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Compelled Speech and the Regulatory State

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Since the Supreme Court's 1943 decision in West Virginia Board of Education v. Barnette*, it has been axiomatic that the First Amendment prohibits the government not only from censoring speech, but also from compelling it. The central holding of* Barnette *itself is largely uncontroversial—it seems obvious that the First Amendment's free speech clause means that no government may require people to espouse or reproduce an ideological statement against their will. But the Court has extended the compelled speech doctrine to stop the government from forcing people to make even truthful, factual statements. These claims have resulted in some of the most hotly contested free speech disputes the Court has addressed in recent years. For instance, in* National Institute of Family & Life Advocates v. Becerra*, the Court invalidated provisions of a California law requiring self-styled "crisis pregnancy centers" to post and distribute truthful information about the availability of state-sponsored services, including abortion, for pregnant women and, where the centers were not licensed to provide medical services, to disclose that fact. The Court held that the First Amendment prohibits such compelled speech unless the disclosure is "purely factual and uncontroversial," and that abortion is "anything but an 'uncontroversial' topic." If this is the appropriate legal standard, then the doctrine must grapple with defining what makes facts controversial or not. This is problematic for a number of reasons. First, facts, as opposed to ideas, would not ordinarily be labeled as controversial. Second, because we are now living in a time of epistemic chaos in public discourse, virtually any fact is now open to dispute, and thereby controversial. Finally, because of increasingly polarizing contemporary debates about the very role of government, the controversial fact standard risks devolving into an infinite regress to the point where every fact is controversial because the role of government regulation is itself controversial. If the Court does not articulate clear and substantial limiting principles, widespread application of the compelled speech doctrine ultimately will result in challenges to all government disclosure requirements, undermining critical components of the regulatory state.*

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INTRODUCTION

In recent years, both judges and legal scholars have sounded an alarm about the Supreme Court's expansionist view of free speech doctrine. They suggest that the Free Speech Clause's application to invalidate regulatory provisions that would not ordinarily be viewed as affecting speech signals an era of First Amendment "Lochnerism," in which businesses weaponize the Constitution to dismantle a range of government regulations.[1] While acknowledging the concerns underlying this critique, I have been more reluctant than others to join the outcry, in part because some of the cases that arguably represent this trend could also be understood to provide the foundations for broader speech protection in more traditional contexts. But Lochnerian concerns are much more troubling in the Court's recent compelled speech cases, which, taken to their logical extreme, could truly undermine the basic functions and foundations of the entire regulatory state. This Essay offers a preliminary exploration of those concerns and addresses some potential ways to modify the path of the doctrine's evolution to adequately protect speech while accommodating the need for essential forms of governance.

The centerpiece of the Court's new direction is *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*),[2] in which it struck down provisions of a California law requiring self-styled "crisis pregnancy centers" to post and distribute information about the availability of state-sponsored services for pregnant women, including abortion, and, where the centers were not licensed to provide medical

1. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting); Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1954 (2018); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (2016). For a different perspective on these concerns, see Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377 (2020).

2. 138 S. Ct. 2361 (2018).

services, to disclose that fact.[3] The law was a response to extensive complaints that such centers are devoted to an antiabortion mission and often mislead women about the services they provide.[4] Drawing out of context some isolated language from a lawyer advertising case, the Court held that the First Amendment prohibits such compelled speech unless the disclosure is "purely factual and uncontroversial," adding that abortion is "anything but an 'uncontroversial' topic."[5] This standard is problematic for a number of reasons, but primarily because, taken to its logical extreme, it could lead to the invalidation of innumerable regulatory provisions requiring even truthful factual disclosures.

In the modern regulatory state, the government routinely compels businesses, institutions, organizations, and even individuals to disclose an extraordinary amount of information. Indeed, governmental mandates requiring factual statements are so ubiquitous most people probably rarely even think about them, much less consider them to be a violation of their constitutional rights.[6] For example, professionals in many states have to publicly display their licenses to practice. Doctors have a duty in every jurisdiction to secure informed consent before they perform some procedures on their patients, which requires them to disclose the facts about the attendant health risks and the availability of alternative treatments. Employers are required to comply with a host of federal regulations directing them to post information in their workplaces about labor rights and safety. Securities laws and regulations include numerous corporate disclosure provisions. Restaurants typically have to display their latest public health inspection "grades." Producers of prepared foods and pharmaceuticals must provide information about the contents of the products they sell. While the *NIFLA* majority dismissed concerns that its ruling would lead to invalidation of such laws, it provided no explanation why that would be the case.[7]

It is unclear why the Court took this approach because, with one exception, the concept of an uncontroversial *fact* is nowhere to be found in prior First Amendment doctrine, though numerous lower courts recently have struggled to understand how to apply it. To the extent that we apply a common meaning of controversial, such as "[g]iving rise or likely to give rise to controversy or public disagreement,"[8] it is unclear how a fact, assuming it is objectively true, can in itself be controversial.[9] Accordingly, it is hard to comprehend what free speech interests are implicated by the vast majority of factual disclosures required by the State.

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3. *Id.* at 2372.

4. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1340–41 (2014).

5. *NIFLA*, 138 S. Ct. at 2372.

6. *See infra* Section II.A.

7. *NIFLA*, 138 S. Ct. at 2376.

8. *Controversial*, LEXICO, https://www.lexico.com/definition/controversial [https://perma.cc/YL6U-N3TR].

9. For a thorough account of the different possible meanings of uncontroversial fact, see Seana Valentine Shiffrin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPP. L. REV. 731 (2020); *see also* Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1380–87 (2019) (describing different lower court approaches to defining "uncontroversial" facts).

Further, even if we could agree upon a legally meaningful definition of uncontroversial facts, the difficulties of this approach may persist for an entirely different reason. For one thing, we are living through an age where disputes over basic empirical, scientific, and even historical facts are increasingly contested, so much so that the conflicts over truth have *become* ideological and therefore controversial. Sharp partisan debates exist over whether climate change is caused by human activity[10] even though the consensus of scientific opinion is that it is.[11] A number of factual disputes concerning COVID-19 arose during the pandemic, such as whether its spread can be minimized by wearing masks, even though their effectiveness has been proven by medical evidence.[12] The aftermath of the 2020 presidential election was a bizarrely contested narrative over whether the election was "stolen" even in the absence of any objective evidence to support that claim.[13] And not that long ago, critics perpetuated the false claim that President Obama was not born in the United States, even after he produced his birth certificate.[14] If there is no such thing as objective truth, then everything can be contested, even when there is no evidentiary support for those who don't believe it. And if every fact can be contested without regard to its basis, no fact is uncontroversial. To say the least, assessing government requirements to disclose factual information in light of this current state of epistemic chaos raises challenging questions about the scope and limits of the compelled speech doctrine.

Finally, the conflict over facts that we are witnessing seems closely connected to a fundamental debate about the very role of government. Some extremist groups argue not only for limited government, but for virtually no government at all. If the

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10. *The Politics of Climate*, PEW RSCH. CENT. (Oct. 4, 2016), https://www.pewresearch.org/science/2016/10/04/the-politics-of-climate/ [https://perma.cc/SC3G-LMVV] (reporting that only 15% of conservative Republicans believe "Earth is warming due to human activity," while 79% of liberal Democrats have this belief).

11. Rick Rouan, *Fact Check: Scientific Consensus Says Humans Are Dominant Cause of Climate Change*, USA TODAY (Apr. 28, 2021, 3:22 PM), https://www.usatoday.com/story/news/factcheck/2021/04/22/fact-check-scientific-consensus-humans-main-cause-climate-change/7336153002/ [https://perma.cc/E6XN-8UAA] ("[S]cientists have concluded with a high degree of certainty that the dominant cause of warming is human-produced greenhouse gases produced by humans becoming trapped in the atmosphere.").

12. John T. Brooks & Jay C. Butler, *Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2*, JAMA NETWORK: JAMA INSIGHTS (Feb. 10, 2021), https://jamanetwork.com/journals/jama/fullarticle/2776536 [https://perma.cc/ZYJ2-QS3H]. Indeed, masks have become such a touchstone of controversy that a recent Wall Street Journal op-ed piece suggested that requiring the wearing of masks even after vaccines have become widely available is a form of compelled speech. David B. Rivkin, Jr. & James Taranto, Opinion, *Face Masks and the First Amendment*, WALL ST. J. (May 18, 2021, 12:41 PM), https://www.wsj.com/articles/face-masks-and-the-first-amendment-11621356093 [https://perma.cc/DE8C-K7Z2].

13. *2020 Electoral College Results*, NAT'L ARCHIVES, https://www.archives.gov/electoral-college/2020 [https://perma.cc/3YR8-PZQA].

14. Jess Henig, *Born in the U.S.A.*, FACTCHECK.ORG (Apr. 27, 2011), https://www.factcheck.org/2008/08/born-in-the-usa/ [https://perma.cc/9X9J-ZFPB].

very concept of *government* is believed to be illegitimate, then all laws that compel factual disclosures are, by definition, similarly inappropriate because they are by definition a product of government. Following this line of thinking, every government compelled factual statement would be controversial under the *NIFLA* standard, and therefore could be argued to violate the First Amendment, even if there is no disagreement about the statement's truthfulness.

This Essay attempts to map out some preliminary approaches to grappling with some of these questions. In Part I, it sketches out the contours and contexts of the First Amendment compelled speech doctrine and identifies some of the central speech and autonomy concerns addressed by limits on government compelled speech. Much of this is well-hewn ground, so this discussion is relatively brief. Part II explores some of the many contexts in which federal, state, and local governments compel individuals, businesses, and organizations to disclose truthful factual information (it would be a monumental undertaking to catalog them all). In doing so, this Part shows how the *NIFLA* "uncontroversial fact" standard could be used to challenge and undermine a wide range of these laws. It argues that the default position under First Amendment doctrine should be that government compelled disclosures of factual information do not violate the First Amendment so long as the facts are objectively true, the disclosure is reasonable in content and scope, and the publication of the facts advances legitimate state interests. Having said that, there still may be circumstances in which the State crosses the line from generally applicable laws requiring factual statements to mandates that truly burden the regulated party's expressive and autonomy interests. Accordingly, in Part III, the Essay discusses some limiting principles to the proposed default rule, recognizing fully that there may be circumstances in which the government might overreach its regulatory prerogatives to the point where even a compelled factual disclosure would violate the First Amendment.

I. UNDERSTANDING THE COMPELLED SPEECH DOCTRINES

A. The Distinct First Amendment Interests Implicated by Government Compelled Speech

As other commentators have noted in great detail, there is no single compelled speech doctrine, but rather several doctrines that apply to different forms of what may be conceptualized as government compelled speech.[15] First, there is the paradigmatic, but fortunately rare, case of a law that requires individuals to say or display a purely ideological statement with which they disagree. Only two Supreme Court cases, *West Virginia State Board of Education v. Barnette*[16] and *Wooley v. Maynard*,[17] fall into this category.[18] Much of the difficulty in understanding the

15. There is some disagreement about how many different categories of compelled speech cases exist. *See, e.g.*, NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, FIRST AMENDMENT LAW 459–88 (7th ed. 2019); Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 388 (2018).

16. 319 U.S. 624 (1943).

17. 430 U.S. 705 (1977).

18. Arguably, the Court's decision in Agency for Int'l Dev. v. All. for Open Soc'y Int'l,

doctrine revolves around the extrapolation of the law from those cases to other contexts that, to varying degrees, involve some of the same First Amendment interests.

Another category of cases deals with government regulations that compel the disclosure of private, personal information about people who have engaged in political association or speech, as in the Supreme Court's decision invalidating a state court order requiring the NAACP to report the names and addresses of its Alabama members.[19] We might include in this category cases assessing the constitutionality of measures prohibiting the anonymity of speakers and people who sign petitions or contribute money to election campaigns.[20] Third, there is a group of cases that address whether the government may, consistent with the First Amendment, compel private entities to allow access to their property for other speakers.[21] A variation within this category includes challenges to laws that require private persons or groups to associate with others in ways that arguably undermine or dilute their own speech or message.[22] And, finally, there are cases that involve laws that require licensed professionals and businesses to disclose truthful factual information relating to their services, operations, and products.[23]

In this Essay, I concern myself with only the first and last categories—compulsion of purely ideological speech and requirements that businesses and professionals disclose truthful factual speech. The other categories, I submit, are conceptually distinct because they involve important associational interests that are not implicated by bare compulsion of ideological or factual speech.[24] In addition, the anonymous speech cases, while focusing on the chilling of speech and political participation, implicate qualitatively different First Amendment interests than compelled ideological or factual speech. These cases are concerned with the chill coming from intrusion on the speaker's *privacy* interests rather than the distinct speech interests described in the following paragraphs. As such, those cases involve indirect

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Inc., 570 U.S. 205 (2013), also involves compelled ideological speech, though there the speech requirement was imposed as a condition on government funding rather than a direct compulsion.

19. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 451 (1958).

20. *See* Doe v. Reed, 561 U.S. 186 (2010); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Buckley v. Valeo, 424 U.S. 1 (1976); Talley v. California, 362 U.S. 60 (1960).

21. *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47 (2006); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1 (1986); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

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

23. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988); Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626 (1985).

24. There is no shortage of respected scholars who have called for a serious reexamination of the Court's compelled speech doctrine. *See, e.g.*, Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1 (2020); Corbin, *supra* note 4; Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365 (2014); Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015).

constraints on actual speech, rather than compelled speech in the sense that the compelled ideology and compelled fact statement cases view those laws.

The complexity in explaining the compelled speech doctrine comes not only from the fact that it arises in so many different contexts, but also because these categories implicate distinct First Amendment interests. Even within the compelled ideological speech category, while most legal scholars agree with the outcome of the major cases, they sometimes disagree about what speech interests are involved. One argument is that when the government forces people to express messages they do not truly believe or agree with, it results in a form of viewpoint discrimination.[25] As I have described this concern, "Those who agree with the mandatory recitation of the state's script, and the corresponding compulsion of political orthodoxy, are unburdened by the law, whereas those who disagree with the state's message (or agree with the message, but still wish to remain silent) may be penalized for failing to comply."[26] There is also a macro-effect on speech that is produced by such compulsions in that they distort the overall composition and range of ideas in the marketplace and falsely suggest ideological unity.[27] Let's call this the "viewpoint discrimination problem."

Another claim suggests that the key First Amendment interest affected by compelled ideological speech is the right not to be co-opted into serving as a mouthpiece or amplifier of the government's message. On this theory, compelled ideological speech is problematic because it results in the misrepresentation of the speaker's beliefs, wrongly attributing to her ideas that are the government's, not her own.[28] Such laws compromise the idea that the First Amendment prohibits laws that prescribe government orthodoxy.[29] We can refer to this as the "misattribution problem."

Finally, some commentators have focused on compelled speech as primarily a problem of intellectual autonomy. Here, the argument goes, the compulsion of speech goes deeper than the actual words spoken. The autonomy claim can work in a couple of different ways. First, the government might compel someone to truthfully divulge their *own* personal beliefs, creed, or other contents of their minds, when that person may wish to keep their thoughts and beliefs private.[30] Here, the argument is

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25. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 644 (1943) ("[L]aws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.").

26. Alan K. Chen, *Forced Patriot Acts*, 81 DENV. U. L. REV. 703, 706–07 (2004) (emphasis omitted).

27. *Id.* at 707.

28. Several commentators dismiss the misattribution problem, suggesting it is not a realistic concern. *See* Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 409, 433 (Michael C. Dorf ed., 2d ed. 2009); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 474 (1995). Although it is beyond the scope of this Essay, I would argue that there is a nonzero risk of misattribution and that it might be highly dependent on context.

29. *Barnette*, 319 U.S. at 642.

30. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1317 (2d ed. 1988); Blasi & Shiffrin, *supra* note 28, at 432–33. Abner Greene suggests on this basis that the right being deprived is not freedom of expression, but the constitutional rights of personhood and autonomy. Greene, *supra* note 28, at 480–82. Even requiring objectors to opt out of required

that such compulsion intrudes on the privacy of one's own thought processes that, for many reasons, the speaker may wish to conceal from public scrutiny. It could also be argued that to the extent personal deliberation is an ongoing process, such compulsions might force an individual to disclose their beliefs prematurely. This type of interest, however, does not typically arise in the Supreme Court's compelled speech cases. Rather, we can observe this analysis in contexts where the government acts to compel disclosure of a person's inner thoughts, as in the case of custodial interrogations of criminal suspects.[31]

A second, alternative autonomy argument suggests that the compelled recitation of ideological speech one does not agree with intrudes on personal dignity by imposing the government's will to inculcate state-sponsored values, thereby interfering with one's own deliberative processes.[32] That is, the fear here is that the repeated, cumulative recitation of a government compelled message could eventually influence the unwilling speaker to begin agreeing with that message, like a subtle form of brainwashing. We'll refer to this as the "autonomy problem."[33]

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speech can be viewed as requiring them to signal their disagreement, thus serving as a version of compelled revelation of one's own beliefs. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 289 (1963) (Brennan, J., concurring) (arguing in context of school prayer that "by requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused."). *But see* Greene, *supra* note 28, at 471 ("Assuming students don't have to give reasons for opting out, it seems wrong to equate a silent action of nonparticipation with a compelled expression of disagreement with the content of the group utterance.").

31. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 460 (1966) (noting that "the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (observing that "[t]he Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.").

32. Blasi & Shiffrin, *supra* note 28, at 432.

33. Other scholars have identified other potential concerns with compelled ideological speech. First, one might argue that compelled speech causes a chilling effect on speakers if they would rather not speak at all than speak their own words along with the government's compelled speech. But if speakers are free to disclaim, rebut, or otherwise express their own views in addition to the government's compelled message, there actually may be an incentive to speak *more* in order for speakers to distance themselves from that message. *See* Amar & Brownstein, *supra* note 24, at 14 ("[T]he speakers' ability to communicate their own messages (alongside the messages they are being required to convey by the government) are generally neither chilled nor silenced."). Timothy Zick has argued that compelled speech in the professional regulation context can sometimes influence or affect speech about other constitutional rights, which is itself a potential red flag under the First Amendment. *See* Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289 (2015); Timothy Zick, *Rights Speech*, 48 U.C. DAVIS L. REV. 1 (2014).

As these First Amendment interests suggest, at its core, the compelled speech doctrine is primarily concerned with state-mandated expression of ideological commitments. The doctrine is rooted in *Barnette*, a case addressing state compulsion of schoolchildren to salute the U.S. flag and recite the Pledge of Allegiance, a form of loyalty oath.[34] Such oaths are, when involuntarily recited, odious to freedom of speech and thought, in part because they prescribe a form of nationalist, and therefore ideological, orthodoxy. Nowhere is this clearer than in the Court's frequently cited admonition that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[35]

In *Wooley v. Maynard*,[36] the other major foundation on which the compelled speech doctrine rests, the Court likewise focused on the ideological component of the expression. New Hampshire's official license plates, which had to be displayed on all cars, bore the slogan "Live Free or Die," a message that conflicted with the plaintiffs' religious and ideological beliefs. In that case, the Court held that the State may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."[37]

The Court has sometimes suggested that compelled statements of fact are no different than compelled ideological speech. In *Riley v. National Federation of the Blind of North Carolina, Inc.*,[38] the Court invalidated a state law regulating charitable solicitations by professional fundraisers. The law prohibited fundraisers from retaining unreasonable or excessive fees for their work, defined by the percentage of fees they charged.[39] It also required fundraisers to disclose to potential donors the "average percentage of gross receipts actually turned over to [the] charities" for solicitations occurring in the past year.[40] Charitable solicitation is a form of speech, and the Court concluded that these provisions burdened the fundraisers' expression in violation of the First Amendment.

In striking down the law, the Court found that compelled factual statements are no different from requirements of speech espousing an opinion.

> These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the

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34. 319 U.S. at 645. Justice Black's concurring opinion referred to the Pledge as a "test oath," *id.* at 644 (Black, J., concurring), while Justice Frankfurter's dissent distinguished the Pledge from what he called "oath tests," *id.* at 663 (Frankfurter, J., dissenting). *See also* Chen, *supra* note 26, at 729 (likening the Pledge of Allegiance to a "mandatory oath").

35. *Barnette*, 319 U.S. at 642.

36. 430 U.S. 705 (1977).

37. *Id.* at 713.

38. 487 U.S. 781 (1988).

39. *Id.* at 784–85.

40. *Id.* at 786.

> average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.[41]

Accordingly, the Court applied strict scrutiny to the disclosure requirement and held that it was an unconstitutional burden on speech.[42] In providing this example, the Court overlooked an important distinction. Its hypothetical laws both required factual statements by someone engaged in public discourse, where those utterances might be viewed as compromising or at least diluting the speaker's political viewpoint. That makes them more like compelled ideological statements. But that seems markedly different from compelling a private fundraiser to disclose that in the past year, the average percentage of gross receipts it turned over to charities was 60% or 95%. Unless one views the percentage charged to their clients as itself an object of ideological disagreement, the First Amendment harms to fundraisers from the compelled disclosure seem minimal at best.

Furthermore, *Riley* cannot possibly stand for the proposition that strict scrutiny applies in *every* instance where the law requires the disclosure of a truthful fact. Neither the Supreme Court nor the lower federal courts have reflexively applied this most exacting scrutiny to all such cases. As discussed in Part II, doing so would completely undermine the functioning of the regulatory state. Moreover, most requirements that speakers make factual disclosures do not implicate important speech interests.

B. Compelled Speech and the Standard of Scrutiny

Before proceeding to the discussion of government mandated factual statements, it's worth noting that the Court's development of First Amendment doctrine in compelled speech cases is quite different from its approach to laws that prohibit or impede expression. The latter follows a well-recognized pattern of determining whether the regulated activity counts as "speech,"[43] whether the law regulates that speech based on the viewpoint of the speaker or the content of the message,[44] and then applying either strict or intermediate scrutiny[45] to assess whether the state has

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41. *Id.* at 797–98; *see also* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1742 (2018) (Thomas, J., concurring in part and concurring in the judgment) (asserting that compelled speech doctrine "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid") (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995)).

42. *Riley*, 487 U.S. at 798.

43. *See* Texas v. Johnson, 491 U.S. 397, 402–03 (1989).

44. Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 37–39 (2003) (describing the Court's methodology regarding the relevance of how a regulation targets speech).

45. *Id.* (describing difference between strict and intermediate scrutiny).

provided a sufficient interest to overcome the speaker and listener interests in an appropriately tailored manner.

These standard doctrinal tests do not map well onto compelled speech laws.[46] First, by definition, all compelled speech requirements are content based (though many are not viewpoint based, an important point we will return to later). Pledge of Allegiance laws, for example, provide a specific script of words to be recited. Food labeling regulations require processors of prepared foods to include particular facts about nutrition on their packaging. But it cannot be the case that all content-based compelled speech laws are subject to strict scrutiny, and accordingly, to almost certain invalidation.[47] It is possible that something approximating the contemporary strict scrutiny test would apply to compulsions of purely ideological speech. The majority opinion in *Barnette* contains somewhat comparable language when it states that First Amendment rights may only be constrained "to prevent grave and immediate danger to interests which the State may lawfully protect,"[48] but at the same time it does not employ the now-standard consideration of narrow tailoring.[49] By the time the Court decided *Wooley*, however, it had fully embraced language that we commonly associate with strict scrutiny. There, the Court required New Hampshire to justify its license plate law with a compelling interest and to do so through the "le[ast] drastic means."[50]

In other compelled speech cases, however, the Court has applied a much more deferential standard. Most important for this discussion is *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.[51] In that case, the Court upheld a professional regulation requiring that lawyers who advertise services based on contingent fee rates disclose whether those rates were calculated before or after the deduction of court costs and expenses.[52] Zauderer's ads did not explain that even

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46. For a thoughtful discussion of the contrasts, see Amar & Brownstein, *supra* note 24, at 8 ("It simply makes no sense to argue that conventional free speech doctrine can be employed in compelled speech cases in remotely the same way it is applied in cases involving restrictions on speech."). These commentators also suggest that it may be less useful to think about government compelled speech as viewpoint based or not, and instead focus on "whether the government's message is a political message or an abstract ideological statement, on the one hand, rather than a factual (albeit contested) assertion, on the other." *Id.* at 29.

47. The matter of whether the application of strict scrutiny is, for all intents and purposes, tantamount to a conclusion that a law is constitutionally invalid is the subject of ongoing debate. *Compare* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972), *with* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006).

48. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). In fact, commentators generally suggest that the strict scrutiny standard in First Amendment jurisprudence did not emerge until the 1950s. *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 364–68 (2006).

49. Robert Post, NIFLA *and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1079 (2022) (observing that the Court's decision in *Barnette* does not ask whether the flag salute statute was narrowly tailored).

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

51. 471 U.S. 626 (1985).

52. *Id.* at 651–53.

though unsuccessful clients would not have to pay legal fees, they would still be liable for paying such costs.[53] The rules represented an overtly content-based speech compulsion, but the Court applied a deferential standard of review. As it noted,

> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected *as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers*.[54]

This standard is notable for the absence of any descriptors suggesting that courts should undertake anything more than a deferential review of the laws in question.[55] It also is notable in contrast to the intermediate scrutiny test the *Zauderer* Court applied to other aspects of the professional conduct rules that restricted, rather than compelled, what lawyers could say in their commercial advertisements.[56] Those regulations were examined under the Court's commercial speech standard.[57] But as discussed in more detail below, the Court's most recent pronouncement in *NIFLA* applied intermediate scrutiny (while reserving the possibility that strict scrutiny might apply) to invalidate California's FACT Act.

II. COMPELLED FACTUAL STATEMENTS

In recent decades, the Supreme Court and lower federal courts have produced few cases involving compelled ideological speech, perhaps because the signals from *Barnette* and *Wooley* are so clear and, for the most part, well settled.[58] Legislators and regulators therefore may be deterred from enacting such requirements.[59] Instead,

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53. *Id.* at 650.

54. *Id.* at 651 (emphasis added).

55. As Post has observed, "*Zauderer* does not employ the specific vocabulary of 'rational basis' review, which would have suggested extreme judicial deference. It instead adopts terminology that unequivocally locates judicial review further toward the deferential end of the spectrum than the intermediate scrutiny authorized by *Central Hudson*." Post, *supra* note 24, at 883; *see also* Clay Calvert, *Wither* Zauderer*, Blossom Heightened Scrutiny? How the Supreme Court's 2018 Rulings in* Becerra *and* Janus *Exacerbate Problems with Compelled-Speech Jurisprudence*, 76 WASH. & LEE L. REV. 1395, 1403–04 (2019).

56. *See Zauderer*, 471 U.S. at 637–49.

57. *Id.* at 638 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.C., 447 U.S. 557, 566 (1980)).

58. Although there may be disagreements about the reasons these examples of compelled speech are unconstitutional, the majority of commentary seems to agree that in most instances they violate the Constitution. *But see* Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006) (arguing that there is no constitutional justification for invalidating laws that compel speech).

59. Though they have not been deterred entirely. *See*, *e.g.*, Lane v. Owens, Civil Action No. 03-B-1544 (PAC) (D. Colo. 2003) (invalidating state Pledge of Allegiance requirement for students and teachers that failed to exempt objectors on nonreligious ideological grounds);

the doctrine's application has migrated toward other types of compelled speech and association that touch on slightly different First Amendment concerns. The doctrine has also been increasingly applied to government compelled statements of fact.

One might think that First Amendment law would draw a fairly clear distinction between compelled statements of ideological belief and mandatory disclosure of facts, but that has not been the case. That is not to say that the compulsion of factual statements could never implicate First Amendment speech and autonomy concerns, but the interests are fundamentally different, precisely because they are statements about facts rather than ideas. Notwithstanding the Court's language in *Riley*, which suggests some equivalence between compelled ideological speech and mandatory disclosures of fact,[60] the speech interests are not identical. As Robert Post has noted,

> For purposes of First Amendment doctrine, there is a constitutional symmetry between restrictions on public discourse and compulsions to participate in public discourse. But this symmetry does not exist within the domain of commercial speech. Because the constitutional value of commercial speech lies in the circulation of information, restrictions on commercial speech and compulsions to engage in commercial speech are constitutionally asymmetrical. Regulations that force a speaker to disgorge *more* information to an audience do not contradict the constitutional purpose of commercial speech doctrine. They may even enhance it.[61]

This argument is confined to compelled factual statements in the commercial speech context, but as I argue below, the majority of compelled factual statements, even as applied to individuals and organizations not engaged in commercial speech, enhance the universe of communication by providing more information, while not implicating the same speech harms associated with compelled ideological statements.

A. The Ubiquity of State Compelled Factual Speech

Understanding the ubiquity of compelled factual disclosures in the modern regulatory state requires at least a brief survey of the range of such requirements. Businesses, institutions, and other organizations are subject to a comprehensive suite of regulations requiring them to publicly disseminate factual information.

A wide range of licensed professionals in most states are required to display their official licenses to practice in their offices in a "conspicuous" location.[62] Health care

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Circle Sch. v. Phillips, 270 F. Supp. 2d 616, 623–36 (E.D. Pa. 2003), *aff'd*, 381 F.3d 172 (3d Cir. 2004) (invalidating state Pledge of Allegiance law because it required schools to notify parents of their children's objections to reciting the Pledge). The author discloses that he was lead counsel for the plaintiffs in the *Lane* case.

60. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797–98 (1988).

61. Post, *supra* note 24, at 877; *see also* Post, *supra* note 49, at 1073 ("Restrictions on commercial speech impede [an information] function whereas the mandated disclosure of commercial information advances it."); Corbin, *supra* note 4, at 1302 (discussing the enhancement of listeners' autonomy interests from some types of compelled disclosures).

62. *See, e.g.*, COLO. REV. STAT. § 12-275-117 (optometrists); IND. CODE ANN. § 25-28.5-

providers in every state must secure informed consent from their patients before performing procedures, which by definition requires the providers to inform patients about health risks associated with such procedures and the availability of alternative treatments.[63]

Federal securities law includes a range of mandatory disclosures associated with corporate securities.[64] Yet, such regulations are not even considered to fall within the coverage of the First Amendment.[65]

Employers in interstate commerce must comply with a number of federal regulations requiring them to post notices in their workplaces that inform workers about their legal rights regarding labor, working conditions, safety, and other aspects of their employment. As one example, the Occupational Safety and Health Act mandates that employers

> shall post and keep posted a notice or notices, to be furnished by the Occupational Safety and Health Administration, U.S. Department of Labor, informing employees of the protections and obligations provided for in the Act, and that for assistance and information, including copies of the Act and of specific safety and health standards, employees should contact the employer or the nearest office of the Department of Labor.[66]

Another example is the requirement under the Americans with Disabilities Act that employers post relevant provisions of the rights protected under that law.[67] Many states' laws require employers to post information about wages and other conditions of employment.[68]

Perhaps the most widely recognized compelled factual statement is the federal law requiring cigarettes and smokeless tobacco products to bear health warnings on

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1-35 (plumbing contractors); 225 ILL. COMP. STAT. ANN. 41/10-30 (funeral directors and embalmers); ARIZ. REV. STAT. § 32-1933 (pharmacists); N.H. REV. STAT. ANN. § 317-A:11 (dentists).

63. *See, e.g.*, Cobbs v. Grant, 8 Cal. 3d 229, 243 (1972) ("[A]s an integral part of the physician's overall obligation to the patient there is a duty of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each.").

64. Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 641–42 (2006) ("[N]ot only do the securities laws and the rules promulgated by the SEC both compel and prohibit corporate speech, but they regulate the content, form, and scope of corporate communications as well." (footnote omitted)).

65. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1780 (2004).

66. 29 C.F.R. § 1903.2(a)(1) (2021). At least one court has rejected a free speech challenge to the OSHA posting requirement. Lake Butler Apparel Co. v. Sec'y of Lab., 519 F.2d 84, 89 (5th Cir. 1975). For a partial list of similar requirements, see Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 32–33 (2016).

67. 42 U.S.C. § 12115.

68. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-364; 820 ILL. COMP. STAT. ANN. 180/40; W. VA. CODE ANN. § 21-5-9.

their packaging and in advertising for such products.[69] Similarly, manufacturers of pharmaceuticals must include in their packaging information such as the particular drug's generic name as well as use and safety information.[70] Another common federal regulation comes from the Consumer Product Safety Commission, which requires specific warning labels on products that are "extremely flammable, corrosive, or highly toxic."[71]

Similarly, food producers must include on their packaging nutritional information, the total number of calories, and the amount of fats, sugar, fiber, and protein (to name a few) contained in their products.[72] Local jurisdictions typically require that restaurants prominently display their most recent grade from health inspectors.[73]

The businesses, professionals, and others who must disclose these facts might sometimes, and even frequently, disagree with the need to provide them to consumers. Under the *NIFLA* intermediate scrutiny standard, they could assert that despite the objective truth of these facts (e.g., the number of calories in a candy bar), the facts are not uncontroversial because the regulated parties dispute the necessity and value of their disclosure. They might even argue that including these facts ultimately misleads, rather than informs, consumers.[74]

Although it is not the focus of this Essay, individuals are also subject to a wide array of factual disclosure requirements, ranging from reporting the amount and sources of income on their tax returns,[75] to submitting information as part of state licensing processes (driver's licenses, hunting licenses, gun licenses),[76] to disclosing current home address information on sex offender registries.[77] Many such requirements are also routine and do not have substantial free speech implications. But if the *NIFLA* standard were extended to such laws, some of the same arguments could be made about the degree to which such facts are controversial. For example, why aren't laws requiring tax protestors to disclose their income a form of compelled speech because the legitimacy and scope of the tax system is controversial? Having said that, there may be some circumstances in which a compelled factual disclosure law's impact on the personal dignity and privacy interests of an individual may be

69. 15 U.S.C. §§ 1333, 4402.

70. 21 U.S.C. § 352; 15 U.S.C. § 1472.

71. 15 U.S.C. § 1261(p)(1)(C).

72. 21 U.S.C. § 343(q).

73. *See, e.g.*, N.Y.C. DEP'T OF HEALTH, REQUIREMENTS FOR POSTING LETTER GRADE CARDS (2011), https://www1.nyc.gov/assets/doh/downloads/pdf/rii/rii-grade-posting-faq.pdf [https://perma.cc/HLL6-W7X7].

74. Or the speaker might contend that the controversiality of the facts and their inaccuracy overlap. *See, e.g.*, Am. Beverage Ass'n v. City & Cnty. of S.F., 871 F.3d 884, 895 (9th Cir. 2017) (concluding that city ordinance requiring manufacturers of sugar-sweetened beverages to state that drinking such beverages "contributes to obesity, diabetes, and tooth decay" was problematic because the factual accuracy of the warning is disputed), *aff'd on reh'g en banc*, 916 F.3d 749 (9th Cir. 2019).

75. *See, e.g.*, United States v. Sindel, 53 F.3d 874, 878 (8th Cir. 1995).

76. *See, e.g.*, MASS. DEP'T OF CRIM. JUST. INFO. SERVS., MASSACHUSETTS RESIDENT LTC/FID/MACHINE GUN APPLICATION (2015), https://www.mass.gov/doc/resident-firearms-license-application/download [https://perma.cc/FM3R-8LQG].

77. *See, e.g.*, United States v. Arnold, 740 F.3d 1032, 1035 (5th Cir. 2014).

materially different from those at stake when the government requires businesses or organizations to make factual statements, therefore requiring a different analysis that is beyond the scope of this Essay.[78]

At the same time, I do not mean to be making an argument that limits application of a deferential standard of review only to compelled factual disclosures in the commercial speech context. Because of the very ubiquity of legally required fact disclosures, they may arise in a number of different contexts that would not technically qualify as commercial speech under the Court's definitions of such speech.[79] And I would argue that in the vast majority of contexts, as in the case of commercial disclosures, such individual disclosures do not implicate important expressive liberty concerns. But I leave the full exploration of that for another day.

B. NIFLA's Uncontroversial Fact Standard and Standard Government Regulations

NIFLA involved a constitutional challenge to the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act, a law that was enacted to address self-styled crisis pregnancy centers, places that offered pregnancy-related services, but were operated by organizations with the goal of discouraging and preventing women from seeking abortions.[80] FACT imposed two separate notice requirements for unlicensed and licensed crisis pregnancy centers. Licensed centers, which were authorized under California law to perform some types of medical care, were required to post and disseminate a government-written notice indicating that the State offered free or low-cost access to family planning services, including abortion, and listing the telephone number of the local county's social services office.[81] This notice had to be posted in the waiting room and printed and distributed to all clients, or provided in digital form, upon check-in.[82] The Court called this the "licensed notice."

Unlicensed centers, which were not authorized to provide medical care, but could offer pregnancy-related services such as ultrasounds and pregnancy testing, were required to post a notice indicating that they were "not licensed as a medical facility by the State of California" and that they did not have on site any provider of medical services.[83] The "unlicensed notice" had to be at least 8.5 inches by 11 inches (the size

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78. For example, in a recent case, transgender persons successfully sued to compel government officials to correct their birth certificates to accurately reflect their gender identity. Arroyo Gonzalez v. Rossello Nevares, 305 F. Supp. 3d 327 (D.P.R. 2018). Though the case was decided on privacy grounds, the plaintiffs also asserted a compelled speech claim, arguing that the refusal to allow changes to gender identity on their birth certificates was a form of compelled factual speech forcing them to identify as the wrong gender. *See* Amended Complaint for Declaratory and Injunctive Relief, *Arroyo Gonzalez*, 305 F. Supp. 3d 327 (No. 3:17-cv-01457-CCC), 2017 WL 6398344. Perhaps such a claim, however, might turn on whether the underlying fact was undisputed, rather than on whether it was "controversial."

79. *See* Corbin, *supra* note 4, at 1285 (noting the difficulty in distinguishing commercial from noncommercial speech under the Court's multiple definitions of the former).

80. Nat'l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2368 (2018).

81. *Id.* at 2369.

82. *Id.*

83. *Id.* at 2370.

of a standard piece of paper), posted "conspicuously" at the center's entrance and in at least one waiting area on site, and included in all advertising materials.[84]

One licensed and one unlicensed crisis pregnancy center sued to challenge the FACT Act as a violation of their First Amendment right to freedom of speech. In a 5-4 decision, the Supreme Court invalidated both provisions of the law as a form of compelled speech. The Court first dispensed with the State's argument that the licensed notice should be upheld under diminished First Amendment standards applicable to the regulation of professional speech. Disputing that there was a separate standard,[85] the Court stated that it had been deferential to regulations of professional speech in only two limited contexts. First, citing *Zauderer*, it stated that a more deferential standard applied to some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech."[86] Second, it noted that its precedents had permitted states to regulate professional conduct that "incidentally involves speech,"[87] citing its decision in *Planned Parenthood v. Casey*.[88]

The Court further distinguished *Zauderer* by claiming that it was limited to commercial advertising and that the law in question there required only the disclosure of "purely factual and uncontroversial information" about the lawyer's services.[89] The decision also found that the licensed notice provision did not apply to the services provided *by* the crisis pregnancy centers, but the FACT Act, in contrast, "requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an 'uncontroversial' topic."[90]

With regard to the unlicensed notice, the State argued that it was required to ensure that pregnant women knew when they were receiving care from a licensed medical professional.[91] Here, the Court observed that even under *Zauderer*, compelled factual disclosures must not be "unjustified or unduly burdensome."[92] But then, rather facilely, the decision went on to cite to other cases applying *intermediate* scrutiny, which requires that the harm identified by the state must be real, not hypothetical, and that the relevant regulation must be no broader than necessary to address such harm.[93] As discussed earlier, however, *Zauderer* applies a much more deferential reasonableness standard that is starkly different from heightened scrutiny.

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84. *Id.*

85. In fact, the Court's professional speech cases apply several different standards depending on how the regulation operates. *See* Rebecca Aviel & Alan K. Chen, *Lawyer Speech, Investigative Deception, and the First Amendment*, 2021 U. ILL. L. REV. 1267.

86. *NIFLA*, 138 S. Ct. at 2372.

87. *Id.*

88. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992). This was a puzzling characterization of at least part of the Pennsylvania law upheld in *Casey*, which required physicians to provide specified information to women seeking abortions and the securing of informed consent, a classic form of state compelled factual statement. *See* 18 PA. CONS. STAT. § 3205.

89. *NIFLA*, 138 S. Ct. at 2372 (quoting Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)).

90. *Id.* (emphasis in original).

91. *Id.* at 2377.

92. *Id.* (quoting *Zauderer*, 471 U.S. at 651).

93. *Id.*

But suggesting that it need not decide whether *Zauderer* applied, the Court held that the State had offered nothing but a hypothetical justification for the unlicensed notice provision and struck it down.[94] This part of the opinion seems to be missing a step in the analysis, because hypothetical justifications *are* ordinarily sufficient to uphold laws under deferential standards of scrutiny, so the Court appeared to be applying intermediate scrutiny while disclaiming the need to decide whether the more relaxed *Zauderer* standard ought to apply.

There are all sorts of problems with the decision in *NIFLA*. But perhaps the most alarming flaw in its analysis is the majority's failure to elaborate on what it meant by labeling a compelled disclosure as involving an uncontroversial fact.[95] Prior to *NIFLA*, the lower courts struggled to identify a meaningful approach to defining what makes a fact "controversial." In one view, one which closely resembles the *NIFLA* majority's view, facts are controversial simply when they relate or pertain to a public controversy.[96] But as I argue below, at some level every area to which government regulation extends can be viewed as controversial, which would make this standard too broad by any stretch of the imagination. Other courts have taken the view that factual and uncontroversial mean the same thing, that if something is not factual, it is thereby controversial.[97] This understanding of *Zauderer*, however, would render the word "uncontroversial" completely superfluous. Still others contend that uncontroversial means uncontested, accurate, or "true."[98] Again, this seems duplicative, rendering the "uncontroversial" element meaningless as part of the legal test.

Indeed, facts should not be, in and of themselves, controversial, but can only become controversial either because people disagree about their truth or because the context in which they arise or the way they are characterized makes their presentation controversial. The first of these scenarios is not present in *NIFLA*. The plaintiffs did not claim that they disbelieved that the State provided free and low-cost family planning services, including abortion; they disagreed that abortion should be legal at all. But one can imagine many scenarios in which a regulated party might disagree about the objective truth of a compelled disclosure. If that were the standard, however, then any regulated party could simply assert that the facts contained in the mandatory disclosure are not true, thereby converting them into controversial facts and leading to heightened scrutiny review. As elaborated on below, this type of self-interested action cannot be the thing that makes a fact controversial.[99]

In this way, *NIFLA*'s approach problematizes compelled speech doctrine in a manner that could well be exacerbated in the current political climate. It is not simply that the law cannot tolerate a regime under which a regulated party can escape

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94. *Id.*

95. For a detailed analysis of seven different possible interpretations of the phrase "purely factual and uncontroversial," see Shiffrin, *supra* note 9, at 747–67.

96. *See, e.g.*, Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 529 (D.C. Cir. 2015). For a survey of different approaches to the question, see Haan, *supra* note 9, at 1380–87.

97. *See, e*.g., Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 630 (D. Vt. 2015).

98. *See, e*.g., CTIA-The Wireless Ass'n v. City of Berkeley, 158 F. Supp. 3d 897, 904 (N.D. Cal. 2016), *aff'd*, 854 F.3d 1105 (9th Cir. 2017), *vacated*, 138 S. Ct. 2708 (2018), *and aff'd*, 928 F.3d 832 (9th Cir. 2019).

99. *See infra* notes 123–24 and accompanying text.

compelled disclosure requirements simply by objecting to them (and thereby making them "controversial"), it is also that we are currently living in an era where the very concept of objective truth is under attack. This era of epistemic anarchy presents enormous challenges for public discourse in general but, when combined with the *NIFLA* standard, could lead to an onslaught of legal challenges to routine regulatory disclosure laws. Moreover, it is a problem that seems likely to persist given all of the structural reasons in our information environment that have led to these types of disputes about truth. Some of those reasons are doctrinal, given the difficulties under current First Amendment law with attempts to regulate fake news and other types of disinformation.[100] Others have to do with the manner in which people choose sources of information based on their ideological predispositions, driven by confirmation bias and motivated reasoning.[101] And, as I have recently argued, there are reasons to believe that the disinformation problem may be even more strongly embedded in that listeners often seek out false information because it promotes a kind of expressive, experiential autonomy and social cohesion with like-minded thinkers.[102]

How might this play out in a compelled factual disclosure case? Suppose that the Federal Department of Transportation issued regulations to car manufacturers requiring that owner's manuals of fossil fuel-based vehicles contain the following statement: "The vast majority of scientific evidence suggests that climate change is in part caused by human activity, including the operation of vehicles fueled by gasoline. The U.S. Department of Transportation therefore urges drivers to minimize their use of such vehicles where possible." Both of these statements are objectively true and as Clay Calvert suggests, "[o]bjectively true facts . . . are not subject for debate in the marketplace of ideas."[103] But what if a factual issue has become politicized to the point where a significant percentage of Americans do not believe something that is overwhelmingly considered by experts to be true? Turning back to my hypothetical, suppose a lot of Americans do not believe that human activity causes climate change.[104] If, as a society, we cannot agree about basic facts, such as who won a closely watched presidential election or whether masks can reduce the spread of a highly contagious virus, it begs the question whether we can distinguish an argument over a fact from an ideological dispute, thus blurring the line between compelled ideological speech and compelled fact disclosures. These types of disputes are all the more likely because of the related problem that many people now mistrust government officials and elite experts in their fields.[105] But it cannot be that

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100. Alan K. Chen, *Free Speech, Rational Deliberation, and Some Truths About Lies*, 62 WM. & MARY L. REV. 357 (2020).

101. *Id.*

102. *Id.*

103. Calvert, *supra* note 55, at 1414.

104. Cary Funk & Brian Kennedy, *How Americans See Climate Change and the Environment in 7 Charts*, PEW RSCH. CTR. (Apr. 21, 2020), https://www.pewresearch.org/fact-tank/2020/04/21/how-americans-see-climate-change-and-the-environment-in-7-charts/ [https://perma.cc/NC2Z-QME2].

105. Rosa Brooks, Opinion, *Competence Is Critical for Democracy. Let's Redefine It.*, N.Y. TIMES (Aug. 15, 2021), https://www.nytimes.com/2021/08/15/opinion/competence-is-critical-for-democracy-lets-redefine-it.html [https://perma.cc/M5VN-KUT6].

simply because a noticeable portion of the population does not believe a fact that it automatically becomes "controversial" as that term is used in *NIFLA*.[106]

Indeed, Sarah Haan has insightfully pointed out that the current doctrine's limitation on laws that require anything but "purely factual and uncontroversial" disclosures is a sign that we are living in a post-truth information economy, "a system of information exchange that discourages evidence-based reasoning, while facilitating decision-making based on simple heuristics such as emotional reasoning, brand loyalty, and groupthink."[107] In her account, the current compelled speech doctrine is a component of the post-truth information economy. As she argues, "by treating controversiality as a problem per se, the *Zauderer* approach calibrates the flow of disclosure information based purely on how that information will affect its audience, and in reverse—*constricting* the flow of useful information on matters of the highest public interest."[108]

But perhaps the problem goes even one step beyond the problem of a post-truth society. In addition to what might be called an epistemological crisis, there is also a small, though growing, segment of the public that fundamentally questions the very role of government. Current fringe groups, such as the Sovereign Citizens Movement, though small, do not believe in the legitimacy of government at all and actively oppose taxes, the courts, law enforcement, and other institutions.[109] While that is an extreme example, a much wider segment of the public is opposed to or skeptical of governmental institutions in a manner that would suggest they believe that any state compulsion of truthful factual statements could be understood as controversial because the very idea of government is controversial. Polls show that an alarming eighty percent of Americans trust the federal government to do what is right only some of the time or never.[110]

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106. Here it is worth noting that there are nuances about what facts are true, how we define knowledge, and how we "know" things. As Jane Bambauer has observed, free speech doctrine has not sufficiently dealt with these nuances. Jane R. Bambauer, *Snake Oil Speech*, 93 WASH. L. REV. 73, 76 (2018). She suggests that knowledge can be broken down into "[a]ccepted knowledge," which "can be verified using a high standard of evidence" and are "verifiable and valid to the relevant community of experts" and "[c]ontested knowledge," which is "known to be presently unverifiable and subject to debate and speculation by the relevant expert community." *Id.* Contested knowledge, she continues, "may be substantiated by empirical evidence, but not enough to have itself accepted as irrefutable." *Id.* Of course, as I argue here, there is substantial conflict in beliefs even about accepted knowledge. On how we know things to be true, see generally Philip Fernbach & Steven Sloman, Opinion, *Why We Believe Obvious Untruths*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/opinion/sunday/why-we-believe-obvious-untruths.html [https://perma.cc/8JV4-2F9Z].

107. Haan, *supra* note 9, at 1369.

108. *Id.* at 1388 (emphasis in original).

109. *Sovereign Citizens Movement*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/ideology/sovereign-citizens-movement [https://perma.cc/6SHT-WTDE].

110. *Americans' Views of Government: Low Trust, but Some Positive Performance Ratings*, PEW RSCH. CTR. (Sept. 14, 2020), https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/ [https://perma.cc/D8U8-AWH5].

What about the second scenario? Can facts become controversial because the context in which they are discussed or presented makes them so? This would appear to be what the *NIFLA* majority was concerned about in its opinion. There is no dispute that the *topic* of abortion is controversial, and *NIFLA* implies that even requiring crisis pregnancy centers to note that abortion is provided by the State in some circumstances harms their speech interests in ways comparable to compulsion of a purely ideological statement. While it is certainly possible that some state compelled factual disclosures might be viewed as controversial because of the context in which they are required or the words used to characterize otherwise objective facts, the *NIFLA* Court goes much further than that. As Claudia Haupt and Wendy Parmet have observed, "it seems that [Justice Thomas's] interpretation of 'uncontroversial' means that as long as a topic is broadly controversial (such as abortion), *any information relating to it*, even if it is factual and accurate (such as the existence of free or low-cost family planning programs in California), *could be deemed controversial*."[111]

I will return to this topic in Part III. For now, let's examine such claims in relation to the earlier discussion of the speech harms associated with compelled ideological speech and assess whether the FACT Act or other similar laws compelling truthful factual disclosures compromise those interests.[112] That is, does requiring the licensed and unlicensed notice trigger the viewpoint discrimination problem, the misattribution problem, or the autonomy problem?

As I've described it, the viewpoint discrimination problem arises when the State forces people to express things they do not truly believe. This interest is strongly implicated by the compulsion of an ideological statement. But as Professor Calvert has observed: "Unlike the seminal right-not-to-speak cases of *Barnette* and *Wooley*, California did not compel the centers to express a viewpoint, adopt a position, or convey a state-sponsored philosophy, maxim, or creed."[113] The best case for the First Amendment's application to the compelled factual disclosure here is that forcing the centers to post the State's script directly contradicts their views on abortion or perhaps dilutes their own message by forcing them to acknowledge that abortion is not only legal, but also funded by the State. But the centers' complaint is not that they do not *believe* those facts, but rather that they disagree with the state of the law that makes those facts possible. That seems fundamentally distinct from being required to espouse ideological agreement with the opposite of one's own beliefs, as in a law that required the centers to state that abortion is "morally justified" and its availability "empowers women's autonomy" or is "good public health policy."

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111. Claudia E. Haupt & Wendy E. Parmet, *Public Health Originalism and the First Amendment*, 78 WASH. & LEE L. REV. 231, 255 (2021) (emphasis added) (footnote omitted); *see also* Calvert, *supra* note 55, at 1410 ("*Zauderer* mentioned 'uncontroversial information,' not an uncontroversial *topic*. Additionally, and problematically, what constitutes a 'controversial' topic is subjective, and Thomas offered no guidance for how it might be established.").

112. *See* Post, *supra* note 49, at 1075 (suggesting that in understanding compelled speech doctrine, "our first task must be to ascertain the exact constitutional values that compelled speech doctrine ought to be fashioned to protect").

113. Calvert, *supra* note 55, at 1407.

To the extent that there is a misattribution problem with compelled factual disclosures, there are relatively easy ways around it. The best argument for misattribution would be that by forcing the centers to speak about the availability of abortion, they may be wrongly understood to advocate for abortion as not just a legal option, but a desirable one.[114] That does not seem to be the case here. First, the regulated parties most likely to object to compelled factual disclosure are the very organizations for whom misattribution is most implausible. Their very distaste in reciting the words strongly incentivizes them to take steps to disassociate themselves with the message. There was nothing in the FACT Act that prevented licensed or unlicensed centers from posting their own notice alongside the State-required one that both indicated that they objected to being required to post such a notice and urged their clients not to pursue the state options. They could post a sign that said, "Abortion is murder!" next to the required notices as well. The ability to engage in counterspeech also mitigates the viewpoint discrimination problem. As Seana Shiffrin has observed,

> From a free speech perspective, what matters for organizations is not that they agree with every regulatory rule that applies to them, including regulatory rules involving speech, but that they have sufficient breathing space in a substantial forum to articulate their own message in a way that may be understood as their own.[115]

Unless the government regulation directly forbids counterspeech, that space should be adequately available under compelled factual speech regulations.[116]

States, in turn, could minimize the misattribution problem by drafting disclosure requirements with precise language that directly attributes the notice to the government. Consider, for example, a law that required the centers to post a notice that said "The contents of this notice are from the State of California" before its substantive portions. As one example, San Francisco enacted an ordinance requiring that sugar-sweetened beverages sold in the city contain the following statement on their labels: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. *This is a message from the City and County of San Francisco*."[117] Although the Ninth Circuit concluded that a trade association's motion for preliminary injunction barring enforcement of this ordinance should have been granted, it did so not on the ground that it was controversial but on the theory

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114. The Court concluded that "the licensed notice plainly 'alters the content' of [the centers'] speech." Nat'l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2371 (2018). But because, as I describe here, the law does not affect the centers' ability to engage in counterspeech, I take this statement to refer to dilution of the message.

115. Shiffrin, *supra* note 9, at 765.

116. To some degree, this concern is also already captured by *Zauderer*'s requirement that the regulation not be unduly burdensome. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985). For example, if a regulation required that the compelled factual disclosure consume ninety percent of the area where the speaker is communicating (an advertisement, a candy bar wrapper, etc.), there might literally not be any space for counterspeech.

117. S.F., CAL., HEALTH CODE § 4203(a) (2015) (repealed 2021) (emphasis added).

that it was unduly burdensome.[118] To some degree that may have been a way to circumvent the fact that the message was clearly designated as coming from the government, and not the beverage producer. Indeed, an alternative approach to the current doctrine would be to treat mandatory disclosures as government speech, which is much less constrained by the First Amendment than government regulations under current doctrine.[119] On at least one occasion, the Court has done just that.[120]

Finally, there are not as many concerns that factual disclosures, as opposed to ideological speech, will deprive regulated parties of their autonomy. To the extent that compelled factual speech infringes on dignitary interests, at the very least those interests are less of a concern where the regulated party is not an individual, but a business or organization. While the latter unquestionably enjoy First Amendment rights, dignitary interests have more to do with the autonomy of beings than entities.[121] If the autonomy problem is that rote recitation of the government's script will, over time, inculcate the government's values, thus interfering with the regulated party's deliberative processes and influencing their beliefs, businesses and organizations do not engage in deliberative processes independent of those who work for them.[122] And, again, the parties most likely to object to compelled factual speech are also the least likely to be influenced by its recitation. The wide availability of counterspeech makes this an even more remote possibility.

Thus, apparently what makes a fact "controversial" under *NIFLA*'s formulation is not that there is any question about its truthfulness or validity, but that the regulated entity disagrees with either the underlying regulation or with the more general state of the law, and therefore the state of affairs, that allows that law to be enacted. Understood in this manner, the *NIFLA* standard seems to empower the regulated party to determine whether the fact is sufficiently controversial to justify judicial review under strict scrutiny. That would be an absurd way to go about assessing the validity of state compelled factual disclosures because regulated parties are frequently, if not always, going to object to such regulations, which they are likely to view as adverse to their idiosyncratic interests. As Professor Post has succinctly pointed out, "Plainly a mandated disclosure cannot become controversial merely because a speaker objects to making it."[123] Professor Shiffrin similarly notes that

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118. Am. Beverage Ass'n v. City & Cty. of S.F., 916 F.3d 749, 756 (9th Cir. 2019).

119. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (describing "latitude which may exist for restrictions on speech where the government's own message is being delivered").

120. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005). It is worth noting, however, that the government expressing its own message directly, such as by renting a billboard to post that message, is still analytically distinct from forcing a private speaker to post that message on *its* billboard. For an interesting approach that suggests, in part, considering whether the government is trying to use private speakers to convey its message to avoid the political and economic costs of speaking directly through government channels, see Amar & Brownstein, *supra* note 24, at 7.

121. Amar & Brownstein, *supra* note 24, at 24; Corbin, *supra* note 4, at 1314–16, 1346.

122. *But see* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 709 (2014) (stating that for purposes of federal statute protecting religious freedom, corporations may "exercise" religion).

123. Post, *supra* note 24, at 910; *see also* Haan, *supra* note 9, at 1385.

"[i]nstitutional actors cannot be exempt from every requirement with which they disagree within a complex, democratic society that protects the rights and interests of all of its members."[124]

Moreover, *NIFLA* is internally contradictory because of its rather weak attempt to distinguish the FACT Act from disclosures that have often been required under the guise of informed consent under state abortion regulations. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[125] the Supreme Court upheld multiple provisions of a Pennsylvania statute that imposed several speech requirements on physicians who performed abortions. First, doctors were obligated to inform women seeking abortions about "the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.'"[126] They were also required to inform women of the availability of printed materials published by the State that described the fetus and to provide these women with information about medical assistance for childbirth, the availability of child support, and a list of agencies that provided adoption and other alternatives to abortion.[127] In addition to asserting that the law violated Fourteenth Amendment due process rights, the challengers argued that the law represented a type of compelled speech in violation of the physicians' First Amendment rights. On the due process claim, the plurality said that "[w]e also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have *no direct relation to her health*."[128] In rejecting the speech claim, the plurality noted that although doctors have the right not to speak, this law only affected that right "as part of the practice of medicine, subject to reasonable licensing and regulation by the State."[129] In *NIFLA*, the Court distinguished this aspect of *Casey*, contending that the FACT Act was not an informed consent provision or any other type of professional conduct regulation.[130] But this formalist distinction does not detract from the argument that the Pennsylvania law at issue in *Casey* compelled statements of fact about a topic that was, as the *NIFLA* majority itself admits, "anything but" uncontroversial.[131]

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124. Shiffrin, *supra* note 9, at 765.
125. 505 U.S. 833 (1992).
126. *Id.* at 881.
127. *Id.*
128. *Id.* at 882 (emphasis added).
129. *Id.* at 884.
130. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2373 (2018).
131. *Id.* at 2372. As Justice Breyer asserted in his dissent,

> If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services? As the question suggests, there is no convincing reason to distinguish between information about adoption and information about abortion in this context.

Id. at 2385 (Breyer, J., dissenting). Or perhaps the reason is sub rosa. As Ruth Colker points out, "[T]he *Casey*/*Becerra* distinction seems to provide more speech protection when the state is endorsing an antiabortion rather than a pro-choice perspective, even though the application of free speech doctrine is supposed to be content neutral." Ruth Colker, *Uninformed Consent*,

The *Casey* comparison reflects another important difference between compelled ideological speech and mandated disclosures of truthful facts. With regard to the First Amendment interests implicated by the latter, it is important to note that the speaker's interest in not speaking is in direct conflict with the *listeners'* interests in hearing the speech. Listeners' interests in this context include the right to be informed of facts relevant to their decision making. This is no less true in the context of a consumer food purchase than in the case of a person pursuing pregnancy-related services. Thus, to the extent the First Amendment protects the speaker's right to not speak, it inherently also diminishes the universe of information available to the listener. This is particularly concerning when the speaker is more powerful than the listeners, as is often the case when the government compels factual disclosures. As Helen Norton has observed, "Powerful speakers' nondisclosures also threaten listeners' interests while enhancing their own . . . . For this reason, more information—so long as it's accurate and material—is often better for listeners."[132] The listeners' interests in compelled factual speech cases have been substantially underappreciated and should be a critical factor in evaluating the constitutionality of laws requiring disclosure of truthful facts.[133]

It is also worth noting that another interest in these circumstances may go unnoticed. In the modern regulatory state, disclosure requirements, in addition to being ubiquitous, are frequently adopted as an alternative to more burdensome, direct regulations of conduct.[134] Such requirements serve to promote transparency, and perhaps self-regulation and compliance, which may be a more effective regulatory option, but also a relatively easier one with which to comply. If compelled factual disclosures are rendered invalid by applying *NIFLA*'s controversial fact test, the State may be forced to resort to direct regulatory mechanisms that impair the freedom of regulated parties just as much as, if not more than, compelled speech laws.

Understood against this backdrop, the Court's adoption of the "uncontroversial facts" standard in *NIFLA* neither makes conceptual sense nor advances critical free speech interests.[135] Indeed, the speech problems associated with compelled factual speech usually will not rise to the level of compelled ideological statements. In his dissenting opinion in *NIFLA*, Justice Breyer noted as much. He wrote that "Where a State's requirement to speak 'purely factual and uncontroversial information' does not attempt 'to "prescribe what shall be orthodox in politics, nationalism, religion, or

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101 B.U. L. REV. 431, 452 (2021).

132. Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 452–53 (2019); *see also* Haan, *supra* note 9, at 1371–72.

133. *See generally* Norton, *supra* note 132; Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329 (2008).

134. *See* Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 353 (2011) ("[M]andatory disclosure has become a growing part of the modern state's regulatory repertoire. Disclosure mandates, either alongside or in lieu of substantive mandates, have become important tools in the regulation of securities markets, consumer product and credit markets, and in the regulation of environmental hazards, health care, food and drug safety, and education.").

135. Yet it is highly consequential. As Professor Haan notes, "It is a test with teeth." Haan, *supra* note 9, at 1379.

other matters of opinion or force citizens to confess by word or act their faith therein,"' it does not warrant heightened scrutiny."[136]

Beyond that, applying heightened scrutiny to state compelled factual statements threatens to undermine many of the most basic functions of the regulatory state. Again, Justice Breyer recognized this when he noted that

> the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation. Virtually every disclosure law could be considered "content based," for virtually every disclosure law requires individuals "to speak a particular message." . . . Thus, the majority's view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.[137]

Indeed, the dangers that compelled speech doctrine could undermine basic forms of government regulation were recognized long before Justice Breyer. In his concurring opinion in the flag salute case, Justice Frank Murphy wrote that "The right of freedom of thought . . . as guaranteed by the Constitution against State action includes . . . the right to refrain from speaking at all, *except in so far as essential operations of government may require it for the preservation of an orderly society*,—as in the case of compulsion to give evidence in court."[138] Murphy's statement foresaw something that few contemporary commentators have emphasized—the state must sometimes, maybe even frequently, compel speech to maintain the "essential operations of government." The Supreme Court's recent controversial applications of the compelled speech doctrine have not only been wrongly decided, but also, taken to their logical extreme, could ultimately lead to the end of the regulatory state.

None of this is to say that no government compelled factual statement could ever cause First Amendment harms. The final Part of this Essay explores some limitations on the general argument that such laws should usually be entitled to great judicial deference.

III. FIRST AMENDMENT LIMITS ON COMPELLED STATEMENTS OF FACT

Though the Court's attempts to establish a limiting principle for evaluation of government compelled factual speech in *NIFLA* were unhelpful, that does not mean that the law is not in need of one. I have argued that the default rule regarding state compelled factual statements should be that they do not violate the First Amendment so long as the facts are objectively true, the disclosure is reasonable in content and scope, and the publication of the facts advances legitimate state interests. The

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136. *NIFLA*, 138 S. Ct. at 2387 (Breyer, J., dissenting) (quoting Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)).

137. *Id.* at 2380 (Breyer, J., dissenting) (citation omitted).

138. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (emphasis added).

remainder of the discussion addresses in what circumstances the courts should take a harder look at the relevant provision.

A. Compelled Factual Disclosures in Political Speech

While I have argued that the application of a deferential standard of review should extend to many types of government compelled factual disclosures, there must be an exception where the speaker's expression is purely political or otherwise directed toward public discourse. The Court acknowledged this in *Riley*, when it hypothesized about the First Amendment problems with a law "requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget."[139]

A comparable exception where factual disclosures might be disallowed would be necessary for much religious speech as well. Such requirements might improperly insert the government into an impermissible role of challenging the truthfulness of religious orthodoxy, where truth might have a very different, spiritual, and faith-based, rather than earthly, meaning.[140] In both these instances, there would be a heightened concern that the government is wandering outside the realm of routine regulatory actions and attempting to affect the speaker's message. But as stated earlier, *Riley* cannot also mean that strict scrutiny must apply to *all* laws requiring truthful factual disclosures.

B. Words that Characterize Facts

Another possible situation where a higher level of scrutiny might be necessary is where the government requires speakers to use specific language that, as opposed to being a bare statement of fact, characterizes the facts in a way that makes their use controversial. For example, what if the Pennsylvania abortion law at issue in *Casey* required doctors to inform patients that "The State of Pennsylvania wishes to make you aware that there are a number of state services available to pregnant women as an alternative to murdering one's unborn child."? The State's requirement of the word "murdering" instead of abortion converts this from a pure factual statement about available state services to one that characterizes abortion as murder, which is much more like a compelled ideological statement.

Many of the more recent lower court disputes about compelled factual disclosures have involved similar examples. In a pre-*NIFLA* case that tried to apply *Zauderer* to a federal compelled fact disclosure, the American Meat Institute challenged a regulation promulgated by the Secretary of Agriculture requiring meat products to be labeled with information about their country of origin.[141] Previous cases in the D.C. Circuit had interpreted *Zauderer*'s deferential First Amendment test for government compelled speech that was "purely factual and uncontroversial" to apply

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139. Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 798 (1988).

140. Chen, *supra* note 100, at 406 (observing that religious speech falls within a category of expression where "what is true is either highly debatable, unverifiable, or subject only to considerations of faith and value").

141. Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014).

only where the government's interest was in preventing consumer deception. Thus, on compelled speech grounds, the court had invalidated federal laws requiring that cigarette packages manufactured in the United States bear not just words, but graphical images depicting the negative health consequences of smoking.[142] The court held that the images, such as a graphic of a man smoking through a tracheotomy hole, were "inflammatory" and could not be said to "impart purely factual, accurate, or uncontroversial information to consumers."[143] In another case, the same court invalidated a statute authorizing the Securities and Exchange Commission (SEC) to issue regulations requiring firms that used "conflict minerals" to investigate and disclose the origin of those minerals.[144] Such minerals were those used by armed groups in the Democratic Republic of the Congo to finance their war, often through the extortion of mining operations.[145] The general purpose of the requirement was to inform investors of the source of a regulated business's revenue. As in the *R.J. Reynolds* case, the court struck down the law, observing that:

> it is far from clear that the description at issue—whether a product is "conflict free"—is factual and non-ideological. Products and minerals do not fight conflicts. The label "conflict free" is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility.[146]

But in *American Meat Institute*, the D.C. Circuit, sitting en banc, overruled those prior cases and upheld the country of origin labeling requirement.[147] In doing so, it first rejected the plaintiff's claim that the more deferential *Zauderer* test applied only to factual disclosures designed to prevent consumer deception.[148] Thus, the fact that the government's asserted interest was not in preventing deception, but in informing consumers about the sourcing of their food products was substantial enough to justify the disclosure requirement. Turning to the issue of whether country of origin labeling was "purely factual and uncontroversial," the court found that the labeling information was not "controversial in the sense that it communicates a message that is controversial for some reason *other than dispute about simple factual accuracy*."[149]

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142. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012), *overruled by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014).

143. *Id*. at 1217. It therefore held that *Zauderer* did not apply and struck down the regulation under the intermediate scrutiny standard applied to regulations of commercial speech. *Id.*

144. Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 362–63 (D.C. Cir. 2014), *adhered to on reh'g*, Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015), *overruled by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014).

145. *Id.*

146. *Id.* at 371.

147. Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 22–23 (D.C. Cir. 2014).

148. *Id.* at 22.

149. *Id.* at 27 (emphasis added).

But let us take seriously the claim that some types of compelled fact disclosures might be viewed as controversial. For example, one other argument raised by the plaintiffs in *American Meat Institute* was that the regulation's original language required use of the word "slaughter" in the disclosure (as in, "this product made from animals slaughtered in Canada"). As the court noted, "we can understand a claim that 'slaughter,' used on a product of any origin, might convey a certain innuendo."[150] Ultimately, the court didn't address this claim because the regulations had been subsequently modified to allow use of the word "harvested" instead.[151] But what if it hadn't? Can the government's prescribed phrasing or characterization of a fact make it controversial or involve "innuendo" such that the First Amendment concerns associated with compelled ideological speech become more apparent? The same claims were made in the case involving graphic health warnings on cigarette packaging and use of the phrase "conflict minerals" in securities disclosures.

To the extent that the answer is yes, I would argue that the problem is not that the statements are controversial, but that they are no longer *purely* factual within the meaning of *Zauderer*. By adding descriptive elements to the phrasing that results in the characterization of the fact, the regulators may violate the First Amendment not by introducing controversy, but by adding an ideological or value laden element to the facts. A graphic image of a man smoking through a tracheotomy hole might be used to create an emotional reaction that would not result from a factual statement that some smokers require tracheotomies because of the health effects of tobacco. A statement about a company's use of "conflict minerals" might imply a moral judgment that would not be present with a more detailed description of how and under what circumstances the company's minerals were obtained. And "slaughtered" is a characterization of the killing of an animal that suggests a less than humane end of life.

The point is that describing factual disclosures as "controversial" is not doing any of the work, here. If anything, it is superfluous, in that if a statement involves not bare facts, but ideologically influenced characterizations of those facts, it is no longer purely factual and therefore bleeds over into a form of compelled ideological statement. Where does that leave us in assessing the Court's decision in *NIFLA*? It would seem that both the unlicensed notice and the licensed notice include bare facts rather than characterizations of those facts. It is not disputed that California provides free and low-cost pregnancy services including abortion or that the unlicensed clinics are, in fact, not licensed to perform medical services. No words included in the disclosure are tainted with any value-laden language unless one were to argue that the word "abortion" is in and of itself ideological. In short, applying this analysis, the disclosure requirements in *NIFLA* seem even less problematic than the ones at issue in the D.C. Circuit cases and therefore should have been upheld.

There are at least two critical responses to the suggestion that the characterization of facts may make those disclosures no longer purely factual, thus removing them from the category of speech entitled to *Zauderer* deference.[152] First, disputes about whether a particular characterization is value-laden enough to make it no longer

150. *Id.*
151. *Id.*
152. I am grateful to Rebecca Tushnet for raising these serious concerns with me.

purely factual might simply shift the argument that previously existed over whether facts are "controversial" to whether the characterization of the facts makes them value laden. If so, then my suggested approach is different, but not necessarily better, than the current one. Second, because I argue that the manner in which facts are required to be characterized may be problematic if they, among other things, evoke an emotional reaction in some listeners, I may be wrongly discounting the role of emotion in individual deliberation.[153] As Rebecca Tushnet argues, "When the government can otherwise constitutionally mandate disclosure, the fact that these disclosures have emotional resonance is not an independent constitutional barrier."[154] If that is the case, then my "characterization of facts" approach may rely on an incomplete (and perhaps also inappropriately gendered) understanding of how listeners process information.

As to the first critique, I concede that there will continue to be hard cases in which the parties will dispute whether a mandated disclosure uses language that characterize facts in a value-laden or quasi-ideological manner. Thus, in the graphic image tobacco warnings case or the country of origin food source dispute, the courts would be deciding whether the compelled speech was a characterization of a fact instead of whether the disclosure was "controversial," thus making little progress in clarifying the doctrine. However, I do think that there would be fewer disputes under my suggested approach. One of the problems with the *NIFLA* majority's analysis is that invoking the *Zauderer* test made it too easy for the majority to conclude that the disclosures were "controversial," not because the *facts* were disputed or controversial, but because the *topic* of abortion is controversial.[155] Most, though certainly not all, government compelled disclosures are comprised of fairly straightforward, sterile statements of information, but many of those may touch on controversial topics because, as I argue above, the value of the regulation itself is contested. And to reiterate, if that is all it takes for a regulated party to have a compelled disclosure invalidated then virtually all such regulations are doomed. But requiring the challenger to show that the manner in which the facts are characterized converts them from facts into ideological statements presents a higher threshold for compelled speech claims. As I have just argued, nothing in the FACT Act's disclosure language can be reasonably viewed as an ideologically tainted characterization of facts—a facility is either licensed or it is not.

As to the second critique, I completely agree that emotion is an important part of deliberation.[156] But such claims are more directly applicable to whether particular forms of expression have value and are therefore covered by the First Amendment.[157]

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153. *See generally* Rebecca Tushnet, *More Than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392 (2014).

154. *Id.* at 2393.

155. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2372 (2018).

156. Tushnet, *supra* note 153, at 2407 (noting that courts' distrust of emotional impact of disclosures "conflicts with decades of research on cognition and decisionmaking, which has shown that emotion, including general positive or negative feelings about a topic, is 'vital to reasoned deliberation'").

157. *See* Chen, *supra* note 100, at 402–16 (arguing that fake news has value to its listeners not because it promotes rational deliberation, but because it facilitates expressive experiential autonomy and social cohesion).

In contrast, in mandatory factual disclosure cases, unlike cases involving the suppression of speech, the question isn't whether the speech has value, but whether the government can compel private speakers to carry the government's message. As I have argued, that is more problematic if the message is ideological rather than factual, and value-laden, sometimes emotion-evoking, statements are at least more like ideological statements than more sterile ones. Moreover, to the extent my approach limits the government's power to require speakers to communicate value-laden fact characterizations, it does not completely take emotional appeals out of the discourse. The government is still completely free to engage in its *own* speech using as many graphics, other heuristics, and emotionally imbued expression as it wishes.

C. Unduly Burdensome Factual Disclosures

Another limitation is already addressed by the requirement that disclosures be reasonable in content and scope. It is not difficult to imagine a regulation that required the regulated entity to disclose so much factual information that it would be unduly costly or otherwise burdensome. This limit is already built into the doctrine, at least in the professional advertising context. In *Zauderer*, the Court noted that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech."[158] It might do so, for example, because of the sheer cost of compliance. Or the volume of the disclosure might also reach the point where it crowds out the regulated party's message or diminishes opportunities for counterspeech. The *NIFLA* majority expressed this concern in discussing the constitutionality of the unlicensed notice. It observed that

> As California conceded at oral argument, a billboard for an unlicensed facility that says 'Choose Life' would have to surround that two-word statement with a 29–word statement from the government, in as many as 13 different languages. In this way, the unlicensed notice drowns out the facility's own message.[159]

Finally, the unreasonableness of the scope of any compelled disclosures might also be a factor in considering whether the provisions were enacted in good faith.

D. Unreasonableness and Government Bad Faith

To address any legitimate free speech concerns with compelled factual statements, courts might also look for evidence that the government's regulation might be subterfuge for an attempt to undermine the regulated party's ideological commitments. This sort of bad faith claim would allow invalidation of the law while not leading to the undermining of the vast majority of regulatory disclosure requirements. This might be advanced by the requirement that the disclosure be reasonable in content. That is, the disclosure must be related to the underlying purpose of the regulation.

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158. Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

159. *NIFLA*, 138 S. Ct. at 2378.

Suppose, for example, that a state enacted a law requiring that all animal rights organizations post in their office spaces a sign that displayed accurate information about the nutritional qualities of different types of meat. The problem here is not that the fact is uncontroversial (assuming that there are objective assessments of nutrition). The problem is that the disclosure's complete lack of germaneness to the regulated party makes it unreasonable. The animal rights organizations may be regulated as employers or as advocacy groups, but they are not in the business of producing, preparing, or selling food products. The disconnection between the regulation and the regulated party's operations suggests that something else is going on, and that the state is simply trying to undermine the organizations' message and mission in encouraging people to pursue plant-based diets.

It is important that the doctrine, as developed, accommodate the possibility that scenarios may exist where the government tries to disguise an effort to compromise the speaker's ideological commitments under the guise of compelling purely factual disclosures, but the general default presumption of deference should be sufficient in the vast majority of cases.[160]

CONCLUSION

The First Amendment's compelled speech doctrine originated as an important limitation on the government's power to directly impose ideological orthodoxy on its citizens. But the doctrine has drifted far afield of this critical function to the point where disgruntled regulated parties can invoke it to challenge what have traditionally been understood as routine regulatory disclosures. The majority of such laws, which do compel the speaker to make factual statements, serve legitimate regulatory purposes that do not unconstitutionally burden speakers but do promote listeners' interests in being informed. The Supreme Court's decision in *NIFLA* is a signal that

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160. The combination of these limiting factors may be useful in distinguishing some of the more transparently anti-abortion messages that some states have adopted as part of their informed consent laws regarding reproductive health services. For example, South Dakota enacted a law requiring that as part of the informed consent process, physicians who perform abortions state, among other things, that an abortion "terminate[s] the life of a whole, separate, unique, living human being." S.D. CODIFIED LAWS § 34-23A-10.1(1)(b). As Professor Corbin has suggested, compulsion of facts can sometimes be linked to government orthodoxy or intrusions on personal autonomy, thus implicating the types of compelled speech that do raise First Amendment concerns. Corbin, *supra* note 4, at 1324–26. While the Eighth Circuit sitting en banc upheld the South Dakota law against a compelled speech challenge, Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008), there are multiple ways even under a deferential standard of review to argue for its invalidation. First, it could be viewed as involving a value-laden characterization of abortion given the highly contested and contextual meaning of "human life." Second, it could be viewed as an unduly burdensome imposition on the listeners' autonomy. Finally, the way this law and others like it are worded, it could be argued to be a rather thinly disguised bad faith effort to insert the State's attempt to influence women not to have abortions into the informed consent process. As the dissenting opinion in the Eighth Circuit correctly observed, "Rather than focusing on medically relevant and factually accurate information designed to assist a woman's free choice, the Act expresses ideological beliefs aimed at making it more difficult for women to choose abortions." *Id.* at 740 (Murphy, J., dissenting).

the doctrine might become a powerful deregulatory tool for any party that disagrees not only with the specific disclosure, but also with the regulatory regime itself, thus converting the disclosure from a statement of fact into a discussion of a controversial topic. Further expansion of the law of compelled speech to invalidate such regulations risks undermining the foundations of the regulatory state unless the Court pulls back from this dangerous and misguided elaboration of First Amendment doctrine.