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Meta Rights

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META RIGHTS

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Are individuals entitled to notice of their constitutional rights or assistance in exercising those rights? In most contexts, the answer is no. Yet, there are some important exceptions, in which the U.S. Supreme Court has held that special circumstances call for notice and procedural protections designed to facilitate rights invocations. This Article refers to these entitlements as "meta rights"—rights that protect rights. The most famous of these is the Miranda *warning, which notifies suspects of their Fifth Amendment rights to silence and an attorney. There are others as well—among them, the First Amendment right of individuals represented by public sector labor unions and bar associations to notice of their right not to subsidize certain union or bar association speech. Certain procedural due process rights also qualify as meta rights, including the notice of the right to litigate individually to which many class members are entitled.*

The reason for the Miranda *warning, as well as for similar notice rights in the procedural due process context, is clear: each aids individuals in overcoming high external barriers to protecting their own rights through self-help. But what justifies meta rights that help union members and attorneys exercise their rights against compelled subsidization of political speech, where there are generally no significant barriers to self-help? Alternatively, why aren't there meta rights in other compelled speech and subsidization contexts? And, if meta rights are appropriate, how robust should they be?*

This Article takes up these questions, arguing that the self-help rationale offers a way to determine when meta rights are required in various constitutional contexts, including in the context of compelled speech and subsidization of speech. It then addresses the challenges inherent in structuring meta rights, which are accentuated where meta rights are owed by private associations—such as unions and bar associations—that have their own First Amendment rights. Ultimately, this Article argues that courts cannot ignore the competing interests of associational speakers and willing members when they determine the scope of meta rights in the

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compelled speech and subsidization context. Thus, to the extent that courts conclude that meta rights themselves implicate the First Amendment, they should account for the possibility that some meta rights do more than just allow dissenters to avoid unwanted speech: they actually encourage opt-outs, and correspondingly discourage speech.

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INTRODUCTION

Constitutional "meta rights"—notice and process rights that are coupled with substantive constitutional rights—exist in just a handful of contexts. The U.S. Supreme Court has not explained why this is so, though there are clues to be divined from cases mandating meta rights in particular contexts. Likewise, while scholars have filled volumes about the scope of meta rights in particular contexts, this Article is the first to compare the Court's differing approaches to these rights across contexts.

This Article begins by considering one area in which the Court has not only established a meta right but also offered a detailed justification for it:

the *Miranda* warning.[1] It then turns to the closely analogous issue of procedural due process rights, and in particular absent class members' entitlement to notice of their opt-out rights. These examples, grounded respectively in the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fifth or Fourteenth Amendment, illustrate that meta rights are usually found where rights-holders cannot otherwise engage in self-help, either because of coercion or because they lack necessary facts—a condition this Article argues is the critical determinant of whether meta rights should be required in a given context.

This Article then applies the lessons of *Miranda* and class action notice rights to First Amendment rights against compelled speech and subsidization, where the Court has held, without explanation, that meta rights are called for only sporadically. In other words, while dissenters often have rights against compelled speech or subsidization, only some institutional speakers are constitutionally required not just to tolerate dissent but also to facilitate it. For example, labor unions must annually provide notice and procedural protections to represented employees who have a right not to pay for union political speech.[2] Bar associations are in theory required to provide the same protections to attorneys,[3] though they often fall short in practice.[4] Yet, public school students are not entitled to notice of their First Amendment right not to say the Pledge of Allegiance, even though students are more vulnerable to coercion than either employees or attorneys.[5]

After considering the availability of self-help in these contexts, the Article concludes that meta rights, if available at all with respect to compelled speech and subsidization, should be distributed differently than they are now. In particular, the most vulnerable potential dissenters—school children—do not currently receive meta rights but have the strongest case for them; while the least vulnerable—food producers participating in certain generic advertising schemes—do not need the protections they now receive. Workers and attorneys fall in between those groups: they do not face significant coercion but sometimes face informational deficits. However, even if these deficits justify some meta rights in the union and bar association context, the Court's recent decision[6] strengthening the meta rights that unions owe represented workers significantly exceeds the justification for those meta rights. Worse, if one accepts the Court's premise that the First Amendment requires strengthened meta rights in order to discourage workers from sleeping on their rights, then the Court's own cure for that problem is as bad as the disease, because it will similarly harm a different set of workers—those who sleep on their rights to speak.

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1. Miranda v. Arizona, 384 U.S. 436 (1966); *see also infra* Part I.B.1.
2. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977); *see also infra* Part I.C.1.
3. Keller v. State Bar of Cal., 496 U.S. 1, 13–14 (1990); *see also infra* Part I.C.2.
4. *See infra* note 153 and accompanying text.
5. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see also infra* Part I.D.1.
6. *See* Knox v. Serv. Emps. Int. Union Local 1000, 132 S. Ct. 2277 (2012).

Given these considerations, and assuming meta rights are at least sometimes called for in the compelled speech context, what should they entail? Here, there are two possibilities: first, notice; and second, structural protections that set behavioral constraints designed to prompt (or discourage) rights invocations. Both notice and structural meta rights in the First Amendment context raise challenging questions regarding the rights of private associational speakers. First, notice rights often call for compelled speech, implicating associations' rights.[7] Second, structural rights, like the opt-in default that applies in the context of certain union dues increases, raise another set of concerns. Behavioral science shows that defaults are not neutral; instead, they are behavioral prompts that encourage individuals to make one decision over another.[8] So, if speech-promoting defaults violate the First Amendment—as the Court recently held in one context[9]—then so should speech-discouraging defaults. Put another way, either none of these defaults violate the First Amendment, and thus can be left to either legislatures or private ordering, or all of them do. However, all is not lost even if the Court concludes that all speech defaults implicate the First Amendment, because careful design of meta rights can minimize infringements on speakers' rights and interests while still protecting dissenters.[10]

This Article proceeds in two parts. Part I defines meta rights and discusses their scope in the *Miranda* and compelled speech and subsidization contexts, as well as the closely related procedural due process context.[11] Then, in Part II, the Article argues that the availability of First Amendment meta rights should turn on whether underlying rights can reasonably be invoked through self-help, and should be structured to minimize interference with willing speakers.

I. RIGHTS AND META RIGHTS

This part begins with a brief general discussion of meta rights, defining them and differentiating them from other types of constitutional rights. Next, it turns to two key areas of constitutional law regarding notice and process rights: first, the right against self-incrimination; and second, procedural due process, particularly the example of class action notice rights. Finally, it turns to compelled speech and subsidization of speech, where courts have imposed meta rights only sporadically, and without meaningful explanation. This Part provides the basis for Part II, which critiques the Court's distribution of meta rights in the compelled speech context and proposes a better way forward.

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7. *See infra* Part II.C.1.
8. *See infra* Part II.C.2.
9. *See Knox*, 132 S. Ct. 2277.
10. *See infra* Part II.C.2.
11. The analogy between meta rights and procedural due process rights prior to deprivations of property or liberty is a close one. Moreover, some procedural due process rights—including the right to the class action notice, on which I focus as an example—fits the definition of a meta right.

A. Defining Meta Rights

Meta rights, which require potential rights infringers to help others invoke their rights by providing notice or other protections, are derived from the same source as the substantive rights that they protect. Probably the most famous meta right is the *Miranda* warning, which notifies individuals undergoing custodial interrogation of their Fifth Amendment rights against self-incrimination.[12] The idea is that *Miranda* makes rights invocation easier (and therefore more likely) by informing those undergoing custodial interrogation that they are entitled to choose to remain silent and that making a different choice may have negative consequences.[13] Thus, meta rights eliminate certain barriers to rights invocation.[14]

Meta rights can be based in legislation or the Constitution. While this Article is concerned with constitutional meta rights, statutory meta rights are relatively common. For example, employers are required to inform employees about a host of workplace rights arising under statutes such as Title VII of the Civil Rights Act[15] and the Fair Labor Standards Act.[16] These statutory protections reflect congressional or administrative judgments that particular rights or entitlements will be better respected and more robustly enforced if potential violators must tell potential victims about their rights.[17]

In contrast to Congress or the Executive, courts generally proceed as though individuals are aware of their constitutional rights, whether or not this assumption is borne out empirically.[18] Thus, constitutional meta rights

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12. Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).

13. This is not to say that the *Miranda* warning makes rights invocation objectively easy. *See, e.g.*, Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 260–61 (1993) (demonstrating challenges associated with invoking *Miranda* rights and arguing that these difficulties will be amplified for women and minorities).

14. In other contexts, both courts and commentators commonly recognize the value of structures that improve individuals' abilities to understand the scope of their rights. The common law system of precedent is such a structure. As one commentator has observed:

> The protection of settled expectations is among the most prevalent justifications for deferring to precedent. When a court issues an opinion, stakeholders modify their behaviors in response. Judicial delineation of the applicable rules affects commercial activities such as the formation of contracts, allocation of investments, and organization of business operations. It influences governmental decisions such as the crafting of legislation designed to foster democratic objectives within lawful bounds. It even affects societal understandings regarding the content of the legal backdrop against which citizens arrange their lives.

Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1855 (2013).

15. 42 U.S.C. § 2000e-10 (2012).

16. 29 C.F.R. § 516.4 (2014).

17. Meta rights could have multiple beneficial effects, in addition to educating individuals about their rights: first, the process of notifying individuals of their rights could serve an educative function for institutions themselves, thereby preventing inadvertent violations; and second, having to provide notice could make institutions acutely aware that individuals know their rights, which could itself deter violations.

18. *See, e.g.*, *infra* note 61 and accompanying text. A significant body of literature shows that where warnings are not required, individuals often are not aware of their rights to avoid encounters with police. *E.g.*, Devon W. Carbado, *(E)Racing the Fourth Amendment*,

are unusual. Where they exist, they are generally announced by courts in the course of articulating substantive constitutional protections.[19] Yet, it may not be apparent from the constitutional text itself that meta rights are required;[20] further, as discussed in the remainder of this Article, the Court shapes meta rights in response to a range of concerns, both constitutional and practical.

Despite their common source, meta rights are distinct from the substantive rights that they protect. Analyzing meta rights in Hohfeldian[21] terms clarifies the distinction. Consider the First Amendment context: First Amendment rights are generally "privileges"—rights that protect individuals' choices to speak or not speak against interference by the government, but do not impose affirmative duties on the government to furnish individuals with opportunities for speech or silence.[22] But a right to receive notice of one's First Amendment rights is a "claim" right—one that corresponds to a duty owed by the government,[23] or, in some compelled

100 MICH. L. REV. 946, 1023 (2002) (arguing that the Court's own analysis reflects the idea that people who do not know their constitutional rights are likely to feel compelled to assent to a police officer's request for permission to search); Lewis R. Katz, *"Lonesome Road": Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413, 1466 (2013) (asserting that the Court's body of law regarding consensual searches is "based upon a misperception that Americans know their rights").

19. Some meta rights first articulated by the Court are later shaped or enhanced by legislatures. *See infra* Part II.B. As I discuss below, the Due Process Clause mandates that absent class members in certain class actions receive notice and an opportunity to opt out of the class. Mullane v. Cent. Hanover Bank & Trust, 339 U.S. 306, 313 (1950). However, the notice procedure is governed by Federal Rule of Civil Procedure 23(c)(2), which tracks the Due Process requirements. *See infra* Part I.B.2. Likewise, some state legislatures mandate more robust protections for objecting union members than are required by the Court. *See infra* Part I.C.1.

20. For example, the Court only recently clarified that the warnings announced in *Miranda* are constitutionally required. Dickerson v. United States, 530 U.S. 428, 438 (2000) (holding that *Miranda* announced a constitutional rule, but acknowledging that the Court had, in previous cases, used language suggesting *Miranda* was subconstitutional). Before *Dickerson*, a significant body of scholarship debated the constitutional status of the *Miranda* warning. *See* Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1044 & n.162, 1045 (2010) (aggregating articles articulating both sides of the debate over *Miranda*); *see also* Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 106–07 (1985) (arguing that *Miranda* warnings are not constitutionally required, and that *Miranda*'s prophylactic rule was illegitimate); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195 (1988) (critiquing Grano's argument).

21. Wesley Newcomb Hohfeld famously constructed a taxonomy of rights, distinguishing between claims, liberties, authorities, and immunities. *See generally* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

22. *See* Hohfeld, *supra* note 21, at 32 (defining "privilege" as an entitlement to take an action without interference and distinguishing a privilege from a claim right, which corresponds to an affirmative duty that someone else must undertake); Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914, 916 (2008) (noting that the First Amendment is "a privilege or a liberty in Hohfeldian language" and "not a right *to* have the actual opportunity to speak, nor is it a right to have a platform for speaking, nor is it the right to have an audience").

23. *See infra* note 22 and accompanying text.

speech contexts, a union or bar association. That is, where individuals are entitled to notice of their rights not to speak, there is a corresponding duty to provide notice that is imposed on an institutional speaker.[24] The same is true of the Fifth Amendment right to avoid self-incrimination: it is a privilege, which means that the government cannot interfere with the privilege where it exists, though it is not bound by any affirmative duty to provide opportunities for silence. On the other hand, the right to receive the *Miranda* warning is a claim right that correlates with a duty to provide the warning.[25]

This distinction is significant because it underscores that meta rights are distinct from rights. Nonetheless, they are often discussed interchangeably, or as though the meta right is merely an extension of the right. However, this conflation obscures the unusual and distinct nature of court-created meta rights and prevents them from being understood together as a class. Accordingly, I discuss in the next section existing rights and meta rights, focusing on the Court's rationale for providing the latter. I then turn to the First Amendment right not to speak or subsidize speech, where meta rights exist only sporadically, and without explanation.

B. Baseline Meta Rights

Although constitutional meta rights are relatively rare, some important exceptions stand out.[26] This section begins with the *Miranda* warning, which is the most thoroughly explained meta right. I then turn to procedural due process rights, focusing in particular on the right of certain class members to receive notice of their opt-out and objection rights. As I discuss, not all procedural due process rights qualify as meta rights. However, procedural due process is a helpful reference point in considering why the Court sometimes views notice and other protections as critical to allowing individuals to invoke their substantive rights.

Finally, while the *Miranda* warning and class action notice right are grounded, respectively, in the Fifth Amendment right against self-incrimination and Due Process, they each involve, in a sense, rights to

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24. Hohfeld, *supra* note 21, at 31–32 (a "claim right" correlates with a duty owed by another); Schauer, *supra* note 22, at 916 ("[A] positive right is one for which there is a claim on the state to provide just that which the right guarantees.").

25. *See* Laurent Sacharoff, Miranda*'s Hidden Right*, 63 ALA. L. REV. 535, 540 (2012) ("At the core of the Fifth Amendment lies a Hohfeldian 'liberty,' the liberty not to speak. On the perimeter, protecting the liberty like soldiers, stand several Hohfeldian 'claims.'").

26. In addition to the meta rights discussed in this Article, other meta rights have been established in connection with criminal trials, where notice of constitutional rights is often provided either by judges or by constitutionally guaranteed counsel. For example, a robust meta rights regime discourages criminal defendants from waiving their right to counsel during a trial. Faretta v. California, 422 U.S. 806, 835 (1975) (holding that defendants have a right to represent themselves, but underscoring that the waiver of the right to counsel must be knowing and voluntary, and requiring that the defendant be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'"). However, I focus on *Miranda* and class action notice and opt-out rights because of the close analogy that can be drawn between these situations and the right to avoid compelled speech or subsidization.

silence—to refrain from participating in police interrogation, or to refrain from litigation (or shape one's own lawsuit), which is a form of petitioning under the First Amendment that can also constitute expressive advocacy.[27] Thus, the Court's rationale for creating meta rights in each of these areas can lend important insights to the development of meta rights in the compelled speech and subsidization context.

1. *Miranda* Warnings

Miranda v. Arizona[28] established the mandatory *Miranda* warning, a meta right to notice that will be familiar to anyone who has ever watched a police procedural. Like the body of law governing the *Miranda* warning, the volume of scholarly literature analyzing the decision and its consequences is massive.[29] However, scholars have not focused on the similarities between the *Miranda* warning and decisions finding meta rights in other contexts.

Why give suspects information about their constitutional rights, rather than either assuming that they are constructively aware of their rights or relying on the suspects themselves to ask for clarification? The *Miranda* Court answered this question in some detail. It began by listing the conditions that were critical to its conclusion that a warning was required: "incommunicado interrogation of individuals in a police-dominated atmosphere."[30] The Court then explained the significance of these conditions and their deleterious effect on the "individual's right to choose between silence and speech."[31] It stressed that police are specially trained to convince suspects to waive their constitutional right to remain silent and decide to "talk,"[32] emphasizing that police practice could go beyond mere

27. The Court has observed that litigation can be expressive, and even non-expressive litigation is protected under the First Amendment's Petition Clause. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("The right of access to courts is indeed but one aspect of the right of petition."); NAACP v. Button, 371 U.S. 415, 429 (1963) (holding that litigation aimed at "achieving the lawful objectives of equality of treatment" is "political expression" protected by the First Amendment); *see also infra* Part I.B.2.

28. 384 U.S. 436 (1966).

29. *E.g.*, THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING (Richard Leo & George C. Thomas III eds., 1998) (compiling essays regarding history, constitutionality, policy, and ethics of *Miranda* warning); Ainsworth, *supra* note 13; Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 858 (1995) (arguing that "the government should be allowed to require a suspect to answer relevant questions in a civilized pretrial hearing presided over by a judge or magistrate," after which "compelled pretrial statements can never be introduced against him in a criminal case but that reliable fruits of such statements virtually always can be"); Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1842 (1987) (arguing that "[a]ll suspects in custody should have a nonwaivable right to consult with a lawyer before being interrogated by the police"); Strauss, *supra* note 20.

30. *Miranda*, 384 U.S. at 445.

31. *Id.* at 469.

32. *Id.* at 449–50 (describing a police training manual that directs police to interrogate suspects outside of their own homes, because a suspect at home "is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home").

encouragement to "persua[sion], trick[ery], and cajol[ing]."[33] The Court's concern was that psychologically coercive interrogation practices involving an "unfamiliar atmosphere" and "menacing police interrogation procedures" would undermine suspects' abilities to stand on their constitutional rights, rendering their subsequent statements not "truly the product of free choice."[34] Further, these conditions made it unlikely that suspects would be able to effectively request counsel, creating a vicious cycle in which coerced suspects would be kept both ignorant of their rights and deterred from learning about them.[35]

The Court elaborated on this reasoning in subsequent cases. In *Berkemer v. McCarty*,[36] the Court considered whether the *Miranda* warning was required either when a motorist was stopped by the side of the road for a suspected traffic offense, or later when the same suspect was arrested for a relatively minor traffic offense and taken to the police station.[37] Beginning with the second question, the Court held that the *Miranda* warning is required any time a suspect is taken into custody, even when the triggering offense is a misdemeanor.[38] Again, the Court stressed the difficulty of invoking one's rights against self-incrimination in the face of police tactics, as well as the usefulness of a bright-line rule.[39]

More telling was the *Berkemer* Court's holding regarding the need (or lack thereof) for a *Miranda* warning during a traffic stop. As the Court put it, the question was "whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights."[40] Answering that question in the negative, the Court focused on two bases for distinguishing a traffic stop from custodial interrogation: that the traffic stop is brief and that it is public.[41] The presumptive brevity of a traffic stop meant that motorists likely would be aware that they would have

33. *Id.* at 455.

34. *Id.* at 457.

35. *Id.* at 465–66 (describing how police denial of a suspect's request for counsel "heightened [the suspect's] dilemma, and made his later statements the product of this compulsion").

36. 468 U.S. 420 (1984).

37. *Id.* at 422–23.

38. *Id.* at 433.

39. *Id.* at 432–33. Some scholars have also emphasized the usefulness of a bright-line rule to distinguish voluntary from involuntary statements to police, sometimes suggesting that the Court could improve on *Miranda* in ways that further eliminate the need for hearings regarding issues related to *Miranda* warnings. *E.g.*, Ogletree, *supra* note 29. Others have argued that *Miranda*'s bright-line rule can actually be counterproductive when judges are lulled "into admitting confessions with little inquiry into voluntariness." Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1026 (2001); *see also* Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 745–46 (1992) (observing that in the twenty-five years following *Miranda*, "the Court has reversed only two convictions on the ground that post-*Miranda* custodial interrogation produced an involuntary statement," in contrast to twenty-three reversals pre-*Miranda*, and further, "lower courts have adopted an attitude toward voluntariness claims that can only be called cavalier").

40. *Berkemer*, 468 U.S. at 437.

41. *Id.* at 437–38.

to withstand police questioning for only a short time before being allowed to continue on their way.[42] The public nature of the stop meant that police officers would have fewer opportunities for "illegitimate means to elicit self-incriminating statements . . . diminish[ing] the motorist's fear that, if he does not cooperate, he will be subjected to abuse."[43] In combination, these factors meant that those stopped by the police would not be coerced into waiving their constitutional rights.

For similar reasons, the Court has held that the *Miranda* warning need not be given before a suspect is interrogated by an undercover officer or police informant.[44] In that situation, the suspect is unaware that "the listeners have official power over him."[45] This combination negates the "interplay between police interrogation and police custody" with which the *Miranda* court was concerned.[46] In other words, suspects in these circumstances who wish to remain silent should be able to do so without the benefit of a warning. Likewise, the Court has held that police need not inform suspects that their attorneys are trying to reach them, reasoning that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."[47]

These cases reveal that the Court's concern in developing the *Miranda* warning was not simply that criminal defendants may be unaware of their Fifth Amendment rights.[48] Rather, the Court has been concerned only about situations in which even criminal suspects with baseline knowledge of their rights would be unable to invoke because of anticipated or actual police coercion. This explains why the same suspect in *Berkemer* was entitled to a warning once he was arrested, but not when he was stopped by the side of the road—even though he was equally likely to be aware (or not) of his rights at both times. Thus, the meta rights regime announced in *Miranda* is aimed at alleviating specific state-created conditions that discourage rights invocation.

2. Procedural Due Process and Notice Rights in Aggregate Litigation

Procedural due process rights occupy an ambiguous position in the rights/meta rights framework. At minimum, they are often quite similar to meta rights in that they demand that individuals receive notice and other protections before they are deprived of liberty or property interests.[49] Yet,

42. *Id.* at 437.
43. *Id.* at 438.
44. *See* Illinois v. Perkins, 496 U.S. 292, 299–300 (1990).
45. *Id.* at 297.
46. *Id.* (emphasis omitted) (quoting Yale Kamisar, Brewer v. Williams, Massiah, *and* Miranda*: What Is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1, 63 (1978)).
47. Moran v. Burbine, 475 U.S. 412, 422 (1986).
48. *See* Yale Kamisar, Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387, 403 (2001) ("*Miranda* has been criticized from the outset for failing to recognize 'the improbability, if not the impossibility, of an intelligent waiver' of one's *Miranda* rights.").
49. Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

procedural due process rights most often attach to liberty or property interests that are created by statute,[50] rather than to substantive rights that flow from the Due Process Clause itself. Thus, procedural due process rights are often separate from the underlying interests that they protect—though there are some exceptions, including in the class action context[51]—whereas meta rights are grounded in the same sources as the underlying rights that they protect.[52] However, even when procedural due process rights are not meta rights as I have defined them, they may still provide useful insights about when and why courts require that rights-holders receive notice and process protections.

In *Mathews v. Eldridge*,[53] the Court announced the modern framework for determining when procedural due process protections, including the right to notice and a hearing, attach to government decisions depriving individuals of liberty or property interests. Under the *Mathews* test, courts are to weigh

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and [the] probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[54]

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50. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."); *see also* Goldberg v. Kelly, 397 U.S. 254, 256, 264 (1970) (holding that procedural due process requires a hearing before discontinuance of statutorily created welfare benefits).

51. *See infra* notes 67, 69 and accompanying text. I focus in particular on the class action context because of its analytical similarities to meta rights that arise in the First Amendment context. However, other procedural due process rights—those that attach to substantive due process rights—may also qualify as meta rights. *See* Boddie v. Connecticut, 401 U.S. 371, 382 (1970) (finding procedural due process right for indigent divorce petitioners to be excused from filing fee requirement). However, the Court is often imprecise about the relationship between substantive and procedural due process rights, leaving some ambiguity as to where meta rights exist—a topic to be explored in future work.

52. In other words, procedural due process does not require that any particular liberty or property interest be created; it simply imposes an external constraint on government actors who choose to create such an interest. *See generally Mathews*, 424 U.S. 319. In contrast, the Court derived the notice requirements announced in *Miranda* and the compelled speech cases, discussed in Part I.C–D, by interpreting and applying the Fifth and First Amendments, respectively; similarly, the due process right to opt out of certain class actions, discussed in this part, itself requires that class members receive notification of their rights. Likewise, meta rights in statutory contexts are generally created either in the same statutes that create the underlying rights (as in the case of Title VII), or else they are created by administrative agencies charged with executing the underlying statute (as in the case of the Fair Labor Standards Act). Accordingly, meta rights are not coextensive with procedural rights; instead only those notice and structural rights that are bundled with the rights they are intended to protect qualify as meta rights.

53. 424 U.S. 319 (1976).

54. *Id.* at 335.

Courts have applied the *Mathews* tests to a range of situations with varying and often unpredictable results, leading to a significant body of criticism.[55] For example, while public employees often have property interests in their jobs, the Court has adopted a case-by-case approach to determining how much process is due, sometimes requiring an informal hearing before an employee is fired, but other times allowing public employers to act first, and provide process later.[56]

Though the process required by procedural due process varies, it often consists of a pre-deprivation, nonjudicial hearing, which must be preceded by adequate notice.[57] It goes nearly without saying that the purpose of the administrative hearing is to avoid erroneous deprivations, though others have pointed out that hearings may have other benefits as well.[58] The reason for the accompanying notice right is similarly straightforward: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."[59] In other words, the required notice provides factual information so that the hearing recipient can participate meaningfully.[60] In contrast, the Court has held that due process does not require notice of legal rights, which are "generally

55. *See, e.g.*, Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 330–31 (1993) (describing limits to *Mathews* test); Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUDIES 307, 373–75 (1994) (describing scholarly criticism of *Mathews* and arguing the *Mathews* test is "confused"); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46–57 (1976) (arguing *Mathews* is overly utilitarian); Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1326–34 (2012) (describing criticism of *Mathews*); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 154–56 (1978) (arguing *Mathews* undervalues dignitary interests); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 354–55 (1990) (arguing *Mathews* can be criticized as overly utilitarian).

56. *Compare* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985) (public employee entitled to pre-termination informal hearing), *with* Gilbert v. Homar, 520 U.S. 924, 935 (1997) (police officer not entitled to pre-suspension hearing after arrest on drug charges), *and* Cafeteria & Rest. Workers Union Local 473 v. McElroy, 367 U.S. 886, 898 (1961) (public employee not entitled to notice or opportunity to be heard before security badge was revoked, resulting in termination of employment). *See also* J. Michael McGuinness, *Procedural Due Process Rights of Public Employees: Basic Rules and a Rationale for a Return to Rule-Oriented Process*, 33 NEW ENG. L. REV. 931, 935 (1999) (observing that "the Supreme Court has declined to specify any litmus test as to what procedural safeguards must be afforded to public employees prior to or after adverse employment action").

57. *See* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1270–71 (1975) (describing development of the hearing requirement).

58. *See, e.g.*, Parkin, *supra* note 55, at 1327–29 (describing benefits to pre-termination benefits hearings, such as improving government accountability, allowing welfare recipients to interact with government on a more equal footing, and promoting organizing).

59. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (quoting Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

60. Friendly, *supra* note 57 at 1280–81 (citations omitted) ("It is likewise fundamental that notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it. Otherwise the individual likely would be unable to marshal evidence and prepare his case so as to benefit from any hearing that was provided.").

available [through] state statutes and case law."[61] Thus, whereas a municipality that seizes private property must provide notice that the seizure has occurred—"because the property owner would have no other reasonable means of ascertaining who was responsible for his loss"—the municipality need not give notice of available remedies because that information is publicly available from other sources.[62] The significance of this distinction between ignorance of facts and ignorance of law is discussed in Part II.

As described above, procedural due process rights sometimes do qualify as meta rights because they were developed to protect rights that themselves arise under the Due Process Clause. One significant example arises in the class action context,[63] where many unnamed or "absent" class members have a due process right to litigate individually.[64] This due process right is in turn buttressed by a meta right: a due process right to notice of the opportunity to opt out.

The parameters of the right to litigate individually and the meta right to notice are established by Federal Rule of Civil Procedure 23.[65] However, Rule 23 carefully tracks the Due Process analysis, and both apply only to class actions that seek money damages,[66] where absent class members are entitled to an opportunity to litigate individually and notice of the same.[67] That rule, as well as its constitutional grounding, flows from *Mullane v. Central Hanover Bank & Trust Co.*,[68] in which the Court held that absent claimants had a due process right to "reasonably certain" notice of the impending resolution of their case, which involved payouts from a common trust fund.[69] The Court stressed that the notice was linked to the due process "right to be heard," which "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[70]

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61. City of W. Covina v. Perkins, 525 U.S. 234, 241 (1999).

62. *Id.*

63. For ease of reference, I generally use the term "class actions" to refer to all forms of aggregate litigation accompanied by opt-out rights.

64. Mullane v. Cent. Hanover Bank & Trust, 339 U.S. 306, 313 (1950). *Mullane* was not itself a Rule 23 class action, but rather a proceeding to settle numerous potential claims against a trust. *Id.* at 307.

65. FED. R. CIV. P. 23.

66. *Id.* 23(b); *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (explaining that lack of notice or opportunity to opt out of class action violates due process when the class action seeks money damages); *Mullane*, 339 U.S. at 313 (reasoning that absent class members are bound by the judgment or settlement in a class action, meaning that the class action extinguishes each absent class member's claim, which is a potentially valuable asset).

67. FED. R. CIV. P. 23(c)(2). For class actions in which only declaratory or injunctive relief is sought—class actions certified under Federal Rule of Civil Procedure 23(b)(1) or (b)(2)—notice may be issued but is not required.

68. 339 U.S. 306 (1950).

69. *Id.* at 315; *see also* FED. R. CIV. P. 23 advisory committee's note of 1966 ("This mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.").

70. *Mullane*, 339 U.S. at 314.

Similarly, the *Phillips Petroleum Co. v. Shutts*[71] Court stressed that absent class members with "claims averaging about $100 per plaintiff" were entitled to notice of their right to opt out of the class and litigate individually, even though individuals with small claims are very unlikely to exercise that right.[72] However, the Court also carefully structured the meta rights to align with the practicalities of the case, rejecting the defendant's argument that an opt-in default (a structural meta right) was required to fully protect absent class members' due process rights to litigate individually:

> Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution. If, on the other hand, the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to "opt out."[73]

Thus, the *Shutts* Court determined that an opt-out default was appropriate by considering the likely preferences and interests of different kinds of class members, assuming they would act in a manner consistent with their economic interests.[74] However, the Court did not suggest that the opt-out default was constitutionally required, and it explicitly rejected the opposite argument, that an opt-in was constitutionally required.[75] Instead, the Court simply chose what it viewed as the best default, which presumably could have been legislatively overridden.[76] Put another way, the Court understood that some absent class members who had not opted out had failed to make a choice and simply waived their rights because of inertia.[77] The Court nonetheless concluded that this was a constitutionally acceptable state of affairs and, in any event, best served the likely interests of the majority of absent class members.[78] Conversely, the Court assumed that

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71. 472 U.S. 797 (1985).

72. *Id.* at 809.

73. *Id.* at 812–13 (citations omitted). Some commentators have criticized this rule as failing to adequately protect the constitutional rights of litigants. *See* Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1601 (2007) (arguing that class actions implicate First Amendment rights against compelled expression or association).

74. *Shutts*, 472 U.S. at 812–13.

75. *Id.* at 812.

76. *Id.* at 813–14 (stating that adopting an "opt in" requirement as a matter of constitutional law would "require the invalidation of scores of state statutes as well as Federal Rule of Civil Procedure 65").

77. *Id.* at 812–13.

78. Although this Article focuses only on the meta rights associated with class actions, other procedural protections are also in place. For example, judges must assure themselves that the class definition is appropriate and must approve any settlement. FED. R. CIV. P. 23(a), (e).

the absent class members who had the strongest motivation to exercise their rights—those with large claims who might conclude that they would do better individually than as part of a class—would take the necessary steps to opt out and concluded that there was no constitutional barrier to requiring them to take those steps.[79]

Finally, it is worth briefly considering the absence of both rights and meta rights in class actions seeking only equitable relief. In these cases, absent class members are neither entitled to opt out of the class nor even guaranteed notice of the pendency of the class action, except in cases in which the parties propose settlement.[80] The Court has justified this different treatment by reasoning that in class actions seeking monetary judgments, class members may be better off litigating individually based on their unique circumstances, whereas injunctive and declaratory relief is more likely to be one-size-fits-all.[81] Ironically, though, equitable class actions are relatively likely to deal with politically charged topics about which class members may hold different views.[82] These are the class actions that are most likely to qualify as "expressive," implicating First Amendment rights of free speech and association in addition to petition.[83] Thus, the Court's conclusion that absent class members are entitled to notice only in monetary relief cases means that absent class members are not guaranteed even the ability to attempt to influence the course of the litigation, much less an opportunity to avoid association with a class of

79. *Shutts*, 472 U.S. at 813 ("[T]he Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so.").

80. *See* FED. R. CIV. P. 23(e)(1); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 347–48 (1987).

81. *Compare* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (explaining that lack of notice or opportunity to opt out of class action violates due process when the class action seeks money damages), *with* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (reasoning that absent class members are bound by the judgment or settlement in a class action, meaning that the class action extinguishes each absent class member's claim, which is a potentially valuable asset).

82. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 505–06 (1976) ("[T]he strongest opposition to civil rights litigation strategy may come from unnamed class members."); *see also* Weber, *supra* note 80, at 353 ("Antipoverty and civil rights cases continue to be among the most frequently filed [equitable relief] class actions.").

83. *See* NAACP v. Button, 371 U.S. 415, 431 (1963) (stating that class-based civil rights litigation is an "effective form of political association"). Thus, some scholars have argued that class membership implicates—and potentially infringes—First Amendment rights. Redish & Larsen, *supra* note 73, at 1601 ("[I]n certain instances, forced association with those who seek to pursue courses of action that the litigant finds economically, morally or politically offensive also threatens fundamental First Amendment dictates that can similarly be discerned from the values appropriately found to explain the procedural due process guarantee."); Jay Tidmarsh, *Superiority As Unity*, 107 NW. U. L. REV. 565, 575 (2013) ("[I]f the First Amendment's freedoms of expression and association guarantee a right of nonassociation, then how can the government force class members to associate with each other in a class action?" (citation omitted)).

litigants seeking a potentially offensive remedy.[84] This state of affairs also contrasts significantly with some of the Court's holdings in the compelled speech and subsidization context, to which the next section is devoted.

C. Rights and Meta Rights Not to Subsidize Speech

This section traces the scope of objectors' rights not to speak or subsidize others' speech. As other scholars have shown, the Court's analysis of these rights lacks a coherent theoretical justification.[85] This critique is equally applicable to the Court's compelled speech meta rights jurisprudence.[86] This section begins with cases concerning the right not to subsidize speech financially, where meta rights are prevalent. In contrast, meta rights to avoid compelled speech itself are conspicuous only in their absence.

1. Labor Unions

Unionized American workplaces are generally governed by the "exclusive representation" system, in which an elected union represents all of the employees in a bargaining unit, including those who voted in favor of representation by a different union or against unionization altogether.[87] This means that each bargaining unit member is covered by the same

84. Redish & Larsen, *supra* note 73, at 1601–02 (discussing range of objections to class action litigation in general and to specific suits).

85. *E.g.*, Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. SEIU, Local 1000, 98 CORNELL L. REV. 1023, 1025 (2013) (arguing that the Court's compelled subsidization doctrine regarding unions cannot be reconciled with First Amendment doctrine privileging the rights of organizations over the rights of associated individuals); Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1090 (2005) ("Over the years, however, the Court has employed different standards to decide compelled subsidization cases. And it has never settled on a single account of the doctrine's theoretical underpinnings—just what First Amendment interest is threatened by compelled subsidization."); Robert Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Marketing Association, 2005 SUP. CT. REV. 195, 197–98 (arguing that "the fundamental premise of [compelled subsidization doctrine] is flawed" and that the doctrine "cannot be rebuilt along theoretically defensible lines until we have some better explanation of when First Amendment review should be triggered and when it should not").

86. Because this Article is focused on meta rights, I discuss only those compelled speech cases that involve an institutional speaker that seeks to compel affiliated individuals to speak or subsidize institutional speech. This is because such cases are the only ones in which meta rights are feasible; where it is difficult or impossible to tell in advance who might be affected by a compulsion to speak, it would also be extremely challenging to provide advance notice of the right to avoid compelled speech.

87. Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 COMP. LAB. L. & POL'Y J. 47, 47 (1998) (stating that "[t]he fundamental ordering principle which shapes American labor law and collective bargaining is the principle of exclusive representation articulated in Section 9(a) of the National Labor Relations Act."); Deborah A. Schmedemann, *Of Meetings and Mailboxes: The First Amendment and Exclusive Representation in Public Sector Labor Relations*, 72 VA. L. REV. 91, 92 (1986) ("Public sector labor laws generally follow the private sector doctrines of majority rule and exclusive representation.").

collective bargaining agreement, which is negotiated and enforced by the union.[88]

Bargaining, contract administration, and other union activities are costly, raising a question about how union expenses will be shared among bargaining unit members. In twenty-four "right to work" states, the answer to this question is straightforward because state legislatures have barred unions from charging unwilling bargaining unit members for any of the costs of representation.[89] However, in the remaining "fair share" states, the answer is more complicated. As explained in more detail below, unions and employers may agree that each bargaining unit member must pay part, but not all, of the union's costs. Specifically, bargaining unit members can be required to pay only for those costs that are germane to the process of collective bargaining, but not for other costs, such as those associated with lobbying and political advocacy.[90] The chargeable portion is called an agency fee.[91]

In the public sector, as well as in workplaces governed by the Railway Labor Act,[92] this arrangement raises First Amendment questions regarding compelled subsidization of union speech. In a series of cases concerning unionized railway and public sector workplaces,[93] the Court established the scope of government employees' First Amendment rights not to associate with or fund labor unions. Additionally, the Court has created an evolving and detailed set of meta rights designed to facilitate bargaining unit members' exercise of their rights not to pay for non-germane union activity.

The key modern case establishing the parameters of public sector bargaining unit members' rights to refrain from paying for certain union

88. Conversely, the union owes all bargaining unit members a duty of fair representation. *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 271 (2009) (discussing the duty that the National Labor Relations Act (NLRA) imposes on a union to serve all bargaining unit members without acting arbitrarily, discriminatorily, or in bad faith).

89. *See Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., INC., http://www.nrtw.org/rtws.htm (last visited Oct. 19, 2014) (listing state right to work laws).

90. *See* Matthew T. Bodie, *Labor Speech, Corporate Speech, and Political Speech: Response to Professor Sachs*, 112 COLUM. L. REV. SIDEBAR 206, 208 (2012).

91. Gerald D. Wixted, *Agency Shops & the First Amendment: A Balancing Test in Need of Unweighted Scales*, 18 RUTGERS L.J. 833, 833 (1987).

92. Though employers and unions governed by the Railway Labor Act (RLA) are private, the Court nonetheless held that union shop contracts governed by the RLA satisfy the First Amendment's state action requirement because the RLA preempts state right to work laws. Ry. Emp. Dept. v. Hanson, 351 U.S. 225, 232 (1956) (citing 45 U.S.C. § 152 (1951)).

93. In *Communications Workers of America v. Beck*, the Court extended the framework applicable to public sector and railway unions to private sector unions governed by the NLRA as a matter of statutory construction. 487 U.S. 735, 762–63 (1988). Thus, the *Beck* Court did not decide whether the conduct of private sector, NLRA-governed, unions involves state action. *Id.* at 761. I do not address that question in this Article, though others and I have critiqued it elsewhere. Charlotte Garden, *Citizens, United and* Citizens United*: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 41–42 (2011) (arguing that state action is not present in NLRA context); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 848–50 (2012) (critiquing the argument that state action is present in NLRA or RLA context). Thus, though the same meta rights generally apply whether the employer is in the public or private sector, I generally confine this Article to the public sector for ease of discussion.

expenses, particularly union political spending, is *Abood v. Detroit Board of Education*.[94] *Abood* held that while any obligation to support a union could "interfere in some way with an employee's freedom to associate,"[95] employees could nonetheless be required to pay for union expenses that are germane to collective bargaining.[96] Conversely, these employees could not be required to fund union "expression of political views," support for political candidates, or "other ideological causes not germane" to collective bargaining.[97]

The Court arrived at this formula by balancing objectors' First Amendment rights to avoid unwanted speech and association against the countervailing government interest in the stability achieved through the exclusive representation system.[98] The Court did not weigh the First Amendment rights of unions or willing speakers in this calculus.[99] The Court emphasized the strength of the objectors' interest in avoiding compelled subsidization of speech with which they disagreed, quoting Thomas Jefferson: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[100] Yet, the Court continued, the government had an important interest in the exclusive representation system because that system

> prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.[101]

Further, permitting bargaining unit members to free ride by receiving the benefits of union representation without paying for them would threaten the "labor peace"-related benefits of exclusive representation, in that it could deprive the union of resources necessary to effectively represent members, which in turn could lead to a greater possibility of labor unrest.[102]

Thus, public employers and unions may agree that bargaining unit members are required, on pain of job loss, to pay an "agency fee" representing their share of union activities that are germane to the union's

94. 431 U.S. 209 (1977). The Court recently held in *Harris v. Quinn* that *Abood* did not apply in the context of so-called partial-public employees, although *Harris* did not modify *Abood*'s core holding. 134 S. Ct. 2618, 2638 (2014).

95. *Abood*, 431 U.S. at 222.

96. *Id.* at 235–36.

97. *Id.* at 235.

98. *Id.* at 220–21 (explaining that exclusive representation means that an elected union is responsible for fairly representing all of the employees in a bargaining unit, to the exclusion of all other bargaining representatives).

99. I have critiqued this failure elsewhere. *See* Garden, *supra* note 93, at 40–41 (arguing that *Citizens United* requires courts to weigh union First Amendment rights against objector First Amendment rights).

100. *Abood*, 431 U.S. at 234–35 n.31 (quoting I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948)).

101. *Id.* at 220–21.

102. *Id.* at 224, 221–22.

role as workplace representative of bargaining unit employees, particularly collective bargaining and grievance administration.[103] Later cases, including *Lehnert v. Ferris Faculty Ass'n*,[104] defined the scope of "germane" expenses in greater detail.[105] In *Lehnert*, the union charged represented employees who did not join the union the full amount of union dues, reasoning that all of its activities, including political interventions such as lobbying on issues related to the workplace, were ultimately designed to improve the union's collective bargaining position.[106] The Court rejected this position in significant part, holding that, whereas unions could require public employees to fund bargaining and grievance administration, union conventions and other social activities, and strike preparation, they could not charge objecting bargaining unit members for lobbying and other political activity—except to the extent the lobbying was designed to encourage a legislature to approve a collective bargaining agreement—or for new organizing and the conduct of illegal strikes.[107]

In sum, employees who are part of a union-represented bargaining unit cannot be required to become full dues-paying members of the union, but they may be required to pay an agency fee. In turn, unions may use agency fees to fund only those activities that are germane to collective bargaining. Conversely, employees cannot be required to fund non-germane activities, including ideological activities like lobbying and political campaigning.[108] Thus, union-represented public employees in fair-share jurisdictions generally fall into one of three categories: union members who pay the full amount of union dues ("members"); nonmembers who nonetheless pay the equivalent of full union dues ("full freight" payers); and nonmembers who pay the agency fee and who may prefer to pay not even that much ("dissenters" or "objectors"). In addition, a smaller number of bargaining unit members come to an alternate arrangement with their union. For example, represented employees whose religious beliefs are incompatible with payment of any money to support a union often have a statutory right to seek an accommodation from their union, such as the chance to pay the equivalent of union dues or the agency fee to a charity.[109]

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103. The *Abood* Court recognized that many aspects of germane union activity in the public sector implicated employees' First Amendment rights. *Id.* at 222. However, those rights were overcome by the government interest in labor peace, as promoted by the exclusive representation system. *Id.* at 222–23.

104. 500 U.S. 507 (1991) (plurality opinion).

105. *Id.* at 522; *see also* Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 448–53 (1984) (holding that unions' relevant expenses include costs of conventions, social activities, publication of information about germane union activities, and certain litigation, but exclude new organizing).

106. *See Lehnert*, 500 U.S. at 512–13; Brief for Respondents, *Lehnert*, 500 U.S. 507 (No. 89-1217), 1990 WL 505709, at *28–40 (arguing that lobbying on issues such as pension reform, education funding, length of school day, and funding for public employees was germane to collective bargaining on behalf of public school teachers).

107. *See* Lehnert, 500 U.S. at 520–32.

108. *Id.* at 520.

109. *See* Reed v. Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., 569 F.3d 576, 579 (6th Cir. 2009) (describing Title VII's protections for religious bargaining unit members, which include the right to a reasonable accommodation); Katter v.

Abood left open several questions about how dissenters would exercise their First Amendment rights against compelled subsidization. Would there be a default position in which bargaining unit members covered by an agency fee agreement could pay full freight and opt out of paying for the union's non-germane speech, or would the default be to pay just the agency fee? Will members be notified of their rights not to pay, and if so, how, when, and by whom? Through what procedural mechanism will members exercise their rights not to pay? What recourse will be available to members who are dissatisfied with the calculation of the agency fee? The Court later answered these questions about meta rights in a series of cases, of which *Knox v. Service Employees International Union Local 1000*[110] is the most recent.

To begin, the Court rejected a "pure rebate approach," reasoning that "[g]iven the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily."[111] Accordingly, unions wanting to charge dissenters an agency fee had to develop a procedure to determine in advance the percentage of dues they would likely spend on non-chargeable expenses, and deduct that amount in advance from the fees to be paid by objectors.[112] The Court evaluated one such procedure in *Chicago Teachers Union v. Hudson*,[113] answering many of the questions that remained following *Abood*.[114]

The objectors in *Hudson* were bargaining unit members who deemed inadequate the union's procedure for allowing objectors to exercise their *Abood* rights.[115] Under that procedure, the union first assessed the "proportionate share" of union dues that were to be devoted to chargeable activities, and began automatically deducting that amount from objectors' paychecks.[116] Objectors seeking to challenge the union's calculation then had to write to the union president within thirty days of the first deduction.[117] That letter triggered a three-step appeal procedure that culminated with arbitration; "[i]f an objection was sustained at any stage of the procedure, the remedy would be an immediate reduction in the amount of future deductions for all nonmembers and a rebate for the objector."[118]

The *Hudson* objectors successfully challenged this procedure as inadequate to protect their First Amendment rights to avoid compelled

Ohio Emp't Relations Bd., 492 F. Supp. 2d 851, 864 (S.D. Ohio 2007) (holding that a public sector employee was entitled to religious accommodation under either Ohio law or Title VII of the federal Civil Rights Act).

110. 132 S. Ct. 2277 (2012).

111. Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 443–44 (1984). In a "pure rebate approach," the union charges objectors the full freight amount but then periodically refunds to objectors the fraction of total dues payments spent on non-chargeable expenses during the previous period. *Id.* at 443–44.

112. *Id.*

113. 475 U.S. 292 (1986).

114. *Id.* at 305–06.

115. *Id.* at 294.

116. *Id.* at 295.

117. *Id.* at 296.

118. *Id.*

support of non-chargeable union activities, including the right to avoid payment followed by a rebate.[119] In addition to offering an explanation—albeit a brief one—for imposing procedural safeguards at all,[120] the Court adopted a trio of notice and structural meta rights to protect dissenters,[121] concluding that the First Amendment required them to do so—creating a true meta right.

The *Hudson* safeguards are as follows. First, unions must annually notify bargaining unit members of their opt-out rights via a document now called a *Hudson* notice.[122] This notice must include "sufficient information to gauge the propriety of the union's fee," which is calculated based on the union's spending during the previous year.[123] In addition, unions must provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," and hold any amount of the objector's fee that is "reasonably in dispute" in escrow while the challenge is pending.[124] The Court explained that these procedures were designed to prevent unions from even temporarily using dissenters' money for non-chargeable ideological expenses.[125] Finally, the Court did not revise its earlier conclusion that the opt-out default (meaning that nonmembers pay full freight unless they affirmatively indicate their willingness to do so) was adequate; the Court reiterated that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."[126]

In two subsequent cases, the Court held that these procedures are only a floor, and that states are free to take other steps to protect or even encourage workers not to pay full freight. First, in *Davenport v. Washington Education Ass'n*,[127] the Court upheld the Washington State's opt-in statutory regime, under which labor unions were prohibited "from using the agency-shop fees of a nonmember for election-related purposes unless the nonmember affirmatively consents."[128] The Court reasoned that *Hudson* was merely a floor below which protections for objectors could not fall, and further, although "*courts* have an obligation to interfere with a union's statutory entitlement no more than is necessary to vindicate the rights of nonmembers," "legislatures (or voters) themselves" could do more to protect nonmembers.[129] In other words, because state legislatures may refuse to allow public sector bargaining at all, or they may allow bargaining

119. *Id.* at 303–04.
120. This reasoning is analyzed in Part II.
121. *Hudson*, 475 U.S. at 310.
122. *Id.* at 306; Knox v. Serv. Emps. Int'l Union Local 1000, 132 S. Ct. 2277, 2291–92 (2012) (describing annual *Hudson* notice procedure).
123. *Hudson*, 475 U.S. at 406.
124. *Id.* at 309–10.
125. *Id.* at 305–06 (holding that the union could not make "forced exaction followed by a rebate").
126. *Id.* at 306 n.16 (quoting Railway Clerks v. Allen, 373 U.S. 113, 119 (1963) (adopting opt-out default in Railway Labor Act context)); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 238 (1977) (relying on *Allen* in public sector context).
127. 551 U.S. 177 (2007).
128. *Id.* at 180.
129. *Id.* at 186.

but bar unions from collecting any fees from unwilling nonmembers, they may also take the lesser step of allowing agency fees, but making it more difficult for unions to collect them.[130] Two years later, in *Ysursa v. Pocatello Education Ass'n*,[131] the Court upheld an Idaho statute eliminating automatic payroll deduction (check off) of money intended to fund union political activities.[132] The Court reasoned that the government was "not required to assist others in funding the expression of particular ideas, including political ones," and that check off qualified as government assistance.[133]

These cases formed the applicable legal landscape until *Knox* called into question the continuing validity of much of the *Hudson* framework. *Knox* arose following a California local union's decision to levy a midyear dues increase to establish a "Political Fight Back Fund," ostensibly to fight two antiunion public ballot initiatives.[134] That name turned out to be both inaccurate and infelicitous—the union ultimately spent the extra money on representational activities rather than political campaigning, but the Court rejected the idea that a "political fight-back-fund" could have in fact funded nonpolitical speech.[135] In levying the increase, the union neither issued a supplemental *Hudson* notice nor allowed a new opportunity to opt out, though it did honor previous opt-outs. In response, dissenting bargaining unit members sued, raising two issues: a rights question about whether the union's lobbying was chargeable, and a meta rights question about whether the union was required to issue a new *Hudson* notice before imposing a midyear dues increase.

The *Knox* Court primarily addressed the meta rights question, actually going further than the plaintiffs asked, and holding that the opt-out regime was not sufficiently protective of the First Amendment interests of dissenters.[136] Instead, the Court held that an opt-in regime was required.[137] To reach this conclusion, the Court focused on bargaining unit members who had not joined the union, yet paid full freight—a combination that the Court viewed as explicable only in terms of a massive failure of *Hudson*'s meta rights regime to protect dissenters.[138] Significantly, in its discussion of these employees, the Court equated the opt-out default itself with

130. *Id.* at 184.
131. 555 U.S. 353 (2009).
132. *Id.* at 355–56.
133. *Id.* at 358.
134. Knox v. Serv. Emps. Int'l Union Local 1000, 132 S. Ct. 2277, 2285 (2012).
135. *Id*. at 2293.
136. *See* Fisk & Chemerinsky, *supra* note 85, at 1043. The *Knox* dissenters and scholars have criticized the Court's activist decision to go beyond the question presented and adopt an opt-in regime. *Knox*, 132 S. Ct. at 2297–98 (Sotomayor, J., concurring); *id.* at 2306 (Breyer, J., dissenting); Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective from the United States*, 34 COMP. LAB. L. & POL'Y J. 277, 299 (2013).
137. *Knox*, 132 S. Ct. at 2291.
138. The reliability of this conclusion is critiqued in Part II.C.2.

"acquiescence in the loss of fundamental rights."[139] Thus, contrary to *Abood* (as well as cases like *Shutts*), which emphasized that the Constitution was not implicated by the fact that dissenters had to take action in order to opt out of a default, the *Knox* Court concluded not that full-freight payers had slept on their rights, but instead that their rights had been violated.[140] However, assuming one accepts this premise, funding political speech and declining to fund that speech are equally exercises of First Amendment rights[141]—meaning that the Court's equation is plausible only if it is correct that it is "likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues."[142] If instead the opposite is true, then *Knox*'s premise that speech defaults or barriers themselves violate the First Amendment calls into question not just *Knox* itself but also *Ysursa* and *Davenport*.

Finally, while *Knox* was limited to midyear dues increases, it is unclear why the Court's reasoning would not apply equally to *any* union dues assessment—the Court suggested no reason that the First Amendment rights of dissenters are heightened in the middle of the dues year. Given this, one can expect to see objectors with an eye toward Supreme Court review to begin to invite courts to reconsider whether *Hudson* procedures are adequate to protect dissenters.[143]

First Amendment rights to avoid compelled subsidization are more robustly developed in the union context than in any other context raising compelled speech or subsidization issues. However, meta rights also exist in the context of bar associations and—more obliquely—compelled agricultural advertising schemes. These contexts are discussed in the next two sections.

2. Bar Associations

Whether attorneys have a First Amendment right to opt out of mandatory bar dues, either in whole or in part, is a question with close parallels to the union context. Indeed, the Court's limited case law in this area (consisting of two cases, the second of which overturned the first) largely tracks *Abood*,

139. *Knox*, 132 S. Ct. at 2290 (quoting Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999)).

140. Thus, the Court expressed concern for employees who *lacked* strong political views: "Nor did we [in previous cases] explore the extent of First Amendment protection for employees who might not qualify as active 'dissenters' but who would nonetheless prefer to keep their own money rather than subsidizing by default the political agenda of a state-favored union." *Id.* at 2290. The Court appeared to understand these employees as having rationally decided that completing the *Hudson* process was not worth their time, considering the weakness of their preferences not to pay full freight. Yet, the Court concluded that the First Amendment demanded protection for these employees too. *Id.*

141. Joseph Blocher, *Rights to and Not to*, 100 CAL. L. REV. 761, 795–97 (2012) (tracing the development of the First Amendment right not to speak).

142. *Knox*, 132 S. Ct. at 2290.

143. At least one such case is currently pending. Friedrichs v. Cal. Teachers Ass'n, No. 8:13-cv-00676-JLW-CW (C.D. Cal. 2013), *available at* http://www.cir-usa.org/legal_docs/friedrichs_v_cta_dc_dec_pldg.pdf.

though the nuances of the law governing mandatory bar association dues are less developed. The leading case is *Keller v. State Bar of California*,[144] in which the Court held that attorneys were entitled to a partial opt-out from California's integrated bar association. As in *Abood*, the Court held that the state bar's functions were important enough to justify limited compelled association and, in turn, to compel objectors to pay for germane expenditures—here, those "necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State."[145] However, the Court declined to reach the meta rights question of what procedures were required in order to protect objectors, citing the underdeveloped record on that issue.[146]

Since *Keller*, only a handful of courts have addressed that question. They have generally held that *Hudson*'s procedures are applicable in the bar dues context,[147] though some courts read *Hudson* quite loosely. For example, the Eleventh Circuit cited *Hudson* and upheld the Florida Bar's procedure for complying with *Keller* even though it differed in significant ways from the procedures required in *Hudson*.[148] Specifically, the bar association required dissenters to object on an issue-by-issue basis, and then offered a rebate (with interest) of the dues spent on lobbying on particular issues[149]—essentially, the "pure rebate" approach forbidden by *Abood* and *Hudson*. Further, while the Florida Bar provided notice via a bar newsletter of the various political positions on which it lobbied, it did not issue individualized notice to each member on either of those issues or the member's right to object.[150] Nonetheless, the Court held that the procedures were adequate, with the sole caveat that Florida was required to calculate interest on refunded dues based on the date that the Bar took the contested position, rather than the date it received notice of a member's objection.[151] This conclusion stands in tension with *Hudson*, in which the Court rejected similar procedures.[152]

Other state bar associations have procedures that plainly fall short of *Hudson*'s strictures.[153] However, few have been challenged in court. One

144. 496 U.S. 1 (1990).

145. *Id.* at 14 (quoting Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 447 (1984)). In contrast, objectors could not be compelled to pay for the bar associations' activities that were unrelated to those goals, such as filing amicus briefs in cases presenting issues unrelated to the regulation of the legal profession.

146. *Id.* at 17.

147. *E.g.*, Romero v. Colegio De Abogados De P.R., 204 F.3d 291, 304 (1st Cir. 2000) (rejecting rebate plus interest approach because that approach was inconsistent with *Hudson*).

148. Gibson v. Fla. Bar, 906 F.2d 624, 630 (11th Cir. 1990); *see also* The Florida Bar *re* Frankel, 581 So. 2d 1294, 1299 (Fla. 1991) (adopting the rationale in *Gibson*).

149. *Gibson*, 906 F.2d at 628–29.

150. *Id.*

151. *Id.* at 631–32.

152. *See supra* Part I.C.1.

153. For example, the District of Columbia bar rules list various membership classes and associated dues amounts with no mention of the possibility of objecting to a portion of bar

reason for this may be that bar associations' lobbying and other political interventions are less obvious than unions', sparking less ire from unwilling bar members. Alternatively, it may be that attorneys who object to bar associations' political spending prefer to contend with relatively obscure procedures than to commence expensive litigation aimed at securing stronger meta rights for all. Whatever the reason, though, opting out of bar associations' non-chargeable spending is often a more complicated proposition than taking the equivalent steps in the union context.

3. Generic Advertising

The Court has addressed compelled subsidization of generic advertising schemes administered by private industry trade groups three times; the outcome in two of those cases turned on the scope of individual producers' rights to avoid compelled subsidization of speech.[154] In each, an agricultural producer objected on First Amendment grounds to the compelled subsidization of advertising that did not refer to any particular producer, but instead simply touted the benefits of a product—asserting, for example, "beef, it's what's for dinner." Although the compelled subsidies in the cases were essentially identical from the advertisers' perspectives, the structure of the two programs resulted in two five-to-four decisions pointing in opposite directions. Further, in each case, the majority asserted that it was correctly applying *Abood* and *Keller*, with the dissent arguing the contrary.[155]

First, in *Glickman v. Wileman Brothers & Elliott, Inc.*,[156] the Court addressed whether producers could be compelled to contribute to a "California Summer Fruits" advertising scheme. That scheme was a small part of a set of economic regulations, promulgated by the Secretary of Agriculture, designed to regularize the price and quality of fruit and protect farmers' incomes.[157] The *Glickman* plaintiffs articulated a range of objections to the advertisements, including that they considered some aspects of the ads (such as the claim that "red colored fruit is superior") to be untrue, that they felt the ads promoted "the 'socialistic programs' of the Secretary," and that they felt the ads promoted "sexually subliminal messages."[158] However, the district court doubted whether these objections were sincere.[159]

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dues under *Keller*. *Rules and Bylaws*, D.C. BAR, http://www.dcbar.org/about-the-bar/rules-and-bylaws/rule-02.cfm (last visited Oct. 19, 2014).

154. In the third case, *Johanns v. Livestock Marketing Ass'n*, the Court held that a similar advertising scheme was government speech, rather than speech of a private group. 544 U.S. 550, 559 (2005). Because the government is entitled to espouse particular views, the advertising program did not violate the First Amendment. *Id.*

155. *See generally* United States v. United Foods, 533 U.S. 405 (2001); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997).

156. 521 U.S. 457 (1997).

157. *Id.* at 461. The *Glickman* plaintiffs objected not just to the compelled advertising subsidy but also to various rules against selling small or immature fruit.

158. *Id.* at 467 n.10.

159. *Id.* at 467.

Like in *Abood* and *Keller*, the Court found it significant that the compelled subsidy was "part of a broader collective enterprise in which [the plaintiff's] freedom to act independently is already constrained by the regulatory scheme."[160] Thus, as in those cases, compelled subsidization of speech could be justified by the presence of an important, broader scheme, of which the compelled subsidization was a necessary part. However, the *Glickman* Court then went further, holding that compelled advertising did not even *implicate* the First Amendment. In particular, the Court relied on three aspects of the advertising scheme. First, "the marketing orders impose[d] no restraint on the freedom of any producer to communicate any message to any audience,"[161] meaning that the producers were free to convey any message they chose—even, for example, that red fruits were not superior—through their own advertising. Second, the compulsion was merely a subsidy, which "[did] not compel any person to engage in any actual or symbolic speech."[162] Finally, the Court held that the advertisements "do not compel the producers to endorse or to finance any political or ideological views."[163] Here, the Court flatly rejected the argument that compelled subsidy of speech always implicates the First Amendment, regardless of the content of the speech: "[R]equiring respondents to pay the assessments cannot be said to engender any crisis of conscience. . . . The mere fact that objectors believe their money is not being well spent 'does not mean [that] they have a First Amendment complaint.'"[164]

The Court took a dramatically different approach just four years later in *United States v. United Foods*,[165] striking down a compelled subsidy for generic mushroom advertising. For the *United Foods* Court, the key feature that distinguished the mushroom advertising scheme from the fruit advertisements in *Glickman* was the absence of a comprehensive scheme of collective economic regulation, as were present in *Abood* and *Keller*.[166] Thus, the compelled subsidization could not be justified based on its necessary role in an important broader program. Importantly, though, the majority also characterized the objection at issue very differently. Unlike the *Glickman* Court's assessment that a producer's desire not to fund

160. *Id.* at 469.
161. *Id.*
162. *Id.*
163. *Id.* at 469–70.
164. *Id.* at 472 (quoting Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 456 (1984)).
165. 533 U.S. 405 (2001). *United Foods* did not overrule *Glickman*, instead distinguishing it based on the presence of a larger scheme of economic regulation in *Glickman*. *Id.* at 414–15. That distinction has been criticized by many, but not all, commentators. *E.g.*, Seana Shiffrin, *Compelled Association, Morality, and Market Dynamics*, 41 LOY. L.A. L. REV. 317, 321 (2007). The two cases took radically different approaches to describing the relevant objections: as disagreement with business strategy in *Glickman* and disagreement with speech imbued with First Amendment value in *United Foods*. *United Foods*, 553 U.S. at 405; *Glickman*, 521 U.S. at 470.
166. *United Foods*, 553 U.S. at 413 ("[I]t is only the overriding associational purpose which allows any compelled subsidy for speech in the first place.").

advertising is fundamentally an economic objection—a mere desire not to pay—the *United Foods* Court considered the producer-plaintiff to be "object[ing] to the idea being advanced."[167] Accordingly, the Court characterized the producer's objection in terms of core First Amendment values: "[T]here is no apparent [First Amendment] principle distinguishing out of hand minor debates about whether a branded mushroom is better than just any mushroom."[168] The negative implication of this statement is that the *United Foods* holding—that compelled subsidization is acceptable where it is part of a broader scheme of collective economic regulation—applies to subsidization of even political speech.

Finally, unlike *Glickman*, where there was no meta rights question because the Court found no First Amendment rights were at stake, *United Foods* at least theoretically presented such a question. After all, there was only one plaintiff in *United Foods*, suggesting that other mushroom growers were willing payers, or at least that they had not objected so strongly as to file a lawsuit. Thus, the Court could have held that United Foods had a right to opt out of the mandatory assessment, and then moved on to consider whether and how other producers' rights to opt out would be protected through notice and other structural procedures.

However, the Court instead simply declared that "the *assessments* are not permitted under the First Amendment."[169] Even though this formulation was not the result of conscious consideration of the meta rights question, it is telling that the Court chose not to articulate its holding in terms of whether producers could be compelled to pay, focusing instead on the assessment itself. In effect, the Court's holding was tantamount to creating an opt-in default, in which producers that still wanted to fund generic advertising would have to affirmatively choose to get together and share the costs of advertising.

D. Rights and Meta Rights Not to Speak or Associate

In addition to the compelled subsidization cases described above, the Court has also confronted compelled speech and association directly in a handful of cases. While the *Knox* Court conflated compelled speech with compelled subsidization[170]—a move that was perhaps unsurprising following the Court's treatment of spending as equivalent to speech in cases like *Citizens United v. Federal Election Commission*,[171] as well as in

167. *Id.* at 410.
168. *Id.* at 411.
169. *Id.* at 416 (emphasis added).
170. Knox v. Serv. Emps. Int'l Union Local 1000, 132 S. Ct. 2277, 2289 (2012) (stating that "compulsory fees constitute a form of compelled speech and association").
171. 558 U.S. 310 (2010); *see also* Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953, 994–95 (2011) (observing that the *Citizens United* Court "considered it so obvious that restrictions on spending money amount to restrictions on speech that it needed no discussion at all, not even a citation to *Buckley* [*v. Valeo*]").

United Foods[172]—commentators and earlier cases draw a distinction between the two, emphasizing that compelled speech was more serious than compelled subsidization.[173] Yet, no court has ever held that meta rights are required to protect First Amendment rights against compelled speech itself.

1. Public Education

In the well-known early case *Pierce v. Society of Sisters*,[174] the Court held that parents have a Fourteenth Amendment right to choose private school over public school for their children, though states could impose reasonable requirements on private schools to ensure that students were properly prepared for the requirements of citizenship.[175] The Court went further in *Wisconsin v. Yoder*,[176] holding that Amish children and parents (though not necessarily other children and parents) had a First Amendment right to be excused from mandatory schooling altogether.[177] Thus, parents may choose private school over public school for any reason, and parents may opt out of secondary schooling for their child altogether at least where school poses an existential threat to a religious group with a track record of appropriately caring for its members. However, these opt-out rights are not accompanied by any notice or procedural protections designed to ensure that parents are aware of their First Amendment rights.[178] (Nor may taxpayers opt out of subsidizing schools or other programs that express messages with which they disagree.[179])

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172. *United Foods*, 533 U.S. at 511; *see also* Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 226 (2011) (observing that the *United Foods* Court cited compelled speech cases in support of its conclusion).

173. *See, e.g.*, Bd. of Regents v. Southworth, 529 U.S. 217, 239–40 (2000) (Souter, J., concurring) (stating that compelled speech cases raise more serious concerns than the compelled subsidy issue presented in *Southworth*); Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 470–71 (1997) (holding that compelled speech cases were "clearly inapplicable" in compelled subsidization context); Bodie, *supra* note 90, at 213 n.51; Sachs, *supra* note 93, at 857–58 (distinguishing between compelled speech and compelled subsidization and noting that the "the line between these two categories is not a clean one"); *cf.* Kathleen M. Sullivan & Robert C. Post, *It's What's for Lunch: Nectarines, Mushrooms, and Beef—The First Amendment and Compelled Speech*, 41 LOY. L.A. L. REV. 359, 370 (2007) ("[T]he only reason that compelled subsidization of speech can possibly raise a constitutional question is that it may be regarded as a form of compelled speech.").

174. 268 U.S. 510 (1925).

175. *Id.* at 534–35.

176. 406 U.S. 205 (1972).

177. *Id.* at 222.

178. This is not to say that parents do not become aware of their rights to homeschool from other sources. To the contrary, the idea of a "right to homeschool" has gained popularity in recent years, due in part to the activities of advocacy groups. Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 732–34 (2011) (documenting how the idea of right to homeschool has "gained considerable support in lower courts, state legislatures, and among some segments of the public"). In Part II, I discuss the significance of the availability of "outside" information about rights to the development of meta rights.

179. *See generally* United States v. Lee, 455 U.S. 252 (1982). Some scholars have convincingly critiqued the Court's distinction between compelled subsidization of speech in the tax context, where objectors may not opt out, and other contexts. *E.g.*, Post, *supra* note

Relatedly, courts have addressed questions pertaining to parents' and students' desires to attend public school but opt out of certain aspects of the curriculum. In particular, the Supreme Court has twice addressed whether students may be compelled to say the Pledge of Allegiance as a condition of attending public school. Notoriously, the Court in *Minersville School District v. Gobitis*[180] held that students belonging to the Jehovah's Witness faith had no First Amendment right to opt out of reciting the Pledge of Allegiance, forcing those students to choose between their faiths and public school attendance. The Court relied primarily on the government's interest in "the promotion of national cohesion," stating that "[n]ational unity is the basis of national security."[181] However, the Court also relied in part on religious parents' rights to enroll their children in private school,[182] implying that the opportunity to opt out completely (however illusory, given the cost of private or religious schools) made the lack of a partial opt-out right constitutionally acceptable.

The Court reversed *Gobitis* just three years later in *West Virginia State Board of Education v. Barnette*,[183] holding for the first time that the First Amendment encompasses a right against compelled speech.[184] Though the *Barnette* plaintiffs, like the *Gobitis* plaintiffs, had religious objections to reciting the Pledge, the Court did not limit its holding to the religious. However, it did explain its holding in terms of convictions: "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes . . . freedom to differ is not limited to things that do not matter much."[185] Accordingly, *Barnette* rejected the power of states to protect national unity by "expel[ling] a handful of children from school" for refusing to say the Pledge.[186]

Courts following *Barnette* have been reluctant to allow students attending public school to opt out of other portions of the curriculum, particularly when the objection is not motivated by religious belief.[187] Moreover, courts have not imposed any obligation on schools to inform students or parents of their *Barnette* rights, despite the fact that teachers routinely lead students in saying the Pledge of Allegiance, and evidence that at least some schools still punish students who decline to say the Pledge.[188] Yet, even

85, at 196 (arguing that the reasoning of *United Foods*, if taken to its logical extreme, would mean that courts must review the use of taxes to fund government speech).

180. 310 U.S. 586 (1940).

181. *Id.* at 595.

182. *Id.* at 599 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

183. 319 U.S. 624 (1943).

184. *Id.* at 633–34.

185. *Id.* at 641–42.

186. *Id.* at 636.

187. Noa Ben-Asher, *The Lawmaking Family*, 90 WASH. U. L. REV. 363, 386–87 (2012).

188. Martin Guggenheim, *Stealth Indoctrination: Forced Speech in the Classroom*, 2004 U. CHI. LEGAL F. 57, 72–73 (discussing prevalence of teacher-led recitation of the Pledge, and lack of student knowledge about *Barnette* rights); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 469 (1995) (discussing constitutionality of

where *Barnette* rights have been violated, decision makers tailor remedies much more narrowly. When these violations are rooted in statutes requiring Pledge recitation, attorneys ask courts to strike down the statutes.[189] Conversely, many cases arising from idiosyncratic decisions by teachers or school districts are resolved via a sternly worded letter to the superintendent from an ACLU attorney.[190] Where that strategy is unsuccessful, students and parents may file suit, but they typically limit their demands for injunctive relief to an order preventing school district officials from punishing students who do not say the Pledge.[191] And, while a handful of civil libertarians have advocated for legislative or regulatory reform requiring school officials to inform students of their *Barnette* rights, such efforts have yet to yield results.[192]

2. License Plates

The Court also found compelled speech in *Wooley v. Maynard*,[193] and on that basis struck down a criminal conviction for violating New Hampshire's requirement that drivers display the state motto "Live Free or Die" on their license plates. Maynard had repeatedly either covered the motto with tape or cut part of it out of his plates because the motto conflicted with his religious faith.[194]

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teacher-led recitations of the Pledge); *see also supra* notes 154, 165 (cases finding violations of *Barnette* rights).

189. Circle Sch. v. Pappert, 381 F.3d 172, 181–83 (3d Cir. 2004) (striking down state statute requiring parental notification when students declined to say the Pledge and holding that statute requiring private school personnel to lead students in the Pledge was unconstitutional); Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992) (concluding that Illinois statute did not on its face compel students to recite the Pledge and noting absence of record evidence about whether schools in fact required all students to say the Pledge); Lane v. Owens, No. 03-B-1544 (D. Colo. Aug. 15, 2003), *available at* http://static.aclu-co.org/wp-content/uploads/files/200309_309pledge_Courts_Oral_Ruling_8-15-03.pdf (order granting temporary injunction against operation of statute permitting only students with religious objections from foregoing Pledge recitation).

190. Emily Garber, *Students Not Required to Participate in the Pledge of Allegiance*, ACLU, http://aclu-or.org/blog/students-not-required-participate-pledge-allegiance (discussing ACLU attorney's efforts to stop compelled Pledge recitation in an Oregon elementary school) (last visited Oct. 19, 2014); Dotty Griffith, *ACLU of Texas Protects Students First Amendment Rights; Sweeny School Officials Must Change Unconstitutional Policy*, ACLU (Apr. 14, 2011), http://www.aclutx.org/2011/04/14/aclu-of-texas-protects-students%E2%80%99-first-amendment-rights-sweeney-school-officials-must-change-unconstitutional-policy/ (discussing ACLU challenge to Texas school district requirement that students stand during Pledge).

191. *E.g.*, Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1268–69 (11th Cir. 2004) (finding genuine issue of fact as to whether school punished student for failing to recite Pledge; student sought compensatory and declaratory relief); Rabideau v. Beekmantown Cent. Sch. Dist., 89 F. Supp. 2d. 263, 268 (N.D.N.Y. 2000) (denying summary judgment for the district based on record evidence suggesting student was punished for refusing to participate in Pledge).

192. *Pledge of Confusion? Schools Wrestle with Flag Policy in Classroom*, FOX NEWS (Sept. 15, 2009), http://www.foxnews.com/story/2009/09/15/pledge-confusion-schools-wrestle-with-flag-policy-in-classroom/.

193. 430 U.S. 705 (1977).

194. *Id.* at 707–08.

The Court first held that the license plate requirement constituted compelled speech because it "force[d] an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[195] Then, the Court applied the compelled speech principles announced in *Barnette*. Overturning the conviction, the Court stated that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[196] Further, the Court rejected the State's attempt to justify the license plate requirement based on either its interest in identifying cars, or its desire "to communicate to others an official view as to proper appreciation of history, state pride, and individualism."[197]

In overturning the convictions, the Court held that New Hampshire "may not require appellees to display the state motto upon their vehicle license plates," and affirmed an injunction entered by the district court.[198] That injunction prevented New Hampshire officials from arresting or prosecuting the Maynards for covering the state motto.[199] However, the district court refused the additional relief sought by the Maynards: an injunction requiring New Hampshire to issue new license plates not containing the motto.[200] Thus, the Maynards could be assured that they would not be convicted of a crime for covering the state motto with tape, but were nonetheless required to take that affirmative step in order to avoid unwanted expression.

Neither the district court nor the Supreme Court held that the case demanded any notice or structural protections. Moreover, the statute requiring "Live Free or Die" to be written on all New Hampshire passenger vehicle license plates remains on the books, and it is still a criminal offense to obscure the "figures or letters" on any plate.[201] Of course, anyone who obscures the state motto for religious or political reasons would have a good First Amendment defense to criminal charges (or could raise the issue affirmatively in a declaratory judgment action). However, a political or religious objector who is aware of state law (perhaps having been informed by a clerk at the DMV or a state trooper) but not the *Maynard* decision may be unwilling to risk prosecution in order to avoid displaying the motto.

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195. *Id.* at 715. The Court observed that the infringement in *Wooley* was less severe than that of *Barnette* because displaying a license plate is a "passive act," but described the difference between the two cases as "essentially one of degree." *Id.*

196. *Id.* at 714 (quoting Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

197. *Id.* at 717.

198. *Id.*

199. Maynard v. Wooley, 406 F. Supp. 1381, 1389 (D.N.H. 1976).

200. *Id.* (observing that "New Hampshire could easily issue plaintiffs license plates that do not contain the motto," but declining to issue the injunction because "[t]he relief we have ordered should fully protect plaintiffs in the exercise of their First Amendment rights, and we would be ill-advised to interfere further with the operation of New Hampshire's system of vehicle identification").

201. N.H. REV. STAT. §§ 261:75, :176 (2014).

This part has defined meta rights and traced their development in a range of contexts. The next part turns to the normative questions of when meta rights are called for and how they should be structured. It argues for the importation of the self-help principle from the *Miranda* and class action contexts to the compelled speech and subsidization context, and then considers the availability of self-help in various compelled speech and subsidization contexts. Then, it argues that, in structuring meta rights in the compelled speech and subsidization contexts, courts must consider the potential speech-discouraging effects of particular types of meta rights.

II. RATIONALIZING META RIGHTS

There are many convincing criticisms of the Court's approach to rights against compelled speech and subsidization. For example, Robert Post observes that much compelled speech and subsidization does not trigger First Amendment scrutiny at all, even where it seems to present equal or more serious concerns than those in cases like *United Foods*.[202] Catherine Fisk and Erwin Chemerinsky have argued convincingly that the Court's compelled speech and subsidization cases reflect reluctance to empower union leaders, relative to leaders of other groups, to take positions that conflict with the group's membership.[203] Others have shown that, even leaving aside inconsistencies between cases, the Court's reasoning is often flimsy; for example, the Court has not offered a persuasive explanation for why the requirement that one display a license plate with a controversial state motto on it equates to compelled speech by drivers, given that anyone viewing the message would be nearly certain to understand the message to be that of the state, not of the individual.[204]

While I agree with many of these critiques, I turn here to the separate issue of the Court's approach to meta rights in these cases. The Court has never convincingly explained why, when, and to what extent constitutional meta rights are required at all; rather, meta rights have developed on a largely ad hoc basis. Further, when meta rights are called for, it is not clear why simple notice of the right to opt out is sometimes insufficient, as the Court held in *Knox* and *United Foods*.[205]

One way to shape meta rights in the compelled speech and subsidization context would be to simply determine how dissenters could be protected to the maximum extent possible. However, the Court has implicitly rejected this approach, and it has held in many other contexts that speakers may be required to take action—and even to overcome genuine barriers—in order

202. Post, *supra* note 85, at 210 (noting that many instances in which government compels speech or subsidization, such as when a litigant must pay the other side's attorneys' fees, do not violate the First Amendment, despite their similarity to speech in which the Court has found a First Amendment violation).

203. *See generally* Fisk & Chemerinsky, *supra* note 85.

204. Greene, *supra* note 188, at 473–74; *cf.* Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 370 (2008) (arguing that there is a First Amendment right against compelled speech that listeners would not attribute to speaker). *See generally* Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006).

205. *See supra* Part I.C.

to speak or avoid speech.[206] For example, cities may require parade organizers to pay money to obtain required permits well in advance of a parade.[207] Similarly, they may require speakers to learn about and comply with time, place, and manner restrictions on their speech, even when doing so involves transaction costs.[208] Likewise, *Citizens United* rejected shareholder protection as a compelling state interest in limiting corporate political spending because shareholders could engage in corporate democracy or sell their shares to avoid funding unwanted corporate political speech.[209] In other words, the Constitution does not require the elimination of all disincentives to speak or not speak, and it does not matter whether the source of those disincentives is the government, an associational speaker itself, or unrelated individuals. A fortiori, then, there is a good argument that the fact that a potential dissenter must make his or her preferences known, as in the union or class action context, does not implicate the First Amendment at all.

Further, some meta rights impose significant burdens on the institutions calling for speech or subsidization, as well as their constituents who wish to speak in concert.[210] For example, the *Hudson* procedure imposes significant costs on unions that both engage in political advocacy and charge bargaining unit members for the costs of representation.[211] Yet, the Court fails to account for the rights of willing speakers—both institutions and members—in its analysis. Thus, to the extent meta rights are appropriate in the First Amendment context, a more nuanced approach to structuring them is needed.

This part proceeds from the premise—evident in the Court's own holdings—that meta rights are not called for as a matter of course in the compelled speech and subsidization arena. The first question, then, is whether there is a principle or set of principles according to which courts can determine whether meta rights are necessary. The compelled speech and subsidization cases do not themselves contain a coherent justification for meta rights. However, as discussed in Part I, the Court has elsewhere called for meta rights when individuals cannot invoke their rights through self-help alone. I argue that this principle is sound and could likewise

206. The First Amendment is not unique here—the Court has permitted government to erect barriers to the exercise of constitutional rights in other areas of law. As described previously, *supra* note 26, courts explicitly discourage criminal defendants from exercising their *Faretta* rights—an anti-meta right. Further, the Court has permitted government actors to discourage individuals from invoking some constitutional rights without requiring any counterbalancing meta rights. *See e.g.*, Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 874 (1992) (allowing states to discourage women from choosing abortion, providing they do not unduly burden women's exercise of their abortion rights).

207. Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 130 (1992) (holding permit requirements constitutional in order to "regulate competing uses of public forums" provided certain additional requirements are satisfied).

208. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 812 (1989).

209. Citizens United v. FEC, 588 U.S. 310, 361–62 (2010).

210. *See infra* Part II.C.

211. As I have argued elsewhere, these requirements are analogous to the procedures that the Court struck down in *Citizens United* because they imposed too great a burden on corporate and union political speech. Garden, *supra* note 93, at 43.

prove useful in deciding meta rights questions in the compelled speech context.

This part concludes by discussing the form that meta rights should take. Here, I take as my starting point the Court's premise in *Knox* that an opt-out requirement can itself violate the First Amendment if it results in bargaining unit members subsidizing union political speech, either because of inertia, or because the speech default itself affects their decision about whether to subsidize speech. Accordingly, this discussion proceeds on the assumption that speech defaults implicate the First Amendment. While that legal conclusion is itself contestable (as noted above), it is nonetheless worth playing out its consequences. These include the possibility that under *Knox*'s First Amendment premises, an opt-in default is, if anything, more problematic than an opt-out default.

A. Meta Rights and the Self-Help Principle

Why should meta rights guard against some—but not all—compelled speech and subsidization? Is there a justification for treating union members and lawyers differently from, say, public school children who may wish to opt out of the Pledge of Allegiance, and for protecting food producers most of all?

The Court's own answer to these questions is thin at best. Unlike in *Miranda*, where the Court offered a robust explanation of why notice rights were necessary in the custodial interrogation context,[212] the Court's compelled speech and subsidization cases offer little explanation of why meta rights are (or are not) provided. For example, the *Hudson* Court offered the following explanation for the development of meta rights in the union context:

> Procedural safeguards are necessary . . . for two reasons. First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee—the individual whose First Amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.[213]

But these are hardly reasons at all. The first simply restates the basic First Amendment principle that infringements of First Amendment rights must not only be justified by a sufficiently important state interest but also must be tailored to achieve that interest.[214] However, whether an agency fee is tailored to achieve the state interest in labor peace through the exclusive representation system has nothing to do with meta rights. The

212. *See supra* Part I.B.1.

213. Chi. Teachers Union v. Hudson, 475 U.S. 292, 302–03 (1985) (footnotes omitted).

214. Underscoring this point, the *Hudson* Court cited a list of cases, quoting language describing the narrow tailoring requirement in parentheticals. *See id.* at 303 n.11.

second states that objectors must be able to challenge an improperly assessed agency fee but does not explain why doing so requires meta rights; after all, dissenters could always file a lawsuit in state or federal court, as most civil liberties plaintiffs (including the parents of children who have been wrongly compelled to say the Pledge of Allegiance) must do. The Court later rejects this argument in conclusory fashion: because "the agency shop itself is 'a significant impingement on First Amendment rights,' the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights."[215]

Hudson's only other explanatory statement comes in a footnote: "Procedural safeguards often have a special bite in the First Amendment context."[216] This statement is followed by a list of citations to general First Amendment principles, such as the vagueness and overbreadth doctrines. Here again, these principles do not explain why meta rights are necessary in the union (or bar dues) context; they simply explain that *courts* approach first order questions about First Amendment rights in a way designed to ensure adequate First Amendment "breathing space."[217] In other words, the vagueness and overbreadth doctrines do not notify people of their First Amendment rights, nor do they encourage individuals to invoke their rights—they simply make it more likely that plaintiffs will succeed if they become aware of their rights and choose to file suit. To be sure, the existence of First Amendment doctrines like vagueness and overbreadth may make plaintiffs more willing to sue by strengthening what would

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215. *Id.* at 307–08 n.20 (quoting Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435 (1984)). The Court offers a similar—and similarly unhelpful—explanation for the notice requirement.

> Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*.

Id. at 306.

216. *Id.* at 303 n.12 (quoting G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1373 (10th ed. 1980)).

217. NAACP v. Button, 371 U.S. 415, 432–33 (1963) (citations omitted) ("The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."). The doctrines cited by the Court are closer to the "prophylactic rights" that David Strauss discusses in *The Ubiquity of Prophylactic Rules*. *See generally* Strauss, *supra* note 20. These are decisional rules that reduce the risk that impermissible government action will go unremedied. *See id.* at 196–97 (discussing, in the First Amendment context, how "the requirement of clear standards reduces the danger that speech will be suppressed unlawfully"). While it is almost certainly the case that meta rights *also* decrease the likelihood of First Amendment violations, and therefore meta rights might be considered a subspecies of prophylactic rights, the existence of some prophylactic rights in the First Amendment context does not explain the need for meta rights in some contexts and not others.

otherwise be weak or nonexistent claims,[218] but the same can be said any time rights are strengthened. What is different about meta rights like those established in *Hudson* is that they put into place structures designed to educate potential objectors about rights themselves or about relevant facts on the ground that otherwise would not be available until the discovery stage of a lawsuit. Or else—as in the case of *Knox*'s opt-in requirement—meta rights encourage individuals to choose (or to default into) rights, such as non-speech instead of speech.[219] Subsequent cases, including *Knox*, offer little additional clarity. The agricultural advertising cases are similarly silent on this issue.

This state of affairs stands in contrast to *Miranda*, where the Court offered a far more detailed description of why a warning is sometimes necessary to the enforcement of the right against self-incrimination—specifically, that police are specially trained to discourage rights invocations and that, by design, individuals in police custody do not have other sources of information available to them, thereby decreasing suspects' baseline level of willingness or ability to invoke their rights.[220] In other words, *Miranda*'s meta rights are designed to counteract coercive conditions that make self-help implausible; where such conditions are not present (as during the traffic stop in *Berkemer*), police need not notify individuals of their rights against self-incrimination, whether or not they are actually aware of them.

The reason for notice rights in the class action context (and the procedural due process context generally) is similarly clear. As the *Mullane* Court emphasized, the danger is that absent plaintiffs may literally have no idea that a class action has been filed.[221] Even without the coercion that is present in the *Miranda* context, self-help is implausible; for absent class members to exercise their opt-out rights without first having received notice of the case itself, they would have to monitor court dockets around the country.[222] Likewise, procedural due process requires that individuals

218. The overbreadth doctrine allows plaintiffs to challenge a law if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," even if the plaintiff's own speech may constitutionally be regulated. United States v. Stevens, 559 U.S. 460, 473 (2010) (citing Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)). Thus, a speaker who lacks a plausible argument that the government is impermissibly restricting his own speech may nonetheless decide to sue if the applicable statute impermissibly regulates others' speech.

219. I discuss why the opt-in default encourages bargaining unit or bar association members to exercise their rights not to pay only the agency fee portion of union or bar dues in Part II.C.2.

220. *See supra* Part I.B.1.

221. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950).

222. This explains why *Mullane* requires that class members be notified of the existence of a lawsuit to which they are parties but does not necessarily explain why class members must be advised of their rights to opt out. However, reasons are readily apparent. First, a notice that simply informs class members of their party status could be subtly misleading, as class members may naturally assume that the notice is a complete accounting of everything they need to know about the class action. Second, the marginal costs of providing information about opt-out rights is negligible. Third, class counsel, who is responsible for effectuating the mandatory notice, owes a fiduciary duty to absent class members, which is

receive notice of basic facts necessary to participate meaningfully in a hearing, but not notice of their legal rights.[223]

The reasoning behind the *Miranda* warning and the class action notice/opt-out scheme both point towards the feasibility of self-help as an overarching guiding principle in determining whether meta rights are necessary to protect rights against compelled speech and subsidization. While it is not always wise or appropriate to import principles from one constitutional context into another,[224] several factors here weigh in favor of importing. First, the use of similar interpretive tools across constitutional contexts promotes predictability in the development of the law. Second, there is the relative similarity of the underlying factual circumstances; each context involves a state actor's request that individuals waive constitutional privileges not to speak (or, in the class action context, not to petition). Third, there is the practical point that, absent any other useful explanation of meta rights in the compelled speech and subsidization context, self-help holds out promise as an organizing principle. Finally, the Court itself has at times suggested that self-help is relevant to the compelled speech and subsidization analysis.[225]

Accordingly, I next consider the extent to which the Court's jurisprudence in the compelled speech and subsidization context already

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consistent with providing class members with information about possible courses of action in a case. *See* Debra Lyn Bassett, *The Defendant's Obligation to Ensure Adequate Representation in Class Actions*, 74 UMKC L. REV. 511, 513 (2006) ("[C]lass counsel's responsibility to ensure that absent class members are accorded adequate representation is a serious and central due process obligation—indeed, class counsel owes a fiduciary duty to the absent class members.").

223. *See supra* note 61 and accompanying text.

224. *See* Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 676 (2011) (providing an "account of the strategic deployment of borrowing to narrow constitutional remedial doctrine, and of convergence's acceleration of that effect, offer[ing] a rare look at the darker side of these processes").

225. For example, the Court relied in part upon the availability of self-help in determining that there had been no First Amendment violation in *CLS v. Martinez*, a case about whether a religious student group was entitled to exemption from a public university's "all comers" policy. 130 S. Ct. 2971, 2978–79 (2010). The Court rejected CLS's claim in part because CLS could easily avoid the "all comers" policy by simply not seeking recognition as a student group, and instead meeting off-campus. Thus, the relative ease of opting out of the entire student group program supported the Court's conclusion that Hastings did not have to exempt CLS from the "all comers" policy. While *CLS* involved a rights question (rather than a meta rights question), factors undergirding a holding of no First Amendment violation should apply a fortiori to the question of whether First Amendment rights-holders require the protection provided by meta rights. In addition, the *Gobitis* Court observed that parents could opt out of sending their children to public school and implied that the ability to opt out of public school altogether lessened the burden imposed on First Amendment rights by requiring students to recite the Pledge. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 598–99 (1940) (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1923)). However, while it is undoubtedly true that the right to enroll their children in private school could have protected some parents who wanted Pledge-free schooling for their children, private school is beyond the reach of many parents (and ignores situations in which children and parents disagree about the desirability of saying the Pledge). Thus, the rejection of *Gobitis* in *Barnette* does not undermine the relevance of self-help to this analysis, particularly considering the *Martinez* Court's reliance on that consideration.

reflects the plausibility of self-help in different compelled speech and subsidization contexts.

B. Self-Help and Compelled Speech and Subsidization

As this section shows, it is relatively easy for dissenters to exercise their First Amendment rights against compelled speech or subsidization—easier, certainly, than it is for suspects undergoing custodial interrogation to exercise their Fifth Amendment rights to silence, or for absent class members to discover their status without notice. Still, the extent to which self-help is a realistic strategy varies among different compelled speech and subsidization contexts. Consideration of the ease and availability of self-help in the context of compelled speech and subsidization suggests that at best, meta rights should be distributed differently than they currently are; arguably, they are mostly unnecessary. Accordingly, this section discusses the likelihood that different groups of potential dissenters would be able to exercise their rights against compelled speech or subsidization without the benefit of meta rights.

The self-help rationale could be implicated either by *Miranda*-style coercion[226] or where the facts needed to understand that rights are at stake are somehow hidden, as in the class action and procedural due process contexts. Importantly, this lack of factual knowledge is distinct from situations in which individuals are aware of the facts that give rise to a right, but unaware of the legal consequences of those facts—as the saying goes, ignorance of the law is no excuse.[227]

Accordingly, this section discusses barriers to remaining silent or declining to subsidize speech in the various contexts in which the Court has found a right to avoid compelled speech or subsidization. It also discusses the closely related issue of government interests in not providing meta rights, such as expense or disruption.

1. *Barnette* Rights

While *Barnette* rights are not accompanied by meta rights,[228] *Barnette* violations raise significant questions about self-help and coercion. Schools

226. In the *Miranda* context, police questioning encourages individuals to waive their rights to remain silent. However, it is less clear that institutional actions in the compelled speech context should be viewed as soliciting waivers of the right not to speak, rather than soliciting individuals to exercise their affirmative right to speak. The latter characterization emphasizes that both not speaking and speaking are protected First Amendment activity, a point taken up again in Part II.C.

227. Mark Osiel, *Rights to Do Grave Wrong*, 5 J. LEGAL ANALYSIS 107, 126 (2013) ("Our legal system may generally presume a knowledge of the law, as when it declares (with rare exceptions) that 'ignorance of the law is no excuse.'"); *cf.* Meir Dan-Cohen, *Decision Rules & Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 645–48 (1984) (describing examples and limited counterexamples of maxim that ignorance of the law is no excuse). For a discussion of legal and factual ignorance in the procedural due process context, see also *supra* Part I.B.2.

228. Martin Guggenheim offers anecdotal evidence of this, describing a symposium at which he asked the audience whether they knew, as elementary children, of their *Barnette*

have unique power over students. This is in part because of their age; we often assume that children cannot invoke their rights in settings where we would expect more of adults.[229] Further, the Court has observed that an atmosphere of vague coercion can pervade the school setting. In the context of school prayer, the Court has recognized these dynamics, holding that children are uniquely susceptible to ideological coercion in the form of peer pressure, and that this "indirect coercion" can rise to the level of a constitutional violation.[230] Further, while some parents may assist their children in standing up to school officials who would compel the Pledge, this is at best a partial solution, akin to saying that the fact that attorneys can help suspects invoke their rights to remain silent vitiates the need for the *Miranda* warning.

Further, schools may prevent students from learning information necessary to exercise self-help—school is the most likely setting for students to learn of their *Barnette* rights, and schools that actively violate those rights by punishing students who do not say the Pledge are unlikely to teach about them.[231] As Martin Guggenheim has observed, "[s]chool boards and teachers go about their daily business as if *Barnette* had ruled that teachers may require all students in the class to recite the Pledge."[232] And, because students (especially elementary school students) often have restricted access to other sources of information about rights (such as the internet), a school may in fact be the only available source of information about rights not to say the Pledge. Although this type of legal ignorance is typically insufficient to support meta rights, it arguably carries special

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rights. *See generally* Guggenheim, *supra* note 188. Only a single person (out of an audience of seventy) claimed to have been aware of his or her rights. *Id.* at 72–73. It is possible that some parents will be aware of students' *Barnette* rights, and counsel their children accordingly, though this possibility will not aid students who do not happen to consult with their parents about whether they may disobey school officials in the Pledge context.

229. *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011) (observing, in the context of whether student was entitled to *Miranda* warning during interrogation by police officer at child's school, that "[t]he law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them").

230. *See* Lee v. Weisman, 505 U.S. 577, 593 (1992) ("[T]he school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion."); *see also* Greene, *supra* note 188, at 454 (observing that Weisman "rests . . . on equating psychological coercion with legal coercion in the public school setting" and arguing that applying this standard in the Pledge of Allegiance context would result in a holding that it is unconstitutional for teachers to lead their classes in reciting the Pledge).

231. Of course, *most* public schools do not actively compel students to recite the Pledge of Allegiance. However, this fact alone should not defeat the need for meta rights. Analogously, the Court has observed that many police departments do not coerce or mistreat suspects during custodial interrogations, yet the Court still held that the *Miranda* warning is necessary. Berkemer v. McCarty, 468 U.S. 420, 433 (1984) ("[W]e have no doubt that, in conducting most custodial interrogations of persons arrested for misdemeanor traffic offenses, the police behave responsibly . . . the same might be said of custodial interrogations of persons arrested for felonies.").

232. *See* Guggenheim, *supra* note 188, at 73.

weight where children are concerned. This is both because it is coupled with the coercion described above, and because the presumption of legal knowledge is simply weaker.[233]

In other words, the argument that meta rights are necessary in the Pledge context is relatively strong—at minimum it is stronger than the argument in the union or bar association context. Just as the *Miranda* Court was concerned with the probability that institutional coercion would render suspects unable to exercise their rights to silence, coercive features in many public schools prevent children from exercising their rights absent additional notice or structural protections. Further, while schools have a special need to maintain order, there is no reason that informing students of their *Barnette* rights need be disruptive. For example, Guggenheim proposes that schools should inform students of their *Barnette* rights in a way that "cultivate[s] an appreciation for the flag by teaching students the constitutional principles involved when we permit the flag salute."[234]

2. License Plates

In comparison to the Pledge context, there are fewer barriers to the exercise of self-help by those who object to displaying the state motto on their license plates, another area in which dissenters receive no meta rights. To begin, these objectors are older teenagers or adults—they are necessarily old enough both to drive and register a vehicle—so it is reasonable to assume that they are at least on inquiry notice of their rights.[235]

Yet, barriers are not non-existent. First, objectors would then have to withstand traffic stops by police officers enforcing otherwise lawful statutory prohibitions against defacing license plates. During these stops, objectors may have to explain their reasons for defacing the motto in an attempt to avoid a ticket, or worse.[236] Further, these stops could be

233. Other areas of law reflect the commonsense idea that children should not be presumed to have the same legal awareness as adults. *E.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 353 (2006) (discussing attractive nuisance doctrine's reliance on idea "that children constitute a special category of trespasser that ought to be treated differently by the law because, among other things, they lack the experience, maturity, and knowledge to grasp the significance of ethereal legal boundaries").

234. Guggenheim, *supra* note 188, at 81.

235. Not only is this assumption reasonable based on drivers' ages, it is also straightforward even for nonlawyers to find information about *Wooley*. For example, a Google search for "defaced license plate First Amendment" leads to information about the *Wooley* case, as does a search for "do I have to display the state motto on my license plate." Google Search for "defaced license plate First Amendment," GOOGLE, http://www.google.com (search "defaced license plate First Amendment"; then click search); Google Search for "do I have to display the state motto on my license plate," GOOGLE, http://www.google.com (search "do I have to display the state motto on my license plate"; then click search). Further, the decision to deface a license plate need not be made on the spot and under pressure, in contrast to a decision to invoke one's Fifth Amendment rights during custodial interrogation.

236. A routine traffic stop for a defaced license plate can quickly escalate if, for example, the driver is also uninsured, or if police claim to find evidence of another crime during the

daunting; although the Court in *Berkemer* described the experience of withstanding police custody during a traffic stop as considerably less coercive than a custodial interrogation, the process of explaining one's disagreement with the "majority"[237] to an officer who is likely to agree with the majority (and who may not know about *Wooley*[238]) could be intimidating.[239] Still, compelled display of state mottos on license plates does not involve the same degree of governmental coercion that existed in *Miranda*, or even that exists in the *Barnette* context; though empirical evidence of police abuse of motorists who do not display the state motto could show otherwise, such evidence does not now exist.

Conversely, there would be some financial cost to providing notice to all drivers of their *Wooley* rights, though these costs would be minimal if state motor vehicle departments simply printed a short description of the right announced in *Wooley* on vehicle registration forms. However, notice rights are unlikely to relieve dissenting motorists of the burdens described above in any meaningful way, given that they would still have to distinguish themselves from scofflaws. Thus, if meta rights are the exception rather than the rule—and it is clear from the Court's present case law that this is the case—then *Wooley* seems to be a poor candidate for meta rights.

3. Unions and Bar Associations

As discussed in Part I.C.1–2, objectors are entitled to opt out of funding union or bar association political speech, though they may be compelled to fund activities that are "germane" to the association's mission. Further, union members are entitled to receive annual, individualized notice of their opt-out rights, as well as a breakdown showing how the chargeable fee was calculated, and a nonjudicial process for challenging that calculation—attorneys are probably entitled to the same, though courts have been less aggressive in this context.[240] Finally, union bargaining unit members must give affirmative consent to the non-chargeable portion of a midyear dues increase (an "opt-in default").[241]

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stop. In this event, police may be able to seize the vehicle and arrest its occupants. Further, particular jurisdictions may have policies of aggressively pursuing grounds for vehicle seizures during traffic stops in order to make up for budget shortfalls. *See* Sarah Stillman, *Taken*, NEW YORKER, Aug. 12, 2013, at 48, 50 (describing civil forfeitures resulting from traffic stops, and reporting that "[m]any officers contend that their departments would collapse if the practice [of civil forfeitures] were too heavily regulated, and that a valuable public-safety measure would be lost").

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

238. Following the Court's decision in *Wooley*, the Maynards moved to Connecticut, where they were again ticketed for covering the state motto on their license plate, though the ticket was apparently overturned. David Hudson, *George Maynard Recalls License-Plate Ordeal, Free-Speech Victory*, FIRST AMENDMENT CENTER (Nov. 30, 2001), http://www.firstamendmentcenter.org/george-maynard-recalls-license-plate-ordeal-free-speech-victory.

239. In addition, objectors would have to deface the plates themselves (unless the state happens to offer motto-free plates), a task requiring supplies and ingenuity—at minimum, a roll of electrical tape, though the dissenter in *Wooley* also cut the state motto from his plate.

240. *See supra* Part I.C.1.

241. *See supra* Part I.C.1.

Put in procedural due process terms, bargaining unit members and attorneys are entitled to, at minimum, the equivalent of notice and a hearing.[242] However, union and bar association meta rights cannot be explained by reference to procedural due process. First, procedural due process rights typically do not attach to non-adjudicative deprivations.[243] Second, public employees who undergo the much greater hardship of losing their jobs altogether do not always receive as much process as bar association or union objectors.[244]

Moreover, the case either for coercion or for lack of factual knowledge is weak. As to lack of factual knowledge, there is no mystery surrounding the existence of the union or bar association, or the obligation to pay fees to either. Attorneys typically pay their required annual fees by check or credit card, making the fact of payment unavoidable.[245] Bargaining unit members often have their dues or fees deducted automatically from their pay, but they often must first consent to the deductions, and in any event the payment will be reflected on each employee's pay stub every pay period.[246] This should be enough to prompt a dissenting employee to seek information about how to opt out of the non-germane portion of union dues; for example, the employee might ask a manager or human resources employee.

More troubling is the fact that the union or bar association itself would be the only source of information about the calculation of the chargeable fee. If a bar association is recalcitrant about providing this information, objectors would be faced with a choice between paying full freight and then seeking a refund, or else paying nothing (or paying a fraction of dues based on a guess), and risking disciplinary action. Likewise, employees who suspect that the agency fee was improperly calculated would face difficulty in verifying their suspicions, though resourceful objectors could find information about union spending in annual reports filed by labor unions and made available on the Department of Labor website.[247] Thus, the case for lack of knowledge, while certainly weaker than in other contexts where individuals enjoy notice rights, is not entirely nonexistent.

The possibility of *Miranda*-level coercion that dissuades objectors from invoking their rights, however, is remote at best. In the bar association context, it is unclear that any opportunities for coercion exist at all, given

242. *See supra* Part I.C.1.

243. United States v. Fla. E. Coast Ry., 410 U.S. 224, 244–45 (1973) (noting due process distinction between adjudication and other types of government action).

244. *See supra* note 56. While this goes only to the hardship prong, the other two prongs—risk of erroneous deprivation and government interest—do not translate easily into this context, which itself suggests another reason that procedural due process does not explain the presence of meta rights in this context.

245. *See, e.g.*, *Automated Installment Plan Enrollment Form*, N.Y. BAR ASS'N, *available at* http://www.nysba.org/uploadedFiles/NYSBA/Membership/Automated_Installment_Plan_for_Dues/2014_AIP_Enrollment_Form.pdf (last visited Oct. 19, 2014).

246. Jeffrey H. Keefe, *A Reconsideration and Empirical Evaluation of Wellington's and Winter's,* The Unions and the Cities, 34 COMP. LAB. L. & POL'Y J. 251, 265 (2013).

247. These reports are required by the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 431 (2012), and are accessible at http://www.dol.gov/olms/ (last visited Oct. 19, 2014).

that most attorneys have relatively little mandatory contact with their state bar associations. Bargaining unit members, of course, come into contact with union representatives and supporters on a regular basis. However, even if union organizers or members pressure workers to pay full freight—perhaps by posting a list of agency fee payers in the breakroom[248]—this pressure would not rise to the level necessary to dissuade determined objectors from opting out, absent extreme circumstances.

Finally, as outlined here, the presumption of legal knowledge is well-founded—in fact much more than in the cases like *Berkemer*. Attorneys, of course, are sophisticated about legal rights; to wit, most state bar exams test on the First Amendment.[249] Bargaining unit members, while not required to pass an exam about their rights as a condition of employment, are nonetheless relatively likely to be aware (or at least constructively aware) of their First Amendment rights, even without the *Hudson* notice. Information about union dissenters' rights is remarkably plentiful and easily accessed online;[250] in addition, employers seeking to weaken employees' ties to a union may be anxious to provide information about opt-out rights.

That bargaining unit members could plausibly be expected to exercise their *Abood* rights without the benefit of meta rights like the *Hudson* notice is underscored by the experience of individuals who object to union membership on religious grounds. These employees often have a statutory entitlement to an accommodation from their union, such as the opportunity to donate the amount of union dues or the agency fee to a charity,[251] but do not necessarily receive specific notice of their rights to object.[252] Further, once they do learn of their rights, they generally exercise them by contacting the union and affirmatively requesting an accommodation; if one is not provided, they may sue.[253] Likewise, objectors in right to work states do not necessarily receive individual notices stating that they are not

248. *See, e.g.*, Leah Barkoukis, *Michigan Union Publishes "Freeloaders" List of Workers Who Opted Out*, TOWNHALL.COM (Feb. 13, 2014), http://townhall.com/tipsheet/leahbarkoukis/2014/02/13/michigan-union-publishes-freeloaders-list-n1794694.

249. The Multistate Bar Examination tests First Amendment freedoms. *See* NATIONAL CONFERENCE OF BAR EXAMINERS, 2013 MULTISTATE BAR EXAMINATION INFORMATION BOOKLET 8, *available at* http://www.law2.byu.edu/page/categories/student_resources/bar_prep/2013/MBE_Information_Booklet.pdf.

250. A Google search for "mandatory union dues" leads to a host of information about objectors' rights and ongoing lawsuits challenging union dues and fees assessments. Google Search for "mandatory union dues," GOOGLE, http://www.google.com (search "mandatory union dues"; then click search).

251. *See supra* Part I.C.1.

252. They may receive generalized notice via the notice regarding Title VII rights that many employers are required to post. This poster notifies employees that they may seek a reasonable accommodation of their religious practices. *See* EEOC, EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW, *available at* http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf.

253. *An Employee's Guide to Union Dues and Religious Do Nots,* NAT'L RIGHT TO WORK LEGAL DEF. FOUND., *available at* http://www.nrtw.org/ro2.htm#ro2FN8 (last visited Oct. 19, 2014).

required to pay any money to their union,[254] though significant numbers of employees nonetheless succeed in invoking their rights under such laws.[255]

Thus, the largest barrier to self-help in the union and bar association context is the lack of publicly available knowledge about how the agency fee is calculated. Yet the *Hudson* procedure goes well beyond remedying this informational gap. Moreover, even if *Hudson* is explicable in terms of self-help, *Knox* is not—there is simply no plausible case to be made that the need to mail a form in order to opt out imposes the type of self-help barrier that motivate meta rights in other contexts.

4. Agricultural Advertising

Finally, the least significant obstacle to self-help, and correspondingly the least compelling case for meta rights, comes in cases like *United Foods*. First, the concept of *Miranda*-style coercion means little in the context of a business entity. It is equally difficult to imagine how a knowledge deficit could arise: not only will producers have all the factual knowledge necessary to discover a claim, they are also likely to be represented by counsel. Thus, there exists neither the knowledge gap nor the institutional coercion that has justified meta rights in other contexts.

Given the relevance of self-help to the establishment of meta rights in other contexts—and the lack of alternate explanation for meta rights in the compelled speech context—the current allocation of meta compelled speech rights is simply bizarre. For example, it is incongruous that, in cases governed by *United Foods*, marketing associations may not even assess contributions for generic advertising. In other words, these producers, who are most able to engage in self-help to avoid compelled speech or subsidization, need not even opt out.[256] Conversely, public school children and their parents can make the strongest case for meta rights to defend against compelled speech and subsidization, yet they are not entitled to any meta rights at all.[257] Finally, union members and attorneys receive disproportionately robust meta rights, despite the lack of barriers to self-help.[258]

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254. *E.g.*, S.C. CODE ANN. § 41-7-110 (2013) (providing that employers may post notice of right to work law and must furnish notice upon request of an employee); TENN. CODE ANN. § 50-1-206(b) (2012) (employers may post or distribute notice of state right to work law provisions).

255. *See* Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors* 28 (Princeton Univ., Working Paper No. 503, 2005), *available at* http://harris.princeton.edu/pubs/pdfs/503.pdf.

256. Counterintuitively, it may have been the very ease of objection that led the Court to strike down the program altogether; the Court's unstated assumption may have been that no producer would ever contribute to generic advertising absent compulsion, and that therefore it was a waste of time to do anything but eliminate the program.

257. *See supra* Part II.B.

258. *See supra* Part II.B.

C. Structuring Meta Rights

Meta rights most often do little more than provide potential dissenters with notice, though some may do more to facilitate or even encourage objectors to exercise their rights. This section separately considers notice and structural meta rights, focusing on their potential unintended effects on institutional or willing individual speakers.

1. Notice Rights

As their name suggests, notice rights simply inform individuals about their rights; both the *Miranda* warning and the *Hudson* notice are examples. When a nongovernmental actor, such as a union or bar association, is required to issue a notice regarding compelled speech or subsidization, an irony arises: the notice itself is a form of compelled speech, which in turn raises its own First Amendment question.[259]

The Court has previously recognized that state-mandated disclosures by private speakers are subject to First Amendment scrutiny. In *Zauderer v. Office of Disciplinary Counsel*,[260] the Court reviewed Ohio's requirement that attorneys advertising their availability on a contingent fee basis also disclose that unsuccessful clients would be required to pay costs.[261] The Court conducted an undue burden analysis, weighing Ohio's interest in the compelled disclosure against the burden imposed on attorneys.[262] It easily concluded that the requirement did not impose an undue burden on attorneys; conversely, the Court observed that the notice protected consumers who were likely to assume that bringing a losing case would be free, when in fact they might incur substantial costs.[263] Thus, the disclosure requirement passed constitutional muster.

Zauderer involved a burden on commercial speech, which is entitled to less protection than ideological speech.[264] In *Citizens United*, in contrast, the Court considered the standard applicable to compelled disclaimers and

259. *See* David Fagundes, *State Actors As First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1641, 1643–44 (2006) (noting that "[c]ourts and commentators alike have long dismissed the notion that the Speech Clause could serve as a source of constitutional protection for government speech," but observing that a small number of courts have held that the First Amendment can protect state or local government speakers whose speech has been limited by the federal government).

260. 471 U.S. 626 (1985).

261. *Id.* at 652–53.

262. *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250 (2010) (explaining that under *Zauderer*, "[u]njustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech, but 'an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers'"); *see also* Nicole B. Cásarez, *Don't Tell Me What to Say: Compelled Commercial Speech & the First Amendment*, 63 MO. L. REV. 929, 952–53 (1998) (describing the *Zauderer* test and observing that "commercial disclosure requirements have been subjected to less stringent First Amendment analysis" than compelled "political, religious, or ideological speech").

263. *Zauderer*, 471 U.S. at 652–53 & n.15.

264. *Id.* at 637.

disclosures under Bipartisan Campaign Reform Act.[265] The Court upheld both requirements, but it first applied "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[266] In particular, the Court relied on the government's interest in providing information to the electorate.[267] The Court did not quantify the costs of the disclosure or disclaimer requirements, though it did consider as one cost the possibility that disclosure would chill donors' speech.[268] Although the Court deemed this possibility insufficient to defeat the disclosure requirement, it implied that it might decide differently a case with a clear record of "threats or reprisals" against donors.[269]

At a minimum, then, notice meta rights—to the extent owed by private associations—should be subject to the *Zauderer* test. However disclosure requirements that, like the *Hudson* notice, are imposed as conditions of engaging in political speech should receive stricter scrutiny under *Citizens United*. Undoubtedly, informing institutionally affiliated individuals of their rights to avoid compelled speech and subsidization is a governmental interest that is at least as significant as providing information to the electorate. Likewise, there is a close relationship between that interest and disclosure. Thus, there is a strong argument in favor of the constitutionality of requiring unions or bar associations to disclose information about the right against compelled speech or subsidization. However, this abstract analysis should not conclude the inquiry. There remains the fact-specific question of whether there is an alternative *method* of notifying dissenters of their rights, while imposing a smaller burden on institutional speakers.[270]

Hudson is more burdensome than the disclosure requirements approved in either *Zauderer* or *Citizens United*, where the respective speakers had to append a short statement to communications that they were making

265. Citizens United v. FEC, 558 U.S. 310, 367 (2010). The disclaimer consists of a statement, to be delivered during any televised electioneering communication, that "[advertiser] is responsible for the content of this advertising," that the communication was not authorized by a candidate or candidate committee, and that provides the name and address of the person or group that funded the advertisement. *Id.* at 366. The required disclosure statement, applicable to anyone spending more than $10,000 in a calendar year on electioneering communications, was to be filed with the FEC and list "the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors." *Id.*

266. *Id.* at 366–67 (quoting Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976)).

267. *Id.* at 367.

268. *Id*. at 370.

269. *Id.*; *see also* Leslie Kendrick, *Disclosure and Its Discontents*, 27 J.L. & POL. 575, 575–76 (2012) ("Compelled disclosure . . . has long been assessed not by its purposes, but by its detrimental effects on expressive association.").

270. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 490–91 (1995) (holding, in the commercial speech context, that "the availability of [less speech-restrictive alternatives], all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [statute] is more extensive than necessary"); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422 (1996) (stating that "[a] law is not narrowly tailored if there are less speech-restrictive means available that would serve the interest essentially as well as would the speech restriction").

anyway, or file a single disclosure report with a government agency. And, it is not clear that the additional burden imposed by the individualized *Hudson* notice is justified, given the available alternatives. For example, bargaining unit members could be notified of their rights via a posted notice, similar to the notices that advise employees of many other workplace rights.[271] This would not work for attorneys, who do not all work in the same place, but a notice displayed prominently on the bar association's website could prove equally useful. Alternatively, employers—who, after all, are parties to collective bargaining agreements imposing union security clauses—could play a greater role in informing employees of their rights.[272] They, rather than unions, could give employees notice of their *Abood* rights.[273] For example, during new employee orientation—when the employee must fill out countless other forms and make numerous other elections related to retirement withholding, health insurance electives, and other benefits—the employee could also be provided with the *Hudson* notice and a copy of the paperwork necessary to opt out of the non-germane portion of union dues. Similarly, employees could then change their agency fee elections once annually, just as they change their insurance elections during the annual "open enrollment" period.

The existence of these alternative methods of notifying dissenters of their First Amendment rights calls into question whether the *Hudson* procedure would survive the *Zauderer*/*Citizens United* inquiry. And, this is not the only aspect of the *Hudson*/*Knox* process that implicates the First Amendment rights of institutional speakers.

2. Opt-Ins, Opt-Outs, and Sticky Defaults

Knox called into question the continuing validity of the opt-out default in the union dues context based on a posited mismatch between the likely preferences of employees and the likely effects of an opt-out as compared to an opt-in. Accordingly, this subsection begins by evaluating whether *Knox* correctly assumed that most individuals who pay full freight without joining their union have a latent preference not to pay, and concludes that few meaningful predictions can be made about these individuals' preferences.

271. *See "EEO is the Law" Poster,* EEOC, *available at* http://www1.eeoc.gov/employers/poster.cfm (last visited Oct. 19, 2014) (stating that "[t]he law requires an employer to post a notice describing the Federal laws prohibiting job discrimination based on race, color, sex, national origin, religion, age, equal pay, disability or genetic information").

272. Of course, individual unions may make the choice to continue providing the *Hudson* notice themselves, preferring not to cede control of this process to employers. However, it is not necessarily the case that every union will make this choice, particularly where they enjoy stable and long-term bargaining relationships with employers.

273. This does not solve the problem of how to provide potential objectors with notice of the union's calculation of the agency fee. This disclosure could still be provided by the union, either directly to objectors or via the employer, or—similar to the disclosure required in *Citizens United*, which is submitted to the Federal Election Commission—via the Department of Labor website.

Then, drawing on principles of behavioral psychology, this subpart plays out the consequences of *Knox*'s novel First Amendment principle that speech defaults can violate the First Amendment if they do not accord with the likely preferences of covered individuals. It argues that if an opt-out violates the First Amendment (because some individuals fail to overcome the speech default), then an opt-in default should pose a problem of the same magnitude where different individuals fail to overcome the non-speech default. Thus, this subsection concludes that, taking *Knox*'s First Amendment premises at face value, an opt-in default should be as problematic as an opt-out default.

Among behavioral psychologists, it is relatively uncontroversial that switching from an opt-out to an opt-in default could have an effect on individuals' outcomes. That is to say, it is plausible that the choice of opt-in/opt-out default could actually (if unconsciously) result in workers adopting different statuses vis-à-vis their unions. If this fact has First Amendment valence, then courts should be equally cognizant of the effects of either default.

To begin, it is worth asking what behavioral psychology has to contribute to constitutional law, and particularly to First Amendment analysis. Paul Horwitz has observed that "there is a natural fit between behavioral analysis and First Amendment law. Much of our current free speech jurisprudence is based on the assumption that the government should not regulate speech because, in an unregulated marketplace, people will be perfectly capable of responding rationally to speech."[274] Behavioral psychology is devoted to understanding the "cognitive failings" that prevent people from responding to situations rationally.[275] Thus, a more sophisticated understanding of these cognitive failings will allow courts and legislatures to tailor restrictions on speech more carefully, achieving better results while lessening burdens on speech.[276] More importantly, the Court itself acts on assumptions about behavior in compelled speech cases. For example, the *Abood* Court relied on the possibility that bargaining unit members would free ride on other workers' payments to their union in deciding to permit the agency shop.[277] Similarly, as I discuss in detail below, the *Knox* Court drew on its own set of assumptions about the likely preferences of bargaining unit members in deciding to require an opt-in regime for midyear dues increases. In other words, the Court already bases rights and meta rights regimes on assumptions about human behavior; introducing behavioral psychology into the mix simply puts these assumptions on firmer empirical footing.[278]

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274. Paul Horwitz, *Free Speech As Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 6 (2003).

275. *Id.* at 10.

276. *Id.* ("[B]ehavioral analysis may offer valuable insights into two crucial First Amendment questions: *how* we decide whether particular speech acts may have unduly harmful effects, and *who* should make such decisions.").

277. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977).

278. Such considerations are not limited to the union context. For example, the Court in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), considered behavioral incentives in

The *Knox* majority adopted an opt-in regime based largely on its conjecture that bargaining unit members who, after receiving the *Hudson* notice, had neither joined the union nor opted out of funding its non-germane activities probably did not want to fund union political speech.[279] Essentially, the Court assumed that many of these employees had not opted out because, while they preferred not to pay, their preferences not to pay were weaker than their preferences not to devote the time or attention to filling out the necessary paperwork.[280] However, this conclusion was flawed; in fact, one can say very little about the likely preferences of employees who pay full freight without joining the union.

Why might a bargaining unit employee not join a union, but still pay the full amount of union dues? The *Knox* Court viewed this state of affairs as contradictory, evidencing a mistake or lapse in attention by the employee.[281] Yet, there are at least two plausible explanations for it. First, there are rational reasons not to join a union even if one agrees with (and wants to fund) the union's political speech. For example, bargaining unit members who do not join the union are not subject to union discipline.[282] Thus, bargaining unit members who support the union's efforts beyond the bargaining table, but who do not want to run the risk of eventually facing union discipline might affirmatively and intentionally choose to pay full freight without joining the union.

The second explanation, though, may be the more powerful one: behavioral research shows that "[d]efaults are sticky, and overcoming inertia is difficult."[283] This research suggests two important reasons that

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evaluating the constitutionality of a restriction on the sale or use of certain information about doctors' prescribing habits by pharmaceutical marketers. Specifically, the Vermont statute under review restricted marketers from using physicians' information where the physicians had not consented to such use. *Id.* at 2668–69. The Court observed that the law "might burden less speech if it came into operation only after an individual choice"—in other words, if it applied only to physicians that opted into coverage, rather than requiring physicians to opt out of coverage. *Id.* at 2669 (adding that even this change "would not necessarily save" the statute). Likewise, the *Shutts* Court also focused on behavioral incentives in choosing an opt-out regime (rejecting the defendant's call for an opt-in). *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 813–14 (1985). The Court based its analysis in significant part on the economic interests, and associated likely courses of action, of absent class members. *Id.* at 813.

279. Knox v. Serv. Emps. Int'l Union Local 1000, 132 S. Ct. 2277, 2290 (2012).

280. *Id.* (discussing "employees who might not qualify as active 'dissenters' but who would nonetheless prefer to keep their own money").

281. *Id.* (posing the rhetorical question: "And isn't it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues?").

282. *See, e.g.*, Scofield v. NLRB, 394 U.S. 423, 435 (1969).

283. Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2036 (2013); *see also* Gary Minda, *Freedom and Democracy in a World Governed by Finance: Habermas and the Crisis in Europe: A Free Labor Response*, 10 RUTGERS J.L. & PUB. POL'Y 244, 269 (2013) (noting that Justice Breyer, in *Knox*, "adopted the conclusion of Sunstein and Thaler in finding that default rules play an important role in influencing behavior of individuals who do not have 'well defined preferences'"); Cass Sunstein & Richard Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1171 (2003); Brian Olney, Paycheck Protection or Paycheck Deception? When

some workers fail to overcome the default (here, to pay full freight without joining the union). One is simple inertia—the employees may not have made a decision at all, or they may have made a decision in the abstract, but then failed to complete the necessary paperwork in time. For these workers, there is no reason to assume that failure to overcome the default indicates a desire not to pay for non-chargeable union expenses. True, it is possible that if required to make a choice, they would opt out. Yet it is also possible that they would resolve the supposed inconsistency by joining the union and continuing to pay.[284]

A second reason for default stickiness is that employees may (correctly or not) see the default as an implied endorsement or expectation. "People interpret defaults as a recommended course of action set out by policy makers."[285] Relatedly, individuals may take defaults as signals about what most people do, meaning that "following a simple heuristic of imitation could lead to its widespread adoption."[286] In other words, an opt-out default might suggest to employees that most people pay full freight, leading them to do the same in order to avoid being seen as free riders. Conversely, an opt-in default might suggest paying is extraordinary, and employees might decide that only suckers pay when they don't have to.[287]

If employees see either implied endorsement or description in the default choice, they make a different decision than they would without the default. Likewise, employees who are driven by inertia will have different outcomes depending on the default. This is significant because it suggests that beyond simply allowing non-dissenters to express their independently held desires, court-imposed defaults and associated procedures can cause a larger or smaller number of people to pay full freight for union representation. In other words, opt-in defaults can have the effect of restricting the amount of money available to labor unions with which to engage in political speech

Government "Subsidies" Silence Political Speech 13–15 (unpublished manuscript) (on file with Fordham Law Review).

284. Behavioral psychology also suggests a reason that the *Knox* majority presumed that full-freight/non-union bargaining unit members preferred not to pay for the union's political speech. Research has proven the existence of the "availability heuristic," in which people "assess the likelihood of risks by asking how readily examples come to mind." RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 25 (2008). *Knox* was filed by a group of plaintiffs who did, in fact, vigorously object to paying for the SEIU's non-chargeable expenses. Thus, it is unsurprising that the majority deemed it likely that other employees also objected to making these payments.

285. Eric J. Johnson & Daniel J. Goldstein, *Decisions in Default*, *in* THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 421 (Edlar Shafir ed., 2012).

286. *Id.* (citing Sunstein & Thaler, *supra* note 283, at 1171).

287. *See* Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 652 (2006) (explaining, in the context of private law, that "a transactor might fear that proposing an opt-out from the default will dissuade his potential counterparty from entering into the agreement," because "the counterparty will suspect that the proposer's decision to deviate from the norm and use an unfamiliar provision . . . is a 'trick'").

independent of the level of support for the unions' speech among bargaining unit members.[288]

Given this background, *Knox*'s First Amendment analysis suggests that the opt-in default would infringe upon First Amendment rights because it would deter some bargaining unit members from paying full freight, thereby decreasing the funds available for union political advocacy. But this is not all; in addition, the rights of two distinct sets of bargaining unit members would also be burdened. First, there are those who overcome the default to pay full freight (with or without joining the union), who lose the opportunity to have their voices amplified by the presence of those who are unwittingly opted out of funding union political speech.[289] Second, there are those who are influenced not to pay full freight by the opt-in regime—in other words, those who are dissuaded from funding political speech because of Court-created meta rights. Even if these individuals use the money they save to engage in other political speech, they have still lost an opportunity to take part in a "collective effort" by which "individuals can make their views known, when, individually, their voices would be faint or lost."[290]

Therefore, if the Court concludes that an opt-out regime violates the First Amendment, then the inevitable presence of other workers, who would be similarly disadvantaged by an opt-in regime, should eliminate that possibility as well. In that case, there is a third possibility that the Court did not consider but that holds promise to protect even the quasi-dissenters with whom the *Knox* Court was concerned: instead of an opt-in or an opt-out default, institutions could simply require affiliated individuals to make an affirmative choice.[291] Thus, unions, employers, or bar associations might ask employees and attorneys to make a choice between paying full freight and paying the agency fee. The advantage of such a scheme is that it avoids

288. It is not clear that the converse is true. At least one study suggests that opt-out defaults do not significantly affect individual choices, and that the results of an opt-out default closely approximate the results of requiring individuals to make affirmative choices. *See* Olney, *supra* note 283, at 14–15. However, this research was performed in the context of organ donation; additional research is needed to confirm that the same conclusion would hold in the union or bar dues context.

289. Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 839 (2002) (arguing that "[t]he Court conceived of the right of association as belonging to the individual members—as augmenting the power of their individual speech"). The Court has recognized the First Amendment interests associated with union speech. *See* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 773 (1961) ("[T]he fact that these expenditures are made for political activities is an additional reason for reluctance to impose . . . an injunctive remedy. Whatever may be the powers of Congress or the States to forbid unions altogether to make various types of political expenditures . . . many of the expenditures involved in the present case are made for the purpose of disseminating information as to candidates and programs and publicizing the positions of the unions on them. As to such expenditures an injunction would work a restraint on the expression of political ideas which might be offensive to the First Amendment.").

290. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981); *see also Street*, 367 U.S. at 773 ("[T]he majority also has an interest in stating its views without being silenced by the dissenters.").

291. *See* Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 39–41 (2013) (discussing "active choosing" as an alternative to a default regime).

suggesting to individuals that the state believes there is a "right answer," and instead conveys the message that speech and silence are equally valid alternatives. While there are some downsides to requiring an active choice—for example, some people may prefer not to be forced to expend mental energy on weighing options[292]—this is the only way to avoid a situation in which the government plays a role in determining whether workers or attorneys will engage in political speech, thereby implicating the First Amendment under *Knox*'s logic.[293]

CONCLUSION

The Court's present ad hoc approach to meta rights has produced an incoherent set of results. This is especially true in the First Amendment context, where those most able to show coercion, information deficits, or both receive no meta rights, while others receive extensive meta rights. Accordingly, the Court should undertake a full-scale reconsideration of meta rights, beginning with the First Amendment context. In doing so, the Court should begin by addressing when and why meta rights are called for at all. Next, to the extent the Court concludes that speech defaults implicate the First Amendment, it should draw on advances in behavioral psychology to anticipate the effects of meta rights on the speech of willing speakers as well as dissenters.

292. *Id.* at 47 (discussing prospect that active choosing might be "quite unwelcome" because of the time and learning curve demanded in making a choice).

293. A more systematic approach to meta rights questions will have significance far beyond the compelled speech and subsidization context. For example, some statutory schemes also create meta rights. To take one example, the NLRB recently promulgated a rule requiring employers to notify their employees of their rights under the NLRA. 76 Fed. Reg. 54006-01 (Aug. 30, 2011). To date, the rule has been struck down on statutory grounds by two circuits, with the D.C. Circuit holding that the rule violated employer's statutory speech rights. Nat'l Ass'n of Mfrs. v. NLRB, 721 F.3d 947, 955 (2013). Although both decisions rested on the NLRA rather than the Constitution, the approach outlined in this Article could also be usefully applied to reconciling employer and employee interests arising under the Act as well. *See generally* Chamber of Commerce v. NLRB, 721 F.3d 152 (4th Cir. 2013).