachers espoused the desirability of "eliminating bias" from the legal system.178 This preaching apparently went beyond stating the lawyer's ethical obligations under the law, and instead endorsed a particular political ideology.179 Such a requirement imposes ideologi-
cal speech on a captive audience regardless of the audience’s desire to listen and it does so at the cost of a significant benefit—the ability to practice law in Minnesota. These diversity-endorsing classes cross the same line as the California bar did in Keller v. State Bar of California,\textsuperscript{180} in which the Court held that the state bar could use compelled bar fees for “activities germane”\textsuperscript{181} to “regulating the legal profession and improving the quality of legal services”—narrowly defined—but not for “activities of an ideological nature which fall outside of those areas of activity.”\textsuperscript{183} The Minnesota bar may require lawyers to listen to speech relevant to lawyers’ ethical duties in the practice of law, including any relating to discrimination, but not diverge into requiring them to listen to speeches endorsing the general ideological value of diversity.\textsuperscript{184}

It is notable that the Keller Court chose not to construe the bar’s mandate broadly, as, for example, advocating justice. Interpreting normative mandates like professionalism, justice, and education broadly would give agencies and institutions a virtual free pass to require its employees and consumers to listen to ideological propaganda. Tracking the Court’s narrow interpretation of the bar’s mandate, the mandate of a university, for example, does not extend to “educating” students about the proper political ideology.

As well as requiring all university students to attend ideologically-driven sessions, or all lawyers to attend ideological “anti-bias” seminars, the state may engage in the more pernicious practice of singling out individuals for their ideological speech and forcing them to undergo counseling for the purpose of changing the ideological beliefs expressed in that speech. Michigan State University, for example, instituted a program that required students who had engaged in “humiliating,” “disrespectful” or “sexist” speech to undergo “classes” that required the student to renounce the speech, and agree to engage in specific “respect-

\textsuperscript{181} Id. at 14.
\textsuperscript{182} Id. at 13.
\textsuperscript{183} Id. at 14.
\textsuperscript{184} Lorence, Sears & Bull, supra note 179, at 276-95; Dahlin, supra note 178, at 1749-63 (both arguing Minnesota’s program is unconstitutional because it violates lawyers’ right to private conscience).
ful” speech in the future. Valdosta State University, similarly, ordered a student to undergo counseling as a result of his speech protesting the school’s plan to build new parking garages, and the University of Delaware ordered a student to get counseling because of the “racist, sexist, anti-Semitic, and homophobic” speech he posted on his website. Such policies not only force the student to listen to the state’s ideological message, it likely requires her to pledge to support the state ideology in the future.

Choosing which materials to read and which speakers to listen to is integral to the formation of self-directed belief systems. The government forcing citizens to listen to or read particular ideologies seeks to shape citizens’ ideologies by undermining their ability to make their own listening choices and thus shape the development of their own views. Requiring citizens to listen to and read the favored ideologies attempts to mold citizens’ ideologies by saturation and the crowding out of other ideological views. This nonrational method of changing a person’s mind amounts to prescribing an orthodoxy.

### B. Interrupting Private Ideological Speech

Another way the government can use its power to speak illegitimately is by inserting its speech into the middle of citizens’ private ideological speech, and thereby crowding out disfavored ideological messages. In Meese v. Keene, the federal government inserted its speech into a particular class of people’s ideological speech in order to prevent


187 Murakowski v. Univ. of Del., 575 F. Supp. 2d 571 (D. Del. 2008) (describing the incident and finding the University of Delaware’s actions a violation of the student’s free speech rights); see also Kenneth Lasson, Political Correctness Askew: Excesses in the Pursuit of Minds and Manners, 63 TENN. L. REV. 689, 703-04 (1996) (describing a professor’s successful First Amendment case against his college after the professor was ordered to undergo school-approved counseling in response to his perceived-as-vulgar speech, and writing of the professor, “[h]e compared the therapy-order to brainwashing that might be done by a totalitarian regime bent on convictions for thought crime”).
that speech from coming to the market on equal terms.\textsuperscript{188} The federal government labeled any communications produced by agents of foreign governments that might influence United States foreign policy as “political propaganda.”\textsuperscript{189} Keene, a member of the California State Senate, wished to show three Canadian films that the federal government had labeled as “political propaganda,” and concerned about his reputation, Keene sued to be able to show the films without the federal government’s designation.\textsuperscript{190} Although the majority rejected Keene’s First Amendment claim, it did so largely because of its factual assertion that the statutory definition of “political propaganda” was “a broad, neutral one rather than a pejorative one.”\textsuperscript{191}

This was an inaccurate claim as the statutory definition itself was negative.\textsuperscript{192} But more importantly, “political propaganda” has a negative meaning in normal usage. The majority recognized this, writing that the phrase normally refers to “[s]lanted, misleading speech that does not merit serious attention . . . .”\textsuperscript{193} As a result, if the federal government labels particular communications as “political propaganda,” it hinders the ability of that speech to compete on equal ground in the marketplace.

As the Meese dissent pointed out, the purpose of the law in question was precisely that: to stop the spread of speech produced by the agents of foreign governments aimed at influencing foreign policy.\textsuperscript{194} In other words, the statute’s purpose was to suppress “bad ideas,” the para-

\begin{itemize}
\item \textsuperscript{188} Meese v. Keene, 481 U.S. 465 (1987).
\item \textsuperscript{189} Id. at 469-71.
\item \textsuperscript{190} Id. at 467-68.
\item \textsuperscript{191} Id. at 477.
\item \textsuperscript{192} Id. at 486 (Blackmun, J., dissenting).
\item \textsuperscript{193} Id. at 477.
\item \textsuperscript{194} Id. at 486-88; see also Smolla & Smith, supra note 139, at 265-68 (demonstrating the legislative intent behind the statute was to suppress the speech in question, quoting the house report as saying “pitiless publicity will serve as a deterrent to the spread of pernicious propaganda”).
\end{itemize}
digmatic illegitimate purpose under the First Amendment. The dissent quoted Lamont, a case in which the Postmaster's policy of requiring people to come pick up their mail if the Postmaster classified it as "communist political propaganda" was found unconstitutional, to support this point. The Lamont Court wrote:

Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda."

The Meese dissent cited another earlier case, American Communications Ass'n v. Douds, for its passage holding that government "discouragements" may "undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes." The American Communications Ass'n Court offered as an example of an unconstitutional discouragement, "a requirement that adherents of particular religious faiths or political parties wear identifying arm-bands," which is functionally indistinguishable from labeling particular communications with the tag of "political propaganda." It is the social meaning of the arm-bands as reflecting a stigmatized and disapproved of group that would cause the bands to infringe the First Amendment rights of its wearers. An arm-band that was part of the U.S. military uniform would not, of course, pose any threat to First Amendment rights because the social meaning of a U.S. military uniform arises in the course of a legitimate purpose. The government is not, in such a case, marking particular ideological beliefs as suspect.

The Meese dissenter pointed out that the government can exercise a coercive force on citizens' ideological beliefs by attaching a label to

195 As the Court put it, the government may not "discriminate invidiously in its subsidies in such a way as to 'aim' at the suppression of dangerous ideas." Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983) (internal citations omitted).
197 Id.
198 Meese, 481 U.S. at 489 (Blackmun, J., dissenting).
199 Lamont, 381 U.S. at 307.
201 Meese, 481 U.S. at 490-91 (Blackmun, J., dissenting).
202 Am. Commc'ns Ass'n, 339 U.S. at 402.
203 Id.
particular speech that marks it as illegitimate. The dissent wrote that the government’s labeling certain communications political propaganda “places the power of the Federal Government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation designed to reduce the effectiveness of the speech in the eyes of the public.” Labeling a category of communications as “political propaganda” is not an attempt to inform citizens of collected information or engage in a dialogue with citizens; it is an attempt to discredit ideas in the minds of citizens without inviting the public’s analysis or thought. Contrast this scenario with a case where the government put forth arguments as to why a particular film was political propaganda or merely publicly asserted as much. In these cases, it is clear the government is simply offering its point of view. However, when the government labels a whole group of people’s speech aimed at a particular end with a derogatory categorization, it uses its coercive powers to prevent the ideological speech from reaching citizens on its own terms.

In a similar case, Riley v. National Federation of the Blind of North Carolina, Inc., a North Carolina statute required professional fundraisers, in the course of any charitable solicitation, to notify the potential donor of the percentage of her collected charitable donations that went to the fundraising fees in the prior year. The statute permitted the fundraiser to disclose that the speech was mandated by the government. As a result, the analysis of the case did not focus on whether the government required the fundraiser to speak the words in her own name. Rather, the problem arose from the government inserting its speech into a private individual’s ideological communications with another citizen. The mandated speech was a fact, not an opinion—in this case, the percentage of gathered charitable contributions going to fundraising fees—but inserting a fact into private ideological communications gave it ideological weight and meaning, implying that it carried particular importance.

204 Meese, 481 U.S. at 486-96 (Blackmun, J., dissenting).
205 Id. at 493 (Blackmun, J., dissenting).
207 Id. at 784-87.
208 Id.
209 Id. at 795-801.
210 Id. In contrast, compelled speech of a factual nature in a nonideological context will not carry ideological meaning. See, e.g., N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health, No. 08 Civ. 1000, 2008 U.S. Dist. LEXIS 31451 (S.D.N.Y. Apr. 16, 2008) (allowing the compelled speech of nutrition labels because such speech contains “purely factual and uncontroversial” commer-
The Court held that the state instead could publish the fundraising fee-percentage information itself. The Court held that the state instead could publish the fundraising fee-percentage information itself.\footnote{211} Doing so "would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation."\footnote{212} The relevant distinction, then, is between the government merely espousing its own view and hindering the ability of a private party to communicate an ideological view to others by inserting speech into private parties' speech.

Punishing citizens for voicing particular ideological beliefs is only one of the ways that the government can attempt to coerce ideological beliefs in the citizenry; another is by interrupting citizens' ideological speech if it conflicts with the government-approved ideology. Hence, the Meese dissenters objected to the government labeling particular films with the tag of "political propaganda:" it prevented the films from entering the market of ideas on their own ideological terms. Shutting down disapproved ideological perspectives is, much like imposing favored speech on captive audiences, an attempt to change citizens' beliefs through saturation and the restricted exposure to other possibilities.

\subsection{C. Coercing Citizens into Broadcasting the Government's Ideological Message}

Similar to inserting its speech into private citizens' ideological speech is the act of requiring private citizens to deliver the government's ideological message to other citizens. This practice differs from compelled speech—which requires the citizen to personally affirm or speak an ideological message\footnote{213}—and from the imposition of delivering nonideological speech.\footnote{214} But like compelled ideological speech, this practice seeks to change citizens' minds nonrationally.

\footnote{211}{\textit{Riley}, 487 U.S. at 800.}
\footnote{212}{\textit{Id.}}
\footnote{213}{Wooley v. Maynard, 430 U.S. 705, 715 (1995) (acknowledging the difference between compelled ideological speech and being forced to carry the government's ideological message).}
\footnote{214}{\textit{See}, e.g., Rust v. Sullivan, 500 U.S. 173, 192-93 (1991) (finding that the federal government can fund private doctors to provide family planning services without funding them to provide counsel on abortion services); Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 469-70 (1997) (finding it constitutionally relevant that a state act does "not compel the producers to endorse or to finance any political or ideological views").}
In *Wooley v. Maynard*, the Maynards were convicted for covering up the caption, “Live Free or Die” on their New Hampshire license plate, which they concealed because the motto contradicted their ethical and religious beliefs. The Court found that by punishing the Maynards, the state “requires that appellees use their private property as a ‘mobile billboard’ for the State’s ideological message.” The Court responded to New Hampshire’s asserted justification of spreading its own ideological message by holding that “where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”

The Court allowed that a state could require citizens to carry their ideological message if the state had a “sufficiently compelling” purpose that it was unable to achieve “more narrowly.” Although the Court did not define the contours of this test, it too presumably follows the germaneness requirement seen in other areas—if the required carrying of the government’s ideological speech arises incidentally in the course of a legitimate government activity, it is permissible; otherwise, it crosses the line into an intentional attempt to coerce ideological belief. *Wooley* makes clear, once again, that manipulating citizens’ ideologies through the use of material incentives does not suffice as a justification for imposing on their right to free speech. In contrast, New Hampshire might have paid citizens to distribute the message “New Hampshire Says Live Free or Die,” in essence hiring their own citizens as government workers. This differs from *Wooley* because the ability to drive a car on public roads is a benefit completely dissociated from the dissemination of the state’s ideology.

The state requiring private citizens to disseminate its ideological message presents a twofold problem. First, as the *Wooley* Court pointed out, the citizens have a First Amendment right “to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.” It is an offense to distribute the message of the government if one finds that message morally objectionable, and this is true even if one makes it clear that he disagrees with the message by, say, putting a

---

215 *Wooley*, 430 U.S. at 706.
216 Id. at 715.
217 Id. at 717.
218 Id., at 716.
219 Id. at 715.
bumper sticker communicating that disagreement on the back of his car. This resonates with Abood v. Detroit Board of Education and Keller cases which hold that it is constitutionally objectionable to require specific, identifiable citizens to fund political speech they disagree with, even though they too might have made clear that they personally oppose the speech that they were being required to fund.

In his Wooley dissent, Justice Rehnquist objected to extending First Amendment protection past the required personal affirmation of ideological belief, arguing that the Maynards were no different than the generic taxpayers funding all of the government’s speech. Justice Rehnquist’s categorization, however, misses the tighter connection between the messenger and the speech extant in both Wooley and Abood. Suppose, for example, that the government required everyone to wear t-shirts with the government’s ideological slogans written on the back. Even if one could attach a disclaimer on his back disavowing the slogan, the burden remains of having to personally broadcast an ideology he finds odious. There is an unavoidable tie between a messenger and the words he carries, and although one can distinguish between the two, one cannot entirely remove the created association. One is personally and directly spreading the ideology even if he makes clear that he does not personally endorse it. That alone is an offense to the privacy of the conscience.

The association created also presents a second, related harm with which the First Amendment is generally concerned: the government intentionally skewing the ideological marketplace. Requiring private citizens to personally broadcast the government’s ideological message creates the appearance of widespread endorsement. The pervasiveness of the message chills thought by influencing citizens through mass exposure and giving the impression of near-universal agreement, while at the same time creating the impression that the government is suspicious of citizens holding alternative ideologies.

This skewing effect reveals yet another way that the government can use its power of speech to coerce ideological belief—by putting ide-

---

220 In dissent, Justice Rehnquist found that since the Maynards were not being required to affirm or speak the motto, and could in fact make it perfectly clear they rejected it by attaching a bumper sticker expressing that sentiment, the practice was constitutional. Id. at 719-22 (Rehnquist, J., dissenting).
223 Wooley, 430 U.S. at 721 (Rehnquist, J., dissenting).
ological speech into the market without revealing its status as author. The federal government has, for example, paid networks to embed anti-drug messages in popular television shows.\textsuperscript{224} The act of underwriting “ventriloquist” speech seeks to change minds by creating the appearance of a widespread or authoritative agreement that does not exist.\textsuperscript{225} In \textit{R.A.V.}, the Court opined that “a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion” because “[i]t is illegitimate for the state to ‘raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.’”\textsuperscript{226} It would be strange, then, if the state could, as a substitute for prohibiting advertisements demeaning men, pay private citizens handsomely to depict advertisements extolling men without disclosing the source of that message. This would likely have a similar skewing effect on the ideological marketplace. Indeed, in another case, the Court stated that the government may not exercise “control over the content of messages expressed by private individuals” and that furthermore, “regulations that suppress, disadvantage, or impose differential burdens upon [private] speech because of its content” must face “the most exacting scrutiny.”\textsuperscript{227} Bankrolling private parties to express particular ideological messages in their own name certainly imposes “differential burdens” and a “disadvantage” on the opposing viewpoint. As one federal judge phrased it:

Of course, a necessary corollary to the doctrine of government speech is governmental accountability for that speech. “Otherwise there is no check whatever on government’s power . . . .” Thus, the government, when it speaks, ought to be required to make clear that it is in fact the government that is speaking. Government speech ought to be labeled as such to prevent confusion and subliminal governmental propaganda in the marketplace of ideas.\textsuperscript{228}

\textsuperscript{224} Morse, \textit{supra} note 79, at 855.

\textsuperscript{225} Greene, \textit{supra} note 32, at 49-52 (arguing that the government acting as a ventriloquist is impermissible under the Constitution); \textit{see also} Robert H. Wood, \textit{Lining the Pockets of Publicists with Federal Funds: The Prohibition Against Use of Agency Appropriations for Publicity and Propaganda}, 7 \textit{Loy. J. Pub. Int.} L. 133, 134-38 (describing how the George W. Bush administration covertly paid conservative pundits to praise the administration’s policies).


The analysis over whether the government is legitimately funding private parties to deliver its message should include whether that message was disclosed as such.\textsuperscript{229} In \textit{Rust}\textsuperscript{230} and other cases interpreted as the government hiring private parties to deliver the government’s own message, it is not clear that the government did disclose the message as its own.\textsuperscript{231} Insofar as the government failed to properly disclose this information, it should have faced the more arduous requirements that attach to the funding of private ideological speech.\textsuperscript{232}

The deliberate manipulation of the ideological marketplace, either by requiring private citizens to distribute the government’s ideology, or by inserting the government’s ideological speech covertly into the marketplace, is an attempt to change citizens’ minds nonrationally. Such distinction illegitimately seeks to reform citizens’ ideological thoughts.

\textsuperscript{229} See, e.g., Bezanson & Buss, supra note 79 (arguing the primary restriction on government speech is that it is disclosed as the speech of the government).


\textsuperscript{231} Id. at 199-200 (offering no indication that patients were not notified that the physicians’ speech was government speech, but suggesting the program was so narrow that the patients would not expect they were receiving the physician’s comprehensive opinion); DKT Int’l, Inc. v. U.S. Agency for Int’l Dev., 477 F.3d 758 (D.C. Cir. 2007) (finding that the funding of clinics was government speech without determining whether the speech was disclosed as such); People for the Ethical Treatment of Animals, Inc. v. Gittens, 414 F.3d 23, 26, 30 (D.C. Cir. 2005) (finding government speech where it was disclosed as such with a plaque); Post, supra note 87, at 174 (arguing patients in \textit{Rust} would have understood physicians to be offering their professional judgment). In another case, a court recognized that there might be a First Amendment violation if the government only allowed members of the press with viewpoints friendly to the government to attend its press conferences. This, unless disclosed as such, would also distort the private speech market as the only reports would be from people with government-friendly views. Brandborg v. Bull, 276 Fed. Appx. 618, 620 (9th Cir. 2008).

\textsuperscript{232} In the context of compelled funding, Justice Souter offered reasoning that applies with equal force here, arguing that “if government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable by indicating that the content actually is a government message” and as follows: [T]he requirement of effective public accountability means the ranchers ought to prevail, it being clear that the Beef Act does not establish an advertising scheme subject to effective democratic checks. The reason for this is simple: the ads are not required to show any sign of being speech by the Government, and experience under the Act demonstrates how effectively the Government has masked its role in producing the ads.

D. Government Employees Engaged in Ideological Speech

Government employees, most obviously, are routinely called upon to carry the government's ideological message, and insofar as this occurs as part of their legitimate duties, this does not present an attempt to coerce belief. However, deploying its employees to disseminate ideology unrelated to their official duties in essence requires them to distribute those ideologies as private citizens. Once citizens are speaking as private parties, the government cannot use their government employment as a way to force them to spread ideological messages against their will. Focusing on the reasoning in *Garcetti* and the germaneness requirements in *Keller*, *Abood* and *Rutan v. Republican Party*, the state should be prohibited from extending employees' official duties to include the dissemination of ideologies nongermane to their government employment.

Requiring postal workers to wear pro-abstinence stickers, for example, has the sole justification of flooding the marketplace with the approved ideology, and constitutes coercing private citizens to act as mobile billboards. The postal worker, for example, does not act in her official capacity as a postal worker when she wears a pro-abstinence sticker. In contrast, a government-funded project designed to encourage abstinence could require its employees to speak out on the value of abstinence.

---

237 As one federal court explained, "the court ruled illegal a local school board’s use of public funds for advocacy in a statewide initiative regarding education funding . . . . [The advocacy] was not directly related to [the school board’s] governance functions and was struck down." *Kidwell v. City of Union*, 462 F.3d 620, 626 (explaining case where school board’s use of funds for nongermane ideological speech was struck down).
238 See, e.g., *Brown v. Cal. Dep’t of Transp.*, 321 F.3d 1217, 1224-25 (9th Cir. 2003). The Court held:

While CalTrans argues that it is entitled to advocate a patriotic message, such an entitlement does not comport with its objective of ensuring safe and efficient transport on California’s highways . . . . We decline to extend the government-funding cases to a situation in which the government has not appropriated any funds toward achieving a policy goal for which it is accountable to the electorate. To do so would deal a crippling blow to the First Amendment by removing an essential check on the government’s ability to support one viewpoint to the exclusion of another.

*Id.*

The germaneness requirements in Rutan, Keller and Abood prevent the government from “press[ing] state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy.”

The Rutan Court laid out the unacceptable consequences of political patronage in jobs whose core functions do not require any particular political beliefs because “[the employees] will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder.” If the state requires employees to step out of their normal tasks and disseminate a particular ideology, it will have the same effect, pressuring them to adopt that ideology or risk career stagnation.

When a state orders an employee to disseminate a nongermane ideology, it pushes the employee out of her official duties, and therefore the state loses its ability to freely regulate the speech. The second part of the Garcetti test examines whether the government’s interest is more important than the employee’s right not to disseminate ideological speech as a private citizen. This balancing should follow Wooley’s clear holding that “where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.” Having employees disseminate ideologies unrelated to their core job functions, like ordering Department of Motor Vehicles workers to disseminate pro-war leaflets, attempts to do exactly that. Indeed, Abood prohibited the state (via the state-empowered union) from forcing a public employee to fund nongermane ideological activity, and compelled speech is much more of an affront to the First Amendment than compelled funding.

Allowing the state to commission unwilling employees in the dissemination of ideologies unrelated to their jobs creates the appearance, if not the reality, of a deeply entrenched state-orthodoxy, making it likely that public employees and private citizens will be wary of voicing opposing views. This reasoning was endorsed in Lamont, which held that the Postmaster General labeling certain mail as communist would exercise

---

241 Id. at 72.
an unconstitutional chilling effect on those wishing to receive such speech, even if there were no punishment attached to the labeling.  

E. Government Propaganda

The government may further use its power to speak illegitimately by engaging in speech that targets the nonrational part of the mind in order to change citizens' ideological beliefs. Speech aimed at the nonrational part of the mind includes outright deception as well as misleading expressions that stoke extreme fears and other intense emotions in order to change ideological beliefs. Such nonrational speech—which I will call propaganda—poses no constitutional threat when it flows from private citizens, including those running for political office. The constitutional protection for the right of private conscience restricts only the government. Attempting to shape citizens' ideological beliefs through falsehoods or extreme emotional framing exerts a coercive pressure on citizens' minds just as much, if not more, than withholding relatively minor material benefits.

Some argue government propaganda is not coercive enough to become a constitutional violation. This is asserted for at least two reasons: other voices in the marketplace can counteract the government's propagandizing speech and, ostensibly, citizens can ignore the speech. Notice, however, these two objections apply to Wooley as well. As the Wooley dissent pointed out, the Maynards could have attached a bumper sticker to the back of their car disavowing the "Live Free or Die" slogan. Much government speech cannot be disputed so directly. As for the second point, the government in Wooley did not create a captive audience for the license plate slogan. The slogan was certainly pervasive, designed and likely to be seen by many, including the Maynards. But citizens were not forced to look at it.

Additionally, in Wooley, the Maynards could have avoided broadcasting the slogan by not driving on public roads. In the case of government propaganda, the speaker would, presumably, usually be a

246 See, e.g., Bezanson & Buss, supra note 79 (arguing as long as speech is intentional and disclosed as the government's, it does not violate citizens' rights); Helen Norton, The Measure of Government Speech: Identifying Expression's Source, 88 B.U. L. REV. 587 (2008) (arguing government speech is permissible as long as it is controlled by the government and identified as such); Smith, supra note 2 (arguing government speech is not coercive enough to violate citizens' rights).
247 Wooley, 430 U.S. at 719-22 (Rehnquist, J., dissenting).
government employee who would stand to be demoted or not promoted if she refused to issue the propaganda. Both benefits are sufficiently large to trigger a coercive effect on the mind, and thus, the right of private conscience protection.

In Garcetti, the Court held that the state may punish its employees for any speech the employee makes pursuant to her official duties. The Court has not addressed the issue of an employee refusing to engage in government-ordered ideological speech, but the reasoning in Garcetti and its antecedents imply that the Garcetti rule might cover the refusal to speak in line with one's official duties as well. If the state punished a public employee for speech made outside her official duties she receives protection only if her speech is a matter of public concern and, additionally, not outweighed by the government's interest in regulating her speech. Though the Court has not defined the exact scope of "public concern," it refers to ideological matters at its core.

The government can dictate individuals' speech insofar as the individuals are legitimately acting as the government. One might thereby conclude that the government can order employees to engage in propaganda as long as the government asserts that disseminating propaganda is part of the employee's official duties. However, the Court rejected the "suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." Instead, the "proper inquiry is a practical one." Beyond this, the Court declined to specify how to determine whether the expression "is within the scope of the employee's professional duties for First Amendment purposes."

Focusing on the reasoning in Garcetti and the germaneness requirements in Keller, Abood and Rutan, it makes the most sense to interpret this test as precluding the dissemination of propaganda. To establish that the government can never order its unwilling employees to disseminate ideological propaganda for the sole purpose of changing citizens'

248 Rutan v. Republican Party, 497 U.S. 62, 71-72 (1990) (stating that hinging demotions or promotions on political beliefs has an unconstitutionally coercive effect on an employee's beliefs).
251 Id. at 146 (describing public concern a "matter of political, social, or other concern to the community").
252 Garcetti, 547 U.S. at 424.
253 Id.
254 Id. at 425.
minds, one would have to argue that disseminating propaganda can never be "within the scope of the employee's professional duties for First Amendment purposes." Policy and public relations jobs, among others, clearly include the task of disseminating the state's ideologies. This alone poses no constitutional harm. The question, however, is whether the government can go further and claim that one of the official tasks of policy workers is to disseminate ideological propaganda for the purpose of changing citizens' beliefs, which, unlike the dissemination of an ideology, intentionally aims to operate coercively on citizens' beliefs through emotional framing or outright deception.

In Garcetti, the Court held that, in the "employee-speech jurisprudence," the "First Amendment interests at stake extend beyond the individual speaker." The other First Amendment interests at stake include "the public's interest in receiving the well-informed views of government employees" and "the necessity for informed, vibrant dialogue in a democratic society." In fact, "the public's interest in receiving informed opinion" and their "right to read and hear what the employees" wish to say as citizens is as important as the employee's individual right to speak.

These additional First Amendment interests justify employees' right to speak out as citizens on their employment

---


256 Garcetti, 547 U.S. at 425.

257 The Court has written, for example, "[l]egislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office . . . ." Bond v. Floyd, 385 U.S. 116, 136-37 (1966).

258 Courts have struggled with the lesser, but related question—whether states can campaign on election issues—and generally found, though often on lack of statutory authority grounds, that the states may distribute information but not engage in campaign advocacy. "Most judicial authorities disapprove the use of public resources to promote partisan positions during elections. In fact, jurisdictions that have addressed the issue so far agree almost uniformly that during an election, communication from the state may inform but not attempt to sway the electorate." Coffman v. Colo. Common Cause, 102 P.3d 999, 1011 (Colo. 2004); see also Leigh Contreras, Contemplating the Dilemma of the Government as Speaker: Judicially Identified Limits on Government Speech in the Context of Carter v. City of Las Cruces, 27 N.M. L. Rev. 517, 546 (1997) (covering how government's partisan campaigning can undermine the democratic process).

259 Garcetti, 547 U.S. at 419.

260 Id.

261 Id. at 420.
insofar as it relates to matters of public concern. But those interests also affect the question, never addressed by the Court, of whether the state can compel government employees to disseminate propaganda. The public’s right to receive informed opinions buttresses the complaint of the employee ordered to disseminate ideological propaganda against her will.

The First Amendment interest in “informed, vibrant dialogue” and the public’s “well-established . . . right to receive information and ideas,”262 cuts against the claim that a government employee’s official duty might include the dissemination of ideological propaganda. This is especially true when the propaganda relies on intentional deception and the suppression of information. If the government can never persuasively argue that an employee’s official duties include the dissemination of propaganda, it must argue that its interest in disseminating propaganda outweighs the employee’s right not to be forced into disseminating objectionable propaganda. Following Wooley, such a calculus would come out in favor of the employee.

Further, the unwilling employee might not be the only one that has a right in this context. The citizen who is regularly subject to the propaganda may also have rights.

The case most on point for the government’s ability to disseminate propaganda is Anderson.263 In Anderson, the Court found that the state placing candidates’ races on the ballot violated the Fourteenth Amendment’s equal protection clause because it was speech intentionally relying on irrationality and had the illegitimate purpose of encouraging racial prejudice. When the state seeks to change citizens’ ideological beliefs through propaganda, it too acts with a paradigmatically illegitimate purpose under the right of private conscience—trying to ensure citizens believe certain ideologies. The only question is whether propaganda is coercive enough. Anderson at least suggests that it is.

Indeed, ideological propaganda may be more coercive than the government merely espousing its ideological view to a captive audience. Both acts seek to change citizens’ minds nonrationally. The latter’s transparency may make it a less effective tool of coercion, and it is far from clear that being forced to listen to the government espouse the virtues of a particular ideology is more likely to alter one’s beliefs than

being routinely exposed to the government's deceptive, misleading and emotionally framed ideological speech.

The *Anderson* Court held that the case "has to do only with the right of a State to require or encourage its voters to discriminate upon the grounds of race."*264* The Court explained that by putting the candidate's race on the ballot:

"The State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. . . . The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls."*265*

The Court interprets the state's speech not as an attempt to persuade citizens of its point of view, but as an attempt to "induce" and "arouse" a particular ideological view. According to the Court, when the state seeks to induce or arouse racial prejudice, it violates the equal protection clause. And this is true even though the citizens can ignore the government's speech. As the equal protection clause prohibits the state from seeking to induce racial prejudice, the right of private conscience should prohibit the state from seeking to induce particular ideological views in citizens. There is no justification for proscribing the state from using its capacity to speak in a coercive manner when it violates one constitutional right, but not another.

The line between propaganda and merely espousing an ideological point of view is a difficult one to draw. Intentional deception for the purpose of changing ideological beliefs will often be the most identifiable example of propaganda. Any use of emotion does not qualify a communication as propaganda. Rather, it has to be explicitly and intentionally deploying irrational cues in order to convert citizens' ideological beliefs to an orthodoxy.

The broader ban on prescribing orthodoxy illuminates the distinction. The government merely espousing an ideological view furthers democratic dialogue, gives voice to the people and respects the autonomy of its citizens. In contrast, when the government conditions benefits or penalties on citizens adopting the right ideology, or uses its power to speak in a deceptive and psychologically coercive manner, it ceases to

*264* *Id.* at 402.

*265* *Id.*
perform a legitimate democratic function. Instead, it infantilizes its citizens, seeking to inculcate the favored ideology through the use of both material and psychological coercion.

**Conclusion**

The Supreme Court’s muddled interpretation of *Barnette*’s prohibition on the state prescribing an orthodoxy has spawned many confused doctrines. The state may not compel citizens to affirm ideologies, but whether the state may engage in other, more pernicious acts of prescribing an orthodoxy remains unclear.

Understanding *Barnette*’s proscription as a ban on the intentional use of nonrational methods to mold citizens’ ideologies provides a much-needed structure for the constitutional doctrine. Interpreting the proscription in this manner also rescues citizens’ right of private conscience from subtler, but no less damaging, attacks by the state.