TOWARD A MORE EXPLICIT, INDEPENDENT, CONSISTENT AND NUANCED COMPELLED SPEECH DOCTRINE

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Cases involving what the Court calls "compelled speech" are decided haphazardly and inconsistently, without any attempt to formalize the analyses into rules of decision. One resulting and abiding shortcoming of the current state of affairs is that compelled speech has remained essentially an all-or-nothing domain of constitutional decision-making. Based on a somewhat inscrutable and seemingly selective consideration of various factors, compelled speech claims are either embraced and subjected to strict scrutiny review, or rejected as not implicating the right not to be compelled to speak at all. No detailed identification of the circumstances that warrant more or less rigorous standards of review has been recognized.

This lack of rigorous doctrinal structure has led to more compelled-speech litigation and, perhaps more problematically, an increased willingness of courts to expand the scope of the case law in this area. In this Article, we propose to lay out a foundation and direction for developing distinctive compelled speech doctrine. While our analysis and suggestions take account of important judicial holdings in many compelled speech cases, we are not attempting to draw a doctrinal line that connects or explains all of the Court's decisions in a harmonious or intelligible way. Indeed, after we explain the circumstances under which the specter of government compulsion of speech should be considered very troubling (warranting rigorous review) and those under which it should not (justifying a more flexible standard akin to intermediate level scrutiny or something more deferential still), we will argue that some decisions were wrongly decided.

Among the most important insights we offer is that while seminal conventional free speech doctrine in cases involving restrictions on speech is grounded primarily on instrumental values relating to democratic self-governance and secondarily on values of individual autonomy and dignity, that

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hierarchy is often inverted when compelled speech is at issue: The instrumental reasons for being skeptical of government compulsion of speech are harder to see and less frequently present; yet dignity and autonomy concerns can often powerfully explain why government should not be allowed to compel speech that it could easily restrict. A second important theme, sometimes prominently identified on the face of our observations and at other times implicit in our analysis, is the very broad background power the government enjoys, consistent with the First Amendment, to speak out for itself (through its own government agents) on most matters in society. One important set of questions we think should be asked in each compelled speech arena is: (1) whether government is really attempting to use private actors to disseminate the government's message—that is, whether the government is using a private person or entity's activities as an occasion or excuse to further the government's preferred message; and (2) if so, is the government really avoiding any costs (political or economic) that would otherwise cabin its (potentially awesome) power to speak by conscripting private messengers for its own use. If the answer to either of these questions is no, then the case for striking down a government law as impermissible compelled speech is weaker, unless dignitary concerns are significant. On the other hand, if the answers to these questions is yes, then courts can use compelled speech doctrine to prevent government from speaking too much, or too costlessly.

A third, related theme raises this question: given that government can speak loudly and expansively with its own resources to influence the marketplace of ideas without violating First Amendment guarantees, does the government speaking through commandeered private individuals or entities distort public discourse to any greater extent than what occurs when government speaks through its own agents. If compelling speech creates no greater danger to the instrumental values freedom of speech furthers in facilitating democratic self-government than the government speaking with its own resources, then constitutional challenges to compelled speech must be grounded in dignitary values alone.

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I. INTRODUCTION

Last summer dissenting Justice Elena Kagan, in one of the most significant 5-4 decisions of the term, accused the majority of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."[1] If Justice Kagan is correct that the First Amendment is being "weaponized,"[2] then the smart bomb of choice these days seems to be the idea that government is impermissibly compelling private individuals and entities to speak. Historically, the vast majority of First Amendment disputes have involved claims that government is improperly impeding or restricting speech activities in which individuals or organizations seek to engage. Increasingly, though, a different claim is being made—that government is improperly forcing or conscripting persons to convey a message with which they disagree. Consider three of the most high-profile cases from the Supreme Court's most recently concluded term—*National Institute of Family & Life Advocates v. Becerra*[3] (*NIFLA*), *Janus v. American Federation of State, County & Municipal Employees*,[4] and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[5] In all three instances challengers invoked the free speech clause to argue that government was forcing them to engage in unwanted expressive activity (the placement of placards, subsidization of union activities, and creation of marriage celebration symbols).[6] The compelled speech claim prevailed in the first two cases, and the Court dodged, but did not reject it, in the third.[7]

The idea that the First Amendment protects us from being compelled to speak, while not new, is being invoked more frequently, more widely, and more aggressively than ever before.[8] Yet, as is true in many other battleground settings, those seeking to defend against new weapons and strategies need time to develop

1. Janus v. AFSCME, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).
2. And she surely is. *See generally* Vikram D. Amar & Alan Brownstein, *The Voracious First Amendment: Alvarez and Knox in the Context of 2012 and Beyond*, 46 LOY. L.A. L. REV. 491 (2013) (cataloguing all the areas of policy and tradition being eradicated as the First Amendment has eclipsed equal protection principles as the transcendent constitutional norm).
3. *See generally* 138 S. Ct. 2361 (2018).
4. *Janus*, 138 S. Ct. at 2448.
5. 138 S. Ct. 1719 (2018).
6. *Janus*, 138 S. Ct. at 2448 (subsidization of union activities); *NIFLA*, 138 S. Ct. at 2361 (placement of placards); *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1719 (creation of marriage celebration symbols).
7. *Janus*, 138 S. Ct. at 2486; *NIFLA*, 138 S. Ct. at 2372; *Masterpiece Cakeshop, Ltd.*, S. Ct. at 1731.
8. *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1724.

effective responses. And the first instinct of justices, like that of generals, is often to (re)fight earlier wars.

Thus, for example, in the first major compelled speech case, *West Virginia Board of Education v. Barnette*,[9] it was natural for the Court to seek to analogize the problems of compelled speech to those presented by more conventional speech regulations, even as conventional speech doctrine itself was not yet very seriously developed. At least this much had already been established, though: government cannot suppress a message it dislikes without a compelling justification for doing so. The *Barnette* Court's instinct from that premise was that "it would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."[10]

To this day, the Court, in processing claims of compelled speech, continues (albeit sometimes more overtly than others) to retreat to familiar doctrinal foxholes developed in more conventional free speech warfare[11]—in cases involving restrictions on, rather than compulsions of, speech.[12] But such old-fashioned instincts and responses are no match for the increasingly innovative compelled speech arsenal; traditional speech doctrine simply is not equipped to deal with modern claims of coerced speech, just as the French Maginot Line posed no meaningful defense to the panzer divisions invading France in 1940.[13] The point is not that the Court in *Barnette* was wrong to suggest that the compulsion of speech can be even more dangerous to First Amendment values than the suppression of speech—sometimes it can.[14] But often it is not, because compelling speech is neither inherently worse nor better than suppressing speech; it is just very different than suppressing speech, and thus often implicates different First Amendment values.[15] For this fundamental reason, the Court needs to develop new doctrinal tools and strategies—new rules of engagement—for responding to claims of compelled speech, a task it has not yet even acknowledged as necessary let alone begun to accomplish, if the First Amendment and other important societal values and goals are to peacefully coexist.

9. *See generally* 319 U.S. 624 (1943).

10. *Id.* at 633.

11. For instance, in his majority opinion in *NIFLA*, Justice Thomas emphasized that the challenged law requiring the posting by crisis pregnancy centers of accurate information about the availability of state-subsidized family planning services was "a content-based regulation of speech." *NIFLA*, 138 S. Ct. at 2371. But Justice Thomas does not explain why and in what circumstances that characterization, so useful in cases adjudicating laws that suppress speech, is particularly relevant to the review of laws alleged to compel speech. *See id*.

12. Indeed, the instinct in *Barnette* to want to line up compelled speech and suppressed speech along a spectrum of seriousness can be seen just last Term. In *Janus*, the justices in the majority and dissent debated whether compelled speech requires a greater justification than suppressing speech or should be evaluated no more rigorously than the silencing of speech. Our focus in this Article is on the need for an entirely distinctive approach to adjudicating compelled speech cases—an approach that cannot be easily considered more or less rigorous than what is required by conventional free speech doctrine.

13. *Cf.* Pierre Bienaimé, *Why France's World War II Defense Failed so Miserably*, BUS. INSIDER (Apr. 14, 2015, 11:35 AM), https://www.businessinsider.com/the-story-of-the-maginot-line-2015-4.

14. *See generally Barnette*, 319 U.S. at 624.

15. *See infra* Section V.B.

Free speech guideposts developed in cases involving the alleged censorship or restriction of expression comprise by far the most complex, nuanced, and sophisticated doctrinal structure for deciding any kind of fundamental rights disputes in all of United States constitutional law. This was not always the case. Early free speech decisions reviewed laws burdening affirmative speech under a much more ad hoc and informal set of considerations.[16] Over time, however, these more intuitive and less rule-governed decisions were replaced by the categorical framework we are familiar with and take for granted today.[17]

Formalizing free speech doctrine furthered several critically important purposes. Freedom of speech was a treasured right, but speech was also a pervasive activity—a facet of virtually all human interactions. Accordingly, there were a myriad of legitimate, sometimes important, government interests that conflicted with unfettered expressive activity. The virtues of free speech justified its rigorous protection, but the harms and costs to private and public interests caused by speech required a range of limitations and restrictions on some expressive activity.

The resolution of these conflicts between freedom of speech and countervailing state interests required more carefully developed doctrine than a simplistic insistence that speech either received maximum protection or none at all. A system subjecting all inhibitions of speech to either "strict" scrutiny or extremely deferential "rational basis" review risked two unacceptable alternatives: the latter would offer insufficient protection to freedom of speech in too many instances by limiting the scope of the right.[18] And the former would displace the primacy of democratic decision making and interest balancing by conferring upon speakers unacceptably broad and rigid protections for their expressive activities.[19]

Rejecting these all-or-nothing approaches, courts (especially the Supreme Court) carefully erected a doctrinal framework for free speech cases that varied the standard of review based on the specific circumstances and features of a case. By considering a range of factors, including the nature of the speech-restricting regulation, the location where the expressive activities are to occur, and the kind of speech being burdened, courts differentiated between situations in which

16. *See*, *e.g.*, Schneider v. New Jersey, 308 U.S. 147, 162 (1939) (applying an ad hoc balancing test to determine whether a law prohibiting handbill distribution on public streets, with the goal of preventing littering, placed a constitutionally impermissible burden on an individual's free speech rights).

17. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 482 (1988) (determining that a form of intermediate level scrutiny should be applied to review a "content-neutral" ordinance banning residential picketing on public sidewalks, a "traditional public forum"); Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (describing how different standards of review apply to speech regulations depending on the forum where speech is expressed and the nature of the regulation restricting expression).

18. Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 57–59 (2006).

19. *See* Nat'l Inst. of Fam. & Life Advocates v. Becerra, 138 S. Ct. 2361, 2380–83 (2018) (Breyer, J., dissenting) (explaining that the majority's expansive application of compelled speech doctrine jeopardizes the constitutionality of numerous regulatory regimes previously understood to be reserved for political deliberation and discretion). *See generally*, Brownstein, *supra* note 18 (explaining that serious and expansive protection of fundamental rights appropriately respecting countervailing state interests requires more complex and nuanced doctrine than a rigid all or nothing formula subjecting all abridgements of the right to strict scrutiny review or failing to protect the right at all).

courts must shield speech aggressively and contexts in which political deliberation as to how best to cabin the costs and harms caused by speech would receive respect, if not deference.[20]

Similar doctrinal development has not occurred in the class of cases dealing with compelled speech.[21] Here, the early cases were (once more) grounded on judicial intuition and ad hoc analysis. But as additional cases have been decided, guidelines for adjudicating compelled speech claims have never clearly emerged. Cases are decided haphazardly and inconsistently without any attempt to formalize the analyses into rules of decision. One resulting and abiding shortcoming of the current state of affairs is that compelled speech has remained essentially an all-or-nothing domain of constitutional decision-making. Based on a somewhat inscrutable and seemingly selective consideration of various factors, compelled speech claims are either embraced and subjected to strict scrutiny review or rejected as not implicating the right not to be compelled to speak at all. No detailed identification of the circumstances that warrant more or less rigorous standards of review has been recognized.[22]

This lack of rigorous doctrinal structure has led to more compelled-speech litigation and, perhaps more problematically, an increased willingness of courts to expand the scope of the case law in this area. Courts appear to be incapable of identifying and justifying durable limitations on the definition of constitutionally impermissible compulsion of speech. Instead, the prohibition against compelled speech is being employed to justify more ambitious judicial interference with areas of law and policy previously understood to be reserved for political deliberation and resolution, precisely the concern animating Justice Kagan's colorful imagery.[23]

In this Article, we propose to lay out a foundation and direction for developing distinctive compelled speech doctrine.[24] While our analysis and suggestions take account of important judicial holdings in many compelled speech cases, we are not attempting to draw a doctrinal line that connects or explains all of the Court's decisions in a harmonious or intelligible way. Indeed, after we explain the circumstances under which the specter of government compulsion of speech should be considered very troubling (warranting rigorous review) and those under which it should not (justifying a more flexible standard akin to intermediate level scrutiny or something more deferential still), we will argue that some decisions were wrongly decided.

20. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (discussing the applicability, purpose, and utility of forum doctrine).

21. For a current and thoughtful compendium of the scope of compelled speech case law and the tensions and conflicts within this area of free speech jurisprudence, see generally Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355 (2018).

22. Indeed, in cases like *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the Court seemed to strongly imply, notwithstanding thoughtful dissents, that there was no basis for distinguishing one compelled speech case from another.

23. Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448, 2501 (2018).

24. S*ee infra* Parts II, VI.

Among the most important insights we offer is that while seminal conventional free speech doctrine in cases involving restrictions on speech is grounded primarily on instrumental values relating to democratic self-governance and secondarily on values of individual autonomy and dignity, that hierarchy is often inverted when compelled speech is at issue: The instrumental reasons for being skeptical of government compulsion of speech are harder to see and less frequent to find; yet dignity and autonomy concerns can often powerfully explain why government should not be allowed to compel speech that it could easily restrict. None of this means conventional doctrine is useless in adjudicating compelled speech cases—it does mean, however, that conventional doctrine must be retooled into a different kind of machinery for use on the compelled speech battlefield.

A second important theme, sometimes prominently identified on the face of our observations and at other times implicit in our analysis, is the very broad background power the government enjoys, consistent with the First Amendment, to speak out for itself (through its own government agents) on most matters in public discourse. Although too much government speech can threaten democratic values and a free society, the Court has of yet acknowledged relatively few judicially enforceable limits on this power. So one important set of questions we think should be asked in each compelled speech arena is: (1) whether government is really attempting to use private actors to disseminate the government's message—that is, whether the government is using a private person or entity's activities as an occasion or excuse to further the government's preferred message;[25] and (2) if so, is the government really avoiding any costs (political or economic) that would otherwise cabin its (potentially awesome) power to speak by conscripting private messengers for its own use. If the answer to either of these questions is no, then the case for striking down a government law as impermissible compelled speech is weaker, unless dignitary concerns are significant. On the other hand, if the answers to these questions is yes, then courts can try to use compelled speech doctrine to prevent government from speaking too much, or too costlessly.

A third related theme raises this question: given that government can speak loudly and expansively with its own resources to influence the marketplace of ideas without violating First Amendment guarantees, does the government speaking through commandeered private individuals or entities distort public discourse to any greater extent than what occurs when government speaks through its own agents. If compelled speech impairs the instrumental values the First Amendment seeks to promote in facilitating democratic self-government no more than government speech that is accomplished purely through the government's own resources, then constitutional challenges to compelled speech must be grounded in dignitary values alone.

25. *See generally* Jeb Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993).

II. THE BIZARRE RESULTS THAT FOLLOW FROM REFLEXIVELY EMPLOYING DOCTRINE RELATING TO THE SUPPRESSION OF SPEECH TO COMPELLED SPEECH CASES

To set the stage for our recommended reconceptualization of the adjudication of compelled speech claims, we begin our analysis by demonstrating somewhat summarily that a different framework from conventional speech analysis is needed. While perhaps few jurists and commentators overtly and full-throatily contend that the conventional rules for handling laws that restrict and regulate affirmative expression can be transposed, incorporated, and applied wholesale to compelled speech cases, that premise (or a variant on it) will continue to do major work in deciding cases until it is exposed for the fallacy it clearly is.[26]

We maintain that there really is no way to equate the two kinds of claims or the framework for reviewing them. 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. To be clear, we do not conclude that no aspect of conventional free speech doctrine can ever be utilized as part of the doctrinal framework for resolving compelled speech issues. But any such analogies must be cabined in scope and independently explained and justified. The jot-for-jot incorporation of conventional free speech doctrine to compelled speech cases would produce absurd results and needs to be rejected outright.

Consider a few basic illustrations.

Let us start with the hierarchy the Court uses to provide differing levels of protection—from fully protected to unprotected—to different types of speech that laws may burden or suppress. At one end of the spectrum is speech on electoral matters and the performance of public officials. The Court has repeatedly observed that such speech lies at the core of the First Amendment,[27] and, for that reason, attempts by government to regulate this kind of speech are particularly problematic. At the other end of the spectrum are kinds of speech like threats and obscenity, categories of speech that are completely unprotected and that the government has tremendous discretion[28] to regulate or even stamp out entirely. Yet this hierarchy simply makes no sense when applied to the problem of government-compelled speech.

For instance, the category of unprotected speech has no meaningful utility for compelled speech. While it may be reasonable to refuse to shield conventionally unprotected speech from suppression,[29] it would be untenable to argue that the government enjoys similar leeway to compel a person to express obscenity,

26. *See supra* note 11 and accompanying text.

27. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (stating that free speech protection "has its fullest and most urgent application precisely to the conduct of campaigns for political office").

28. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382–84 (1992); Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

29. In this Article, we accept the conventional understanding that government may reasonably decide to suppress a category of unprotected speech without violating the First Amendment.

threats, fighting words, or incitement. The justification for identifying these subjects of speech as unprotected against suppression simply does not translate into comparable doctrine when the state is compelling, rather than suppressing, such speech.

In the same vein, consider the "lesser" but still significantly protected category of commercial speech—for present purposes defined as speech proposing a commercial transaction. Such advertising can be regulated to prohibit lies or misleading statements, or to protect certain vulnerable communities like children.[30] But government has little power to regulate advertising that is truthful simply because government worries, for paternalistic reasons, that consumers may positively respond to advertising by consuming too much of a controversial product.[31] By contrast, when government seeks to compel advertisers to convey truthful, relevant information to consumers—say in food packaging or drug warnings—no one thinks the government's efforts are illicit or violative of the First Amendment, even if the government's motive is the same: to influence consumer behavior so that they will purchase less of a particular product.[32]

Next, consider the location where speech occurs, another significant factor used by courts in conventional free speech doctrine.[33] Courts routinely take the location where speech occurs into account in determining the standard of review to apply to laws restricting or suppressing speech.[34] Expressive activities in a street or park, identified as traditional public fora, receive maximum protection because history and custom support reserving these publicly owned locations for robust and unrestricted debate among the body politic.[35] Conversely, regulations of speech on most other public property, identified as a nonpublic fora, receive much more deferential review.[36] Here, courts are concerned that unbridled expressive activities would be functionally incompatible with the use to which public property is being put by the state, and they want to provide the government the flexibility it needs to determine what speech, if any, can be tolerated on public property dedicated to specific tasks and duties.[37]

30. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.").

31. *See e.g.*, Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 513–14 (1996) (rigorously reviewing and striking down laws restricting advertisements containing the price of alcoholic beverages enacted to reduce alcohol consumption by reducing price competition).

32. *See generally* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 321–350 (2018) (Food and drug label requirements are quite common, with few questioning their legitimacy.).

33. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 479 (1988).

34. *Id.*

35. *See Frisby*, 474 U.S. at 480–82 (identifying streets and parks as traditional public fora where speech regulations receive maximum scrutiny).

36. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992) (concluding that state owned airport terminal is a nonpublic forum where viewpoint neutral speech restrictions receive relatively lenient review).

37. *See generally id.*

Location can be a relevant factor in some compelled speech cases too.[38] It surely would be unwise and unavailing, however, to try to superimpose conventional forum analysis on compelled speech cases.[39] The distinctive protection of speech in traditional public fora seems irrelevant to the evaluation of the state compelling speech. A law prohibiting rallies concerning immigration in parks and a law mandating people to hold rallies in parks supporting the state's immigration policies may be equally unconstitutional, but a law requiring people to express their views on immigration in public parking lots (nonpublic fora) would be just as unconstitutional too. Whatever one thinks about the merits of forum doctrine in conventional doctrine, the relatively lenient standard of review applied to content-discriminatory regulations in a nonpublic forum, such as the lobby of a government office building, should not be applied without further analysis to government requirements compelling speech in such a location.

We could list many other commonsense examples, but there is no need to belabor the point: doctrine created to deal with speech regulation in many instances is thoroughly unhelpful in dealing with speech compulsion.

III. THE CENTRALITY OF INSTRUMENTAL DEMOCRACY-REINFORCING VALUES IN CONVENTIONAL DOCTRINE THAT DO NOT CARRY OVER EASILY TO COMPELLED SPEECH CASES

Why can't conventional doctrine be transposed jot-for-jot to compelled speech disputes? Because the reasons we are skeptical of some regulations of speech are quite different from the reasons we may be skeptical of some compulsions of speech. Doctrine is supposed to implement fundamental values. Accordingly, to construct and develop doctrine, one must first identify and analyze those fundamental values on which it is to be based.

Doctrine directed at the regulation of speech primarily evolves out of two foundational, instrumental values: (1) government should not distort the marketplace of ideas (especially with regard to matters of public policy and elections); and (2) as a general matter, more private speech is better than less private speech.[40] These two values, in turn, come from the most widely embraced (and we think most defensible) theory for why the First Amendment's free speech clause exists at all. As one prominent commentator has explained:

> Freedom of speech means both more and less than freedom of words. . . . Is there any unifying principle of inclusion and exclusion? Two prominent candidates exist. The first focuses on freedom of speech as a guarantee of individual self-expression and autonomy. . . . Although the Supreme Court has protected self-expressive speech in many contexts, its case law [in the

38. It may be, for example, that certain important dignity harms discussed infra would vary when speech is compelled in certain locations. Streets and parks are very public locations. Perhaps being forced to speak inauthentically in such an open and visible location is a special affront to some of the values underlying First Amendment concerns about compelled speech.

39. *See* discussion *infra* Section V.A.

40. This is one of the reasons it is said that the constitutionally preferred answer to bad speech is more good speech, rather than speech restrictions.

> realm of speech regulation] tops short of enshrining autonomy and self-expression as the centerpiece of the First Amendment. Nude dancing, for example, even if remarkably self-expressive, is "only marginally" within "the outer perimeters of the First Amendment."
>
> A more promising descriptive theory of Supreme Court case law, and one rooted in the history and popular sovereignty ideology behind the First Amendment, builds on the work of Alexander Meiklejohn. As with its explicit textual counterpart in Article I, Section 6, which guarantees freedom of "Speech or Debate" in Congress, the Freedom of Speech Clause was designed, at a minimum, to safeguard the necessary preconditions of collective, democratic self-government. In order to vote and deliberate on public policy, citizens must be free to exchange political opinions and information with each other. . . .
>
> The Supreme Court embraced this underlying vision in the landmark First Amendment case of *New York Times v. Sullivan*, and reaffirmed it in [other cases]. In *Sullivan,* the Court, per Justice Brennan, spoke of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . . It is as much [the citizen's] duty to criticize as it is the official's duty to administer. As Madison said, "the censorial power is in the people over the Government, and not in the Government over the people."[41]

This democracy-reinforcing reading of the First Amendment does most of the work in explaining probably the most important operational principle of conventional doctrine involving speech regulations, the idea that so-called viewpoint and content-based laws (compared to content-neutral regulations of the time, place, and manner of speech) are strongly disfavored, even though they, because of their more precise and limited scope, probably restrict less speech than their content-neutral counterparts would.[42] As one of us has observed:

> Content- and viewpoint-discriminatory regulations are constitutionally pernicious, in the words of Geoffrey Stone, primarily because they "distort public debate" in our society. They "excise" particular information or messages from the marketplace of ideas and in doing so manipulate the discussion and resolution of public policy issues by the polity.[43]

Viewpoint discrimination in particular is thought to represent the greater constitutional evil:

> Viewpoint-discriminatory laws are uniquely violative of the First Amendment because they directly empower one side of a debate with weapons that are denied to the proponents of the other side. This distorts the ability

41. Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 140–41 (1992) (citation omitted).

42. *Id.*

43. Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553, 590 (1996) (citation omitted).

of the participants to fairly compete on the merits of their ideas. Justice Scalia recognizes this distinguishing quality of viewpoint-discriminatory laws in *R.A.V.* v. *St. Paul* when he argued that the state has no authority "to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."[44]

The aversion to content-discriminatory laws, while taken for granted, turns out to require a more complex explanation. Content-based laws do not create the same kind of distortion as viewpoint-based regulation in public discourse because the regulatory classification that the government employs does not distinguish directly between competing ideas or perspectives. For example, proponents of nonpolitical speech are not unfairly empowered when political speech alone is prohibited.[45] There is simply no salient conflict between political and nonpolitical speech that will be skewed by government intervention.[46]

It is true that content-discriminatory laws may involve deliberate manipulation that is intended to distort the marketplace of ideas and skew debate in favor of one side or the other.[47] But that can also be true of content-neutral laws, and it is by no means clear that content-discriminatory laws are always substantially more vulnerable to such abuses than content-neutral ones. Indeed, both content-neutral and content-discriminatory laws can be used to indirectly influence debate in a similar manner that can be easily contrasted with the direct distortion created by viewpoint-discriminatory laws. In the debate about abortion, for example, it is obviously unconstitutional to prohibit only anti-abortion messages in traditional public fora, while allowing speech supporting the right of women to have an abortion to be expressed in those same locations.[48] Yet if a law is passed prohibiting the expression of all speech relating to reproductive health issues in traditional public fora, it is far less clear that this law empowers one side of the abortion debate and disables the other. Both sides use traditional public fora for expressive purposes and are disabled by this law. Of course, if a particular park has a history of being used for one side of the debate, or is known to have a particular utility for one side's expressive activity, prohibitions on speech about reproductive health in that park may reflect an invidious viewpoint-discriminatory motive. But a content-neutral law forbidding all speech in that park could similarly be improperly motivated. Similarly, a law prohibiting speech about abortion in an area in front of the entrance of a clinic providing abortion services may have the same viewpoint discriminatory effect as a law creating a facially neutral buffer zone prohibiting all leafletting or carrying of signs near the entrance of the clinic.

If content-discriminatory laws do not involve a sufficiently increased propensity for indirect viewpoint discrimination to justify the heightened review

44. *Id*. at 591 (citation omitted).
45. *Id.*
46. *Id*.
47. *See*, *e.g*., Amar, *supra* note 41, at 143.
48. *See* Police Dep't of Chicago v. Mosely, 408 U.S. 92, 95–96 (1972). *See generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) (describing substantive and normative nature of content-based limitations).

they receive, there must be other concerns with these kinds of regulations that explain why courts subject them to more rigorous scrutiny than content-neutral laws. One possibility is that content-discriminatory regulations *do* directly manipulate public debate, but they do so in a different way than viewpoint-discriminatory regulations. Content discrimination excises information and entire subjects of discussion from public discourse.[49] While one side of a debate is not unfairly debilitated, the entire marketplace of ideas is depleted. The scope and richness of public discussion is artificially restricted. All else being equal, for First Amendment purposes, more speech, wider discussion, and new topics of analysis are always preferable to a restricted world of expression in which part of the domain of thought and speech has been placed off limits to the polity.[50] Again, put simply, more speech is better than less speech. Content-discriminatory laws are problematic for First Amendment purposes because they substantively diminish the marketplace of ideas.[51] In essence, content discrimination at the extreme threatens to shrink the unregulated, private information supermarket that provides abundant consumer choices into a state-managed convenience store that offers minimal, stale, and colorless selections.[52]

But even this account seems incomplete. In the end, examining the purpose of content-discriminatory regulations and the effect of such regulations on public debate does not provide us an adequate justification for regulating content-discriminatory laws much more rigorously than content-neutral laws. An additional piece needs to be added to the puzzle to make this argument fully persuasive. We suggest that piece is this: a constitutional regime that permits content-discriminatory regulations of speech makes it too easy for government to restrict expression. The issue here is one of process, not substance. The breadth and general applicability of content-neutral laws may make them difficult to enact because they impair the expressive activities of politically powerful groups within society. A general ban on picketing outside commercial or medical establishments may provoke sufficient political resistance from unions, for example, that the law will not be adopted. A content-discriminatory law that prohibits picketing at medical facilities only when the picketing addresses the kind of health services the facilities provide, on the other hand, will be contested by a more limited constituency.[53] Thus, by rigorously reviewing content-discriminatory laws, we prevent government from excluding politically powerful groups from the coverage of its neutral speech restrictions and, thereby, increase the political difficulty of

49. *See* Brownstein, *supra* note 43, at 600.

50. *Id*.

51. *Id.*

52. *Id.*; *see, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (explaining that government cannot sanitize the marketplace of ideas and undermine the emotive force of expression by restricting the content of speech on the basis of taste and style).

53. Bans on residential picketing, for example, often excluded labor picketing from their coverage. Such discriminatory exclusions of certain subjects of picketing were struck down in *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) and *Carey v. Brown*, 447 U.S. 455 (1980).

burdening expression in general. As a result, we promote the "more speech is better than less speech" value.[54]

We descended a bit into the weeds of content- and viewpoint-based regulation of speech to illustrate just how important, and how complex, instrumental democracy-reinforcing values are in understanding the development of the most central of doctrinal principles—the distrust of content- and viewpoint-based laws—when government seeks to regulate or suppress speech. With this analysis in mind, we can now better appreciate precisely why those same values are not implicated—or at least not implicated in the same way—when government compels rather than regulates speech.

Most compelled speech mandates involve content discrimination[55]—or at least the person or entity claiming compulsion alleges pressure to facilitate speech on a particular matter or of a particular viewpoint: very few laws that are challenged as speech compulsion place pressure on persons or entities to simply speak without regard to content of what they will say.[56] The debate-distorting concerns discussed above in the realm of content-discriminatory speech regulations, however, do not apply to the great majority of compelled speech cases, largely because the 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.[57] Compelling private actors to communicate does not diminish the scope of the marketplace of ideas. Indeed, it may actually expand it. Nor does compelling speech prevent speakers from calling attention to defects in the status quo. While the government's voice may be strong enough to influence debate on a salient issue, the question remains how compelling private actors to join in communicating the state's preferred message adds to that influence in a constitutionally significant way.

54. *See* Brownstein, *supra* note 43, at 608–09. A related, process-based argument supports the courts' constitutional preference for content-neutral laws. The broader coverage of the content-neutral law not only makes it more difficult to enact, it also suggests that the legislature's evaluation of the costs and benefits that allegedly justify the law's enactment are more worthy of respect. If a law burdens the very citizens who support its enactment by depriving them of valuable interests, the contention that the law's benefits outweigh its burdens seems plausible on its face. Certainly, we can be more confident of that conclusion than the alternative. We are rightfully dubious of the value of a law that exacts no cost from the many for the privilege of burdening the few. *See generally* Railway Express Agency v. New York, 336 U.S 106, 112 (1949) (Jackson J., concurring).

55. *See, e.g.*, Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting) (warning that "[v]irtually every disclosure law could be considered content-based").

56. Perhaps the closest analogy to a content-neutral speech regulation in a compelled speech case decided by the Supreme Court might be PruneYard Shopping Ctr. v. Robbins, 447 U.S. 74 (1980). Here, a mall owner challenged California's state constitutional mandate requiring large shopping centers to allow speakers to distribute leaflets and engage in other expressive activities on mall property. *Robbins*, 447 U.S. at 77–78. Requiring the owner to host speakers with which it or its tenants might disagree, the owner argued, constituted compelled speech prohibited by the free speech clause of the First Amendment. *Id.* at 85. In rejecting the owner's challenge, the Court did not construe the California requirement to be a content-neutral compulsion of speech subject to some form of intermediate level scrutiny. *Id.* at 87. Instead the Court concluded that the California mandate did not constitute compelled speech for constitutional purposes. *Id.* at 88.

57. *See, e.g.*, United States v. United Foods, Inc., 533 U.S. 405 (2001).

There are three debate-distorting concerns that can apply, albeit infrequently, to compelled-speech requirements. Although these concerns are somewhat distinct from the reasons why content discrimination is considered problematic in conventional free speech doctrine, the presence of these concerns, as we explain later, can certainly justify rigorous review of some speech compulsion. First, if the government's compelled message is attributed to the private speakers who are required to express it, public debate could be distorted in various ways. The audience of the compelled speech may believe that private speakers with their own independent credibility and followers support the government's position when in fact they do not do so. In a similar vein, the polity may mistakenly believe there is widespread support for the government's position if it believes that the compelled message reflects the actual beliefs of a substantial number of people required to express it. So the debate distorting consequences of the misattribution problem, as a court might call it, can be very real.

But these problems are also limited, because the great majority of compelled speech cases involve required messages that would not be reasonably attributed to the persons required to express them, either because the context makes clear that the bearer of the message does not affirmatively embrace it, or because (relatedly) the bearers of the message can easily and cheaply distance themselves from the message if they choose to do so. For example, in one of the earlier and most seminal compelled speech cases, *Wooley v. Maynard*,[58] where the Court struck down a law requiring every license plate in the state to bear the New Hampshire state motto—"Live Free or Die"—no reasonable observer would conclude that every driver of every car with a New Hampshire plate actually believed in the creed, especially since the law did not prevent a driver from adding a sticker on his car above the license plate with an arrow pointing downward containing the message: "I don't believe in this motto!"[59]

Second, compelled speech may distort debate indirectly.[60] Think of compelled speech, when there is no misattribution problem, simply as a particular

58. *See generally* 430 U.S. 705 (1977).

59. The majority opinion in *Wooley* never suggests that the message on state license plates required to be displayed on all vehicles would be attributed to the Maynards. *See id.* at 705. Justice Rehnquist's dissenting opinion emphasizes this failure in distinguishing *Wooley* from *Barnette*. *Id*. at 720–21 (Rehnquist, J., dissenting). Justice Rehnquist argued that "[f]or First Amendment principles to be implicated, the State must place the citizen in the position of either apparently to, or actually 'asserting as true' the message. This was the focus of Barnette, and clearly distinguishes this case from that one." *Id.* Without the element of attribution, the majority's compelled speech argument would extend so broadly that it would justify a challenge to the national motto "in God We Trust" appearing on national currency. *Id*. at 721–22. The majority's only response to this point was a footnote explaining that "currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator." *Id*. at 717 n.15 (majority opinion). We doubt that a unitary message on state license plates required on all vehicles is associated with (in the sense of attributed to) the owner or driver of a vehicle. A stronger distinction between the national motto on currency and a state message on the license plate of cars would be grounded on the special status and connection of cars to the personal identity of the owner in American culture.

60. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1294 (2014).

medium (private messengers) utilized by the government to get out its own message. Generally, government has the authority to speak on most every matter.[61] And it is virtually black-letter First Amendment doctrine that the Free Speech Clause of the First Amendment does not impose significant restrictions on the government's power to speak or the choices the state may make about the messages it wishes to communicate.[62] There are some limits, of course. Whether it is the free speech clause or the structure of the Constitution more generally doing the work, we generally all acknowledge that the government cannot use its voice to campaign for particular candidates for office.[63] And the equal protection and establishment clauses may also invalidate certain kinds of racist or religiously discriminatory speech.[64] Yet, the general point remains—government is given wide latitude to speak directly, particularly for free speech clause purposes, in its own voice.

Thus, the government's recognized ability and power to speak on its own behalf is a formidable and continuing backdrop that must be taken into account in explaining exactly why some kinds of compelled speech are constitutionally problematic. Under conventional free speech doctrine, the government's ability to influence public discourse through government speech is not considered to be the kind of debate distorting activity that requires judicial intervention.[65] Influencing debate by adding the government's voice to the marketplace of ideas (increasing speech) is fundamentally distinguishable from diminishing public discourse (reducing speech) by silencing private speakers and excluding their messages from the marketplace of ideas.

It is increasingly appreciated, however, that direct government speech becomes more and more problematic to the extent that it pervades society, dominates public discourse, and drowns out competing private messages.[66] In egregious circumstances, drowning out can distort almost as much as literal silencing. Thus, as the Court rightly observed in the recent case of *Matal v. Tam*,[67] although "'it is not easy to imagine how government could function' if it were subject to the restrictions that the First Amendment imposes on private speech,"[68] and "while the government-speech doctrine is [thus] important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse."[69]

61. *Cf.* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250 (2015) (explaining that "[b]ecause the State is speaking on its own behalf, the First Amendment strictures (sic) that attend the various types of government-established forums do not apply").

62. *Id*. at 2245–46.

63. *Id*. at 2246.

64. *See generally* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013).

65. *See*, *e.g.*, Matal v. Tam, 137 S. Ct. 1744 (2017) ("The First Amendment prohibits Congress and other government entities and actors from 'abridging the freedom of speech;' the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely. And our cases recognize that '[t]he Free Speech Clause . . . does not regulate government speech.' . . . '[T]he Government's own speech . . . is exempt from First Amendment scrutiny.'"). (citations omitted).

66. *Id.* at 1758.

67. *Id.*

68. *Id.* at 1757.

69. *Id.* at 1758.

Thus, it is appropriate—indeed quite necessary—to keep in mind those intrinsic, practical checks which exist that prevent government speech from getting out of hand. One inherent limit to government speech is the cost of communicating the state's message. One aspect of cost is political—a government that engages in speech can be held accountable for expressing unpopular messages. Yet if the misattribution problem mentioned above is not present, then whether the government speaks directly through its own agents and resources or by compelling private persons to convey its message, the political costs to the government will be the same.[70]

But a different analysis applies to financial and logistical costs. It may be expensive for the state to promulgate its message itself and to attract the attention of the audience it wants to reach. By compelling private parties to bear the cost of communicating the government's message, the state can avoid this intrinsic fiscal limit on its ability to overwhelm the marketplace of ideas with the state's message. Similarly, by commandeering private speakers, the state can intrude into media and venues that it might have difficulty reaching through its own expressive resources. For example, in *Wooley*, consider how many roadway billboards the government would have to buy and erect to get its motto in front of the same number of eyes it can reach by requiring every license plate to bear the state's message.[71] Thus, even absent misattribution, if a particular instance of compelled speech makes it too costless—and therefore too easy—for government to speak too much, that is an instrumental democracy-distorting issue that deserves to be taken into account.

An analogy to another area of constitutional law where system-focused and instrumental concerns are shaping cutting-edge doctrine might also be helpful here. In the recent Fourth Amendment cases[72] involving GPS-tracking and cell-phone tower site locations, the government (in defending these two means of gathering information) analogized their techniques to simply assigning a government agent to follow the suspect twenty-four seven to trace his movements in all public spaces. And such a practice would indeed generate precisely the same information as a GPS tracker or cell-phone site towers. But the Court in both instances rejected the analogy, in part, commentators suggest,[73] because technology that makes invasive surveillance so cheap—and therefore so easy for gov-

70. *Id.*

71. Wooley v. Maynard, 430 U.S. 705, 721 (1977).

72. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206 (2018) (reviewing government's collection of cell-phone location data from wireless providers and concluding that such data collection was a search that ordinarily requires probable cause and a warrant); United States v. Jones, 565 U.S. 400, 404 (2012) (reviewing police use of a GPS device to monitor a vehicle's movement for 28 days and concluding that, "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" and, consequently, violates the Fourth Amendment).

73. *See* Evan Caminker, *Location Tracking and Digital Data: Can Carpenter Build a Stable Privacy Doctrine?*, 2018 SUP. CT. REV. 411, 425, 456 n.224 (2019).

ernment to use on a wider scale—threatens privacy values much more than analogically similar but more expensive means of doing so (like around the clock police surveillance).[74]

Yet a third way compulsion of speech might distort debate and impede democratic decision-making is that, on some occasions, compelled speech requirements may burden the speakers' ability to communicate their own message. The classic illustration of this condition involves compelled speech requirements that apply only if a speaker communicates a particular message.[75] The trigger for the compelled speech is prior private speech.[76] You could think of the mandated message as a tax or sanction on that prior speech,[77] where the speakers' ability to communicate their own message is discouraged or chilled in that it is only by refraining from expressing their own message that the speakers can avoid being compelled to express the state mandated message with which they disagree.

Miami Herald v. Tornillo[78] is just such a case. Florida enacted a so-called "right to reply law" that required newspapers that criticized a candidate for election in their editorial pages to print a response by the candidate of comparable size and location to their critical commentary.[79] In striking down this statute, the Court emphasized that newspapers subject to this mandate would be less willing to publish critical commentary of electoral candidates if doing so required them to surrender control of part of their own editorial pages for the candidate's "reply."[80]

The above analysis demonstrates that while instrumental concerns can justify the rigorous review of compelled speech in some limited circumstances, there is little overlap between these largely idiosyncratic concerns and the conventional doctrinal principles supporting strict scrutiny of content discriminatory regulations restricting speech. We can see the dissonance between the instrumental concerns underlying conventional doctrine and compelled speech in other free speech areas as well. For instance, let us return to conventional doctrine concerning the regulation of commercial speech. When courts protect commercial speech against government regulation, they do not emphasize the autonomy interests of the speaker in communicating its message.[81] Instead, the focus is on

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74. *Id*. at 456.

75. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985) (holding that "an advertiser's [First Amendment] rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers").

76. *Id.*

77. *Cf.* Minn. Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 591–93 (1983) (recognizing that "[a] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action").

78. 418 U.S. 241 (1974).

79. *Id.* at 243–45.

80. *Id.* at 257 ("Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.").

81. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 646 (1985).

the instrumental benefits to the consumer audience to receive truthful information that will be useful to them in making decisions about what to purchase.[82] The core concern is that the state should not be able to manipulate consumer behavior by denying to people the information they need to make fully informed purchasing decisions.[83]

When the government compels sellers to communicate truthful information to consumers, by contrast, the instrumental shoe is on the other foot. Here, the government is trying to increase—not dampen—the amount of truthful information to be conveyed to consumers, and it is the private party resisting the mandate who is trying to limit the information communicated to consumers to manipulate their purchasing behavior. The instrumental value in more, undistorted, speech and the objective of providing consumers the information they need to make informed purchasing decisions are advanced, rather than hampered, by the speech-compelling law. Thus, according to the reasoning of the caselaw protecting commercial speech against state regulation or suppression, it is difficult to understand why compelling the communication of truthful information in commercial advertising requires any rigorous constitutional review.[84]

The review of laws involving the expression of lies is yet another area that demonstrates the stark dissonance between protecting such speech content from penalty, on the one hand, and compelling its communication, on the other. The exact parameters of the protection provided to people who lie remains unclear. In a long line of defamation cases, the courts have held that liars in many circumstances are shielded to some extent from the civil sanctions they would be exposed to under the common law of libel and slander.[85] More recently, however, in *United States v. Alvarez*,[86] the Supreme Court splintered, with a plurality of justices ostensibly rejecting the idea that laws punishing lying should be treated as a distinctive doctrinal category while a majority of justices argued either that lying was essentially unprotected or that it should be protected under some new proportionality-based standard of review.[87]

Despite this uncertainty, there is general consensus that one of the primary justifications for providing any protection at all to false statements of fact is instrumental and democracy-reinforcing—the need to avoid chilling effects.[88] The imposition of serious penalties for lying may discourage individuals from ex-

82. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

83. William S. Dodge, *Weighing the Listener's Interests: Justice Blackmun's Commercial Speech and Public Forum Opinions*, 26 HASTINGS CONST. L.Q. 165, 174 (1998).

84. *Id*. at 212, 216.

85. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) (limiting tort remedies for libel and slander, because the "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive . . .'").

86. 567 U.S. 709 (2012).

87. *Compare id.* at 722 (holding by a plurality, the Court "rejects the notion that false speech should be in a general category that is presumptively unprotected"), *with id.* at 730 (Breyer, J., concurring) (applying "intermediate scrutiny" or "proportionality" review in determining that the government interests supporting the challenged law are insufficient to justify the constitutional harm to free speech interests created by the statute).

88. *See, e.g.*, *New York Times Co.*, 376 U.S. at 271–72.

pressing arguably truthful statements out of fear that their statements may ultimately be determined to be false in whole or in part—a conclusion that would expose them to severe sanction.[89] If ever there was any doubt as to this concern, in the current world of alternative facts in which we live, the line between truth and falsity provides little security to speakers threatened with civil or criminal sanction.

Concerns of this kind about the chilling effect created by uncertainty as to how speech will be perceived as to its accuracy would seem to have little relevance to the compulsion of speech. No compelled speech case to our knowledge raises the concern that speakers may be subject to sanction because there are doubts about the consequences of their attempted discharge of the obligation to convey the state's message. While, as noted in the *Tornillo* setting discussed above, compelling speech may in certain circumstances discourage speech, it does not do so by creating uncertainty as to what the speaker may or may not say—which is the essence of the more classical chilling effect at issue in the sanctioning of lies.[90]

IV. Dignity/Autonomy Concerns Are the Foundational First Amendment Values Underlying the Rigorous Review of Compelled Speech

The preceding discussion was not intended to suggest that instrumental values alone drive all doctrine relating to the regulation of speech. Although dignitary and autonomy values are clearly secondary in most of the important cases, they do help explain some of the contours of conventional doctrine.[91] For example, content discrimination is problematic in conventional free speech doctrine not only for instrumental reasons. Restricting expression on subjects of speech the state disfavors is inconsistent with a vision of human dignity—an understanding of dignity that respects the autonomy of the individual to express and choose to hear whatever speech he or she deems worthy of expression or at least worthy of consideration. It is intrinsic to human dignity to define oneself through what one says. Content discrimination arguably offends these dignitary concerns in a way that content neutral laws do not. By enacting content neutral laws, the state does not displace the individual as the judge of whether the content of speech merits expression. Such laws treat all speech the same way and limit it in the service of goals that are not grounded in the value or lack of value of particular messages. Content discrimination, by its nature, assigns value to messages and denies the individual the right to express ideas or information on subjects deemed unworthy of discussion or too harmful to be communicated.[92] In doing so, the state necessarily denigrates individual autonomy by subordinating it to state interests.[93]

89. *See generally* Stone, *supra* note 48.
90. Miami Herald v. Tornillo, 418 U.S. 241, 257 (1974).
91. *See* Rubenfeld, *supra* note 25, at 1140.
92. Brownstein, *supra* note 43, at 593.
93. *Id.* at 601–04 (citations omitted). Content-discriminatory laws reinforce the idea that the state

Dignitary and instrumental rationales can often work in tandem.[94] But our primary point here is that, with regard to most of the conventional doctrinal rules, instrumental values dominate, and dignitary values are simply of secondary importance, the garnish offered with the main course. Certainly, the great Supreme Court free speech decisions, both majority opinions and dissents, respond to instrumental concerns and the need to maintain a robust and unfettered marketplace of ideas.[95]

This ordering is inverted when it comes to compelled speech. As we have noted earlier, there are sometimes instrumental reasons why we should frown on certain kinds of compelled speech.[96] But even absent such instrumental reasons,

> has some special role or expertise in determining the value of speech. To the contrary, as a people, we mistrust the government's evaluation of the worth of speech and its willingness to substitute its judgment for that of individuals in deciding whether speech has merit and utility. We do not trust the government to conclude for us what subjects of speech are particularly valuable or worth our attention. Moreover, we demand respect for our own choices and for our capacity to make those choices. What we say, and what we choose to see and hear, determines in an important sense who we are. That decision belongs to the individual, not the state. Determining the subjects of our discourse and the audiences we will join is part of our basic autonomy. By enacting content-discriminatory laws, the government impermissibly intrudes into the process by which people define themselves. Thus, the distinctive improper purpose motivating content-discriminatory laws is not the goal of suppressing bad ideas, but rather a paternalistic vision of the state in which citizens are reduced to the status of children.
>
> This same argument can be made regarding the instrumental value of speech for the resolution of public policy debates. We reject content-discriminatory laws because we do not trust the government to correctly evaluate what people need to know to decide how our society should be governed. The government's perspective may be biased, even if officials are not consciously aware of their own predispositions, and therefore its vision will often be more limited than the choices of an unrestrained market.
>
> A broad ban on political speech, for example, reduces sources of information available to the public and opportunities for subjecting ideas to the crucible of public discussion. While not directly viewpoint-discriminatory, a ban of this kind would have the effect of protecting the status quo by dampening political discussion in general. The problem is not so much that a ban on private political speech leaves the government free to pursue its own expressive agenda while private critics are silenced. Even if the state did not promote its own policies through government speech, prohibiting political expression would be intolerable. Expression is the primary tool that connects isolated people experiencing discontent and enables them to organize around mutual interests. A content-discriminatory ban on political expression, or political expression on a particular subject such as civil rights, blatantly interferes with and disrupts such possibilities.

Id.

94. *See* Rubenfield, *supra* note 25, at 1080, 1162–63 (arguing that government takings occur when government conscripts private property to accomplish its objectives rather than regulates private property that currently is interfering with government objectives). The takings arena is a good example of that. Just as we have a dignitary and an instrumental reason for requiring just compensation—one shouldn't be a tool, *and* government should have to pay for what it wants to do to show the thing needs doing—so too in compelled speech. Government shouldn't be able to "take" our voice and "use" it without paying a cost. *See* Rubenfeld, *supra* note 25, at 1080 (arguing that government takings occur when government conscripts private property to accomplish its objectives rather than regulates private property that currently is interfering with government objectives). When the government's expressive goal is furthered more by commandeering our voices than it would be if we didn't exist—which is true in some compelled speech settings—then it is impermissibly using us.

95. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (recognizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *see also* Abrams v. United States, 250 U.S. 616, 630–31 (1919) (insisting that "the best test of truth is the power of the thought to get itself accepted in the competition of the market" and, accordingly, "[o]nly the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command [of the First Amendment]").

96. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 257 (1974).

dignitary values would ordinarily dictate the same results in prominent compelled speech cases. For example, in *Wooley*—the New Hampshire license plate case—there was no concern for misattribution distortion or the prospect of a chilling effect on private expression.[97] There might have been a concern that the government was using the law to speak very pervasively (on all roadways) in a way that it could not otherwise financially afford—which does implicate a possibility of distortion arising from too much government speech. But imagine the law did not apply to all license plates issued in the state, but only those issued in 1976, the bicentennial of American independence. Even though the number of cars forced to bear the motto—and the pervasiveness of the government's speech—would be greatly reduced, would anyone contend the First Amendment claim would have been viewed or resolved any differently on those altered facts?

The reason the answer is "no" is that what was doing the work in *Wooley*—as even the Court at times seemed to be aware—was the autonomy and dignity interest implicated by the requirement that someone's car be turned into the government's "mobile billboard."[98]

This dignitary concern is grounded in the understanding that it is an affront to human dignity to be required to speak inauthentically.[99] Even when there is no misattribution, as is true in *Wooley* and most compelled speech cases, there is something uniquely personal about speech that renders coerced communication an intrusion into personal autonomy.[100] Individuals living with dignity must be able to control what they say.

The vision of personal dignity, which requires a prohibition against compelled speech, has distinct dimensions to it. The core concern involves the state requiring an individual to explicitly affirm a belief or fact that the commandeered individual rejects as immoral or false. Even relatively private utterances, such as compelling private prayer or oaths of allegiance, are problematic because the individual is required to violate his or her sense of self and identity.[101] Compelled public affirmations, however, arguably intensify the affront to personal dignity. Even the possibility of deceiving one's community about an individual's core beliefs is a particularly severe form of dignitary harm.

The harm to personal dignity that results from compelled speech does perhaps become more blunted when the message at issue is not explicitly affirmed by the individual, and, indeed, may not be attributed to the individual at all. But even here there is a widespread Kantian intuition that individuals can validly claim the right not to be transformed into an expressive tool to serve the state's

97. *See generally* Wooley v. Maynard, 430 U.S. 705 (1977).
98. *See id.* at 715, 717.
99. *See id.* at 714–15.
100. *Id.*
101. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943).

purpose.[102] Notwithstanding the fact that everyone can see that it is the state pulling the strings, it is demeaning to personal dignity to be the state's vocal puppet.

Certainly, the pervasive commandeering of an individual's voice would raise a serious dignitary concern.[103] Also, there may be places and activities that are recognized to be so reflective of an individual's personality and sense of self that the state's demand that they be employed as the state's messenger constitutes special dignitary harms. The commandeering of one's home, car or cell phone may fall into this category.

Moreover, it is arguably a particular affront to human dignity when individuals are required to take a side in a philosophical or public policy debate by supporting a position they oppose on moral or political grounds.[104] This dignitary harm is magnified by the lack of an important state interest that would be furthered by compelling private actors to echo the state's ideological positions.[105] The state's need to factually inform the consuming public about the risks inherent in using a product justifies the inclusion of a warning on the product.[106] The compelled speech mandate in this context makes intuitive sense. No such commonsense intuition justifies a state law requiring the posting of ideological bumper stickers on all autos driven on state roads.

So some cases do cry out for judicial intervention against the commandeering of individuals. But most state action requiring expressive activities involves much more limited and less intrusive mandates.[107] The aggrieved individuals may not be required to say anything themselves, and they will have little personal connection to the property used to communicate the compelled speech. Their objection would be the bare experience of having to facilitate or associate with a message they oppose.[108] In situations where there is considerable attenuation between the required communication of a message and the individual's sense of self or identity, the burden on personal dignity is of less constitutional significance. Why exactly is being required to facilitate the communication of a government message one disapproves of so different from being required to engage in any conduct that furthers the government's goals that the individual opposes? In a world in which individuals are required to do so many things both expressive and nonexpressive to further governmental interests, ranging from military conscription, to the myriad messages businesses must routinely communicate to clients, customers, and employees, to compliance with the mandates of civil rights laws, reasonable questions may be raised as to whether limited and attenuated compelled speech requirements raise to the level of constitutionally significant burdens. Certainly, one may argue that the harm here, standing alone, may be

102. *Cf.* Murphy v. NCAA, 138 S. Ct. 1461, 1481 (2018); Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 161 (1992) (all holding that federal government cannot treat states as puppets or implements by commandeering them to enact or enforce federal policy).

103. *See* Volokh, *supra* note 21, at 358.

104. *Id.* at 368–70 (discussing *West Virginia State Board of Education v. Barnette* and *Wooley v. Maynard*).

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

106. Volokh, *supra* note 21, at 379–82, 392–94.

107. *See* Stone, *supra* note 48, at 198; *see also* Brownstein, *supra* note 43, at 591 (1996).

108. *See Wooley*, 430 U.S. at 715.

adequately addressed by courts without subjecting the government's requirements to strict scrutiny review.

It is also crucially important to recognize that human dignity is essentially an interest of human beings. It is not an interest of large business entities or corporations, which, of course, are not human. These institutions cannot meaningfully be said to experience inauthenticity or shame the way that an individual does. Commercial integrity may have instrumental value to a business, but it is an anthropomorphic misnomer to equate the "dignity" of a public utility or a large agribusiness with that of a human person.[109]

We think Justice Rehnquist put the point well in his dissenting opinion in *Pacific Gas & Electric Co. ("PG&E") v. Public Utilities Commission of California*[110] in which he challenged the majority's conclusion that a large public utility could assert a compelled speech claim grounded in personal dignity.[111] Justice Rehnquist explained:

> This Court has recognized that natural persons enjoy negative free speech rights because of their interest in self-expression; an individual's right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in freedom of conscience.
>
> . . . .
>
> Extension of the individual freedom of conscience decisions to business corporations strains the rationale of these cases beyond the breaking point. To ascribe to such artificial entities an "intellect" or "mind" for freedom of conscience purposes is to confuse metaphor with reality.[112]

This conclusion is not inconsistent with recent cases[113] recognizing the free speech rights of corporations to commit expenditures for independent political messages supporting or opposing candidates running for election. Business corporations have speech rights for instrumental reasons: we protect their expressive activities against government suppression or censorship because these entities may have information or opinions that play an important role in public policy debate.[114] An oil company, for example, may have a voice on energy policy that others may greatly benefit from hearing; a voice that belongs in, and has a part

109. *See* Alan Brownstein, *Protecting the Religious Liberty of Religious Institutions*, 21 J. CONTEMP. LEGAL ISSUES 201, 207–18 (2013). We recognize that the Supreme Court's majority in *Burwell v. Hobby Lobby*, 573 U.S. 682, 717–19 (2014) extends the protection of religious liberty (essentially, although not exclusively, a dignitary) to a large, family owned, closely held corporation. But *Hobby Lobby* involves interpretation of a federal statute, the Religious Freedom Restoration Act, not the religion clauses of the First Amendment and it relies in considerable part on statutory canons of interpretation to do so. *Id.* at 694–95. A statute that purports to protect dignitary interests where none exist is still law binding on the courts. United States v. Lee, 455 U.S. 252, 261 (1982). While we do not have time or space to discuss *Hobby Lobby* at length in this piece, we suggest that the Court's opinion would have been far more sensible and persuasive if it had focused on the religious liberty rights of the family members who owned Hobby Lobby, rather than the "rights" of the artificial entity through which they engaged in their business.

110. 475 U.S. 1 (1986).

111. *Id.* at 26 (Rehnquist, J., dissenting).

112. *Id.* at 32–33.

113. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 315 (2010); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784–86 (1978).

114. *Bellotti*, 435 U.S. at 783.

to play in, the marketplace of ideas. Recognizing corporate free speech rights against suppression to further instrumental goals, however, does nothing to justify corporate rights against compelled speech in the name of human dignity.[115]

V. (VERY) SELECTIVE INCORPORATION OF CONVENTIONAL DOCTRINE

Although, as we have repeatedly urged, the doctrinal framework employed to adjudicate cases involving restrictions on speech cannot be applied in its entirety and without modification to compelled speech cases,[116] there are aspects of conventional free speech doctrine that can be useful to developing compelled speech doctrine and in some circumstances may be fairly easily adapted to compelled speech cases. Several examples are described below.

A. The Conduct/Speech Distinction

Perhaps most importantly, conventional free speech doctrine has respected a critical speech/conduct distinction. It is generally recognized that certain conduct is conventionally recognized as speech for free speech purposes: talking, writing, distributing leaflets, publishing books, making movies, holding rallies, parades, forming certain kinds of noncommercial organizations, etc.[117] Other conduct, such as working at a retail counter or as a food server, is not generally speech for free speech purposes, though the activity is carried on largely through verbal communication.[118] In some atypical cases, conduct that is not conventionally expressive, such as starting a fire, can be considered speech for free speech suppression purposes, as in the draft card burning and flag burning cases.[119] But

115. The free speech rights of corporate expressive organizations, the Press, are distinguishable in part because they receive distinctive recognition in the language of the First Amendment and in part because the autonomy interests intrinsic to editorial discretion overlap so substantially with instrumental concerns. Corporate religious institutions require a more complex analysis, beyond the scope of this Article. Here, the theological relationship between the individual and the groups defies any simple analysis. We are hardly alone, however, in recognizing the difficulty in grounding the protection of religious institutions on human dignitary grounds, see, for example, Ashutosh Bhagwat, *Religious Associations:* Hossana-Tabor *and the Instrumental Value of Religious Groups*, 91 WASH. U. L. REV. 73 (2014).

116. *See supra* Part II.

117. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) ("It is also true that a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative"); *see*, *e.g.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 569 (1995) ("The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression."); Joseph Burstyn v. Wilson, 343 U.S. 495, 502 (1952) ("Expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."); Lovell v. Griffin, 303 U.S. 444 (1938) (finding that the "liberty of the press . . . necessarily embraces pamphlets and leaflets.").

118. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'") (internal citation omitted); *see also* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

119. *See Johnson*, 491 U.S. at 406 (flag burning); *O'Brien*, 391 U.S. at 367 (draft card burning).

these cases invoke extremely lenient review unless the state is prohibiting the conduct to suppress its expressive meaning—a very rare occurrence.[120]

Conversely, just as the regulation of conduct that is not conventionally recognized to be expressive can raise conventional free speech concerns, it is also the case that expressive activities that may be formally characterized as speech will be considered conduct rather than speech for First Amendment purposes and, accordingly, the regulation of such activities will not receive free speech review.[121] Indeed, this is a fairly common situation. Because speech and communication is an intrinsic aspect of so many economic and professional activities, it would be difficult, if not impossible, for government to engage in much of what is commonly accepted as legitimate regulatory discretion if the subject of the regulation was not characterized for constitutional purposes as conduct, rather than speech.

Thus, for example, it is generally recognized that the government can regulate professional conduct even when that conduct is conventionally communicative in nature without raising free speech concerns.[122] A physician, for example, can be sanctioned for giving a patient advice that is inconsistent with what sound medical practice requires.[123] An attorney can similarly be sanctioned for failing to obey rules at trial that limit his or her ability to speak.[124]

These speech/conduct understandings and conventions should be equally applicable in compelled speech cases. To state the principle most simply, the government should be able to compel conduct that it can freely regulate without implicating free speech guarantees. Thus, to build on the court's reasoning in *Rumsfeld v. Forum for Academic & Institutional Rights ("FAIR")*,[125] if the government can regulate the recruitment and hiring practices of employers without implicating free speech concerns about suppressing or restricting speech because the recruitment and hiring of employees is considered to be conduct and not speech,[126] it can also compel support for the recruitment and hiring of employees without implicating the prohibition against compelled speech.

Similarly, to cite a commonplace example relating to professional practice, the tort doctrine of informed consent requires physicians to provide sufficient information to patients when they obtain the patient's consent for treatment.[127] A failure to provide such information exposes the physician to tort liability for undisclosed adverse outcomes that may result from the treatment.[128] No cases

120. *Compare Johnson*, 491 U.S. at 406 (prohibiting symbolic speech, flag burning, to suppress its message), *with* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (applying lenient review to prohibition of symbolic speech, sleeping in a public park, for reasons unrelated to suppressing the message being communicated).

121. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 389 (1992); *O'Brien*, 391 U.S. at 376.

122. Volokh, *supra* note 21, at 389–94.

123. *Id.* at 390–91.

124. *Id.*

125. 547 U.S. 47, 65–66 (2006).

126. *Id.* at 66.

127. *See* Cobbs v. Grant, 502 P.2d 1 (Cal. 1972).

128. *Id.*

subject these traditional informed consent tort law requirements to free speech scrutiny even though they require physicians to engage in communicative conduct. This understanding only applies to speech that is part of the treatment of the patient, however.[129] The government cannot freely compel speech that falls outside of the physician/patient relationship any more than it can regulate or suppress speech that falls outside of the physician/patient relationship.[130]

This speech/conduct distinction has become controversial in recent years. Statutes requiring physicians to provide information to clients seeking abortion services arguably extending beyond what the medical profession considers to be medically necessary or appropriate have been challenged on compelled speech grounds.[131] As we will discuss shortly, some of the cases decided last term by a deeply divided Court might be criticized for eroding this distinction.[132] We maintain, however, that a robust commitment to recognizing conduct as regulable conduct for free speech purposes, notwithstanding the fact that the conduct involves communication between parties, is a critical border that needs to be maintained.

Respect for constitutional constraints is predicated on the recognition that democratic and political decision-making is the primary mechanism for resolving public policy disputes under United States constitutional law.[133] To maintain the primacy of democratic decision-making, the scope of substantive constitutional controls on the judgment of the political branches of government must be limited. In most circumstances, private choices and political deliberation, not constitutional adjudication, are the means by which competing interests are reconciled, resources are allocated, and values are identified and implemented. Government has to have the discretionary authority to do its job. The Constitution does not prevent it from doing so.[134]

Let us be clear here. We absolutely recognize the importance of the courts protecting substantive rights. But if those rights are defined too expansively, the Court displaces too much of the decision-making power that belongs to the people. Democracies cannot, should not, and will not surrender that level of decision-making to courts.

129. *See*, *e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) ("To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.").

130. *See, e.g*., Pickup v. Brown, 728 F.3d 1042, 1053–56 (9th Cir. 2013).

131. *See, e.g*., *Casey*, 505 U.S. at 833; Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

132. The majority's arguments suggesting a narrow limiting of the government's ability to restrict or compel professional speech in *NIFLA* are the most disturbing aspects of a generally unpersuasive opinion. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2371.

133. *See supra* note 41 and accompanying text.

134. *Id.*

B. The Nature of the Regulation, The Location of Speech, and The Kind of Speech

As explained previously, conventional free speech doctrine considers the nature of the regulation in determining the appropriate standard of review to apply.[135] Are any of these distinctions among different kinds of regulations useful in adjudicating compelled speech cases? As noted, the category of content-neutral regulations, so useful for conventional doctrine, is largely irrelevant to compelled speech cases.[136] Compelled speech mandates are nearly always content based.[137] Similarly, the fact that compelled speech involves specific content adds little to the doctrinal framework. The primary reasons why content discrimination is problematic for conventional speech doctrine do not apply in the compelled speech context.[138]

There is also the question of whether the state compelling the expression of an ideological message or a particular viewpoint on a disputed issue is analogous to viewpoint discriminatory laws in conventional doctrine and requires equally rigorous, strict scrutiny review. Viewpoint discrimination is considered the most problematic kind of regulation employed to suppress speech because of its capacity to distort debate.[139] It is much less clear that prohibiting the state from compelling the expression of a viewpoint furthers the same instrumental goal. Putting aside the limited circumstances in which compelling speech chills expression or would be attributed to a private speaker as the speaker's own message, or a situation in which the state's compelled speech mandate is so pervasive as to create risks of dominating debate or drowning out private voices, the distorting effect of compelling the expression of particular viewpoints is uncertain. The state is constitutionally permitted to use its own resources to communicate support for a particular viewpoint, notwithstanding the extent to which doing so will influence debate.[140] Ordinarily, not much more distortion will result when the state requires private actors to express the same message it can proclaim on its own behalf.

It may be, however, that dignitary, as opposed to instrumental, concerns justify the rigorous review of the state compelling ideological or viewpoint specific messages. As suggested above, it may be a particular affront to human dignity when individuals are required to take a side in a debate by supporting a position they oppose on moral or political grounds.[141] On the other hand, mandating *any* statement with a normative dimension to it could be construed to be viewpoint discriminatory in a formal sense.[142] Even fact-based warnings about the need to use or to refrain from using various products reflect a position that could

135. *See* cases cited *supra* note 17.
136. *See supra* Part II.
137. *See supra* note 56 and accompanying text.
138. *See supra* notes 57–66 and accompanying text.
139. *See supra* Part III.
140. *See supra* note 65 and accompanying text.
141. *See supra* note 104 and accompanying text.
142. *See supra* Part III.

be opposed. Someone who believes that smoking cigarettes is not dangerous to a person's health because the positive feeling experienced by smoking outweighs the health risks associated with doing so may be a fool, but we would characterize a government ban on pro-smoking arguments to be viewpoint discriminatory and subject it to strict scrutiny review. Does this mean that requiring health warnings to be posted on cigarette packages should also be reviewed under strict scrutiny?

We suggest that formal viewpoint discrimination should not be all that relevant, and certainly much less determinative, of the standard of review to apply in compelled speech cases than in conventional doctrine. What may be more significant for compelled speech purposes is 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. These factors focus more on the particular message embodied in the speech, however, rather than the characterization of something as "viewpoint based."[143]

In this regard, arguably, compelling political or ideological speech should receive particularly rigorous review. For example, compelling speech relating to legislation under consideration by Congress or speech relating to left-wing or right-wing ideological principles should be beyond the state's power. The assumption here is the predicate of our system of government is one of popular sovereignty. The people determine their political will and expect their representatives to be responsive to those independently derived positions and principles. Empowering the state to compel the polity to express the state's positions demeans the people individually and collectively by superimposing the government's voice over that of the people.

It should come as no surprise that we feel the conventional categories of fully protected, lesser protected, and unprotected speech do not translate particularly helpfully into compelled speech doctrine. Instead, a different analysis altogether is called for. The conventionally recognized kinds of unprotected speech should provide the government no flexibility or discretion when it comes to compelling speech.[144] We simply cannot imagine anyone arguing the state has authority to compel a person to express threats, obscenity, fighting words, or the incitement of imminent unlawful conduct.

A similar point is vividly illustrated by the treatment of lies. In reviewing laws that restrict speech, laws that burden truthful expression are more dangerous and pernicious than laws that restrict falsehoods.[145] Truth, after all, is more valuable to the marketplace of ideas than lies. Accordingly, laws that suppress truthful statements should ideally receive more rigorous review than laws that restrict lies.

The opposite holding applies in compelled speech cases. While there may be some cost to human dignity in some circumstances when individuals are required to state truthful statements that they would rather not express, surely the

143. *See supra* Part III.
144. *See generally supra* Part II.
145. United States v. Alvarez, 567 U.S. 709, 746 (2012) (Alito J., dissenting).

affront to personal dignity is magnified when individuals are required to express falsehoods and to lie at the state's command. Further, the state will rarely have an important justification for compelling people to lie to their friends and neighbors or to the public at large. Thus, for compelled speech purposes, mandating the expression of falsehoods should receive more rigorous review than requiring people to state the truth.

Finally, there may be reasons to consider the location where speech occurs in some compelled speech cases. Compelling speech in certain places may amplify the dignitary harm caused by the government's mandate. Arguably, compelling speech in places particularly identified with an individual's personality, such as the home, cell phone, or even his or her car may merit some level of review.[146] Similarly, compelling speech in very public and visible venues may increase the sense of alienation and personal indignity experienced by compelled speakers. Also, for instrumental reasons, commandeering speech in parks and streets substantially magnifies the state's voice at no cost to its resources. There seems little reason, however, to try to superimpose contemporary forum analysis on compelled speech cases.[147]

VI. THE OUTLINES AND APPLICATION OF A NEW COMPELLED SPEECH DOCTRINAL FRAMEWORK

So, if we know what compelled speech doctrine should not resemble, what *should* it look like? Obviously, our observations in this regard are somewhat provisional. But we do think that, like conventional doctrine, compelled speech doctrine should employ a multifactor, nuanced framework to guide the adjudication of cases. These factors taken together will provide a template courts can utilize

146. *See generally* Fisher v. Carrousel Motor Hotel Inc., 424 S.W.2d 627, 629 (Tex. 1967) (discussing how tort of battery protects dignity of the individual by supporting claims based on contact with a person's clothes, objects he is carrying, or other property associated with his personal integrity).

147. We do not have space in this Article to consider tangential free speech doctrine in any depth, but a few tentative observations may be useful. The regulation of speech in public schools has developed its own conventional doctrinal framework under the holdings of two seminal cases, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 265 (1988). Pursuant to these decisions, school authorities have more constitutional authority to regulate speech in school sponsored activities than in non-school sponsored activities. *Kuhlmeier*, 484 U.S. at 271. That distinction may well extend into compelled speech doctrine. Even in school sponsored activities, however, it would be necessary to distinguish compelled speech cases where the speech would be attributed to the student—as in the flag salute case—for more rigorous review. Also, with regard to government employment, in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), the Court determined that government employees receive no protection under conventional free speech doctrine from government restrictions on any speech they express as part of their official duties. Compelled speech doctrine might well track this holding. The government can dictate the script its employees must express in fulfilling their professional responsibilities. Off the job, however, the Court has developed a complex framework providing the government considerable authority as an employer to control the speech of its employees when the speech at issue is not a matter of public concern and restrictions on employee speech are necessary to promote the efficient operation of government services. *Id.* at 418 (summarizing generally the Court's approach to constitutional protections of public employees' speech). It is not clear to us that a similar analysis should be adopted under compelled speech doctrine. The government has no obvious special justification for compelling what off duty employees must say—other than the disclaimer that they are not speaking for the government when they express their views in public.

to differentiate between different standards of review to be applied to different case scenarios. In some circumstances, a particular factor may be dispositive (as it is when courts review viewpoint discriminatory laws under conventional doctrine), but in many cases multiple factors will have to be considered. Thus, under conventional doctrinal rules, content discrimination, standing alone does not determine the appropriate standard of review to apply.[148] Courts must also take into account the location where the regulated speech is expressed and the kind of speech being regulated. A similarly complex analysis of multiple factors will apply often in compelled speech cases under the model we propose.

In particular, we think the presence of the following instrumental factors ought to incline a court to apply strict scrutiny:

- The prospect of meaningful misattribution/distortion, especially where the law prohibits the speaker from distancing himself from or disclaiming the state's message or where the costs of doing so are high;
- The presence of a chilling effect because the compulsion of speech is itself triggered by the exercise of speech rights; and
- The government's attempt to promote a political or purely ideological (or, worse still, a partisan) message unrelated to the compelled speaker's conduct or activities.

Moving beyond these instrumental concerns, strict scrutiny is supported if human dignity and personal autonomy interests are substantially impaired on account of factors such as:

- The personal nature of the location or medium on which the government is intruding—an individual's person, clothing, home, car, phone, etc.;
- The inherently expressive nature of the activity on which the government is imposing its message—publishing, writing, holding demonstrations, lobbying, parades;
- The intrinsically offensive content of the message such as requiring someone to express obscene or vulgar statements or obvious lies; and
- The direct and personal affirmation of the government's message as is the case when public school children are required to pledge their loyalty to the state.

The following factors ought to incline a court to apply less rigorous review, some form of intermediate level scrutiny:

- The government compels the expression of truthful noncommercial information or apolitical suggestions to further a legitimate regulatory purpose and the identity or activity of the compelled speakers is substantially related to the message they are required to communicate (*e.g.*, if the state license plates in *Wooley* contained a driving related statement such as

148. *See supra* Section V.B.

"Keep an eye out for road workers" or "Share the Road" rather than "Live Free or Die");[149] and

- There is some likelihood that government can unduly dominate public discourse (or in egregious circumstances potentially drown out private speech) by using compelled speech pervasively to greatly reduce the costs government would otherwise bear if it spoke through its own agents or instrumentalities.

Here, we think intermediate level review should operate more like the multifactor balancing test applied to content neutral speech regulations restricting speech (which asks among other questions whether there are alternative avenues of communication available to the regulated speaker), rather than the more generic inquiry of whether the challenged law is substantially connected to an important state interest. For compelled speech cases, one key set of questions to ask under intermediate scrutiny would focus on the relative advantages achieved by government and the costs imposed on private individuals and associations under a compelled speech mandate in comparison to benefits and costs of the government speaking through its own agents and with its own resources. Thus, one prong of our proposed test would ask whether the state substantially furthers its legitimate goals by commandeering private individuals to communicate its message in comparison to what could be achieved by the state speaking itself. A second prong would examine whether the state's use of compelled speech substantially distorts public discourse more than the government's proclaiming the same message directly using its own agents and resources. The third distinctive prong would evaluate the dignitary harm resulting from compelling private participation in the expression of the government's message in comparison to whatever offense might result from the government's message, without regard to how it was communicated.[150]

Factors suggesting that a deferential reasonableness standard of review (akin to the standard applied to viewpoint neutral speech regulations of nonpublic fora under conventional doctrine) should generally include:

- Government regulations that are not directed at communicating a message or even requiring expression per se, but instead simply regulate conventionally nonexpressive conduct in circumstances that might on some limited occasions implicate expression;[151]

149. Wooley v. Maynard, 430 U.S. 705, 714–17 (1977).

150. Thus, for example, in *NIFLA*, we might ask whether the pregnancy crisis clinics would have been equally or almost equally offended by a government employee standing near the entrance of the facility informing its clients of the availability of low or no-cost family planning and abortion services available through public programs as it allegedly was by the requirement that the clinics communicate this same information themselves by posting a placard in their lobbies. 138 S. Ct. 2361 (2018). The former means of communication, of course, would not involve compelled speech.

151. The enactment and enforcement of the civil rights law prohibiting discrimination in places of public accommodation at issue in the Masterpiece Cakeshop case would be an example of this kind of regulation. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

- The regulated activity is barely communicative and the conduct dimension of the activity dominates its alleged expressive aspects;[152] and
- Situations where the relationship between the allegedly compelled speaker and the means by which the message is communicated is attenuated.[153]

Minimum rationality review ought to apply when:

- Government requires individuals to express information about themselves in order to fulfill government functions (*e.g.*, the state needs applicants for benefits to provide information to it, passengers on flights may have to provide TSA agents various information, police officers can ask a driver to provide information at a traffic stop etc.); and
- Government regulates large for-profit corporate entities to express a message where the only harm would be dignitary in nature.

A. Confirming or Questioning Holdings of Past Precedent

While a comprehensive review of the reasoning of each and every major compelled speech case the Court has handed down over the last seventy-five years is not possible here given space limitations, applying the observations and framework discussed above, albeit in summary form, to prominent compelled speech rulings will help to illustrate where our approach would take the Court.

The earliest—and perhaps easiest—Supreme Court case prohibiting compelled speech was the 1943 ruling in *West Virginia State Board of Education v. Barnette*,[154] where the Court struck down a school requirement that all teachers and students participate in the salute to the flag and the recitation of the pledge of allegiance.[155] We say the case was quite easy because it raised very substantial dignitary and distortion concerns.[156] At a minimum, strict scrutiny should apply and render unconstitutional and inconsistent with human dignity a requirement forcing individuals to personally, publicly, and inauthentically affirm an explicit belief to which they may not adhere. Because the pledge is a personal affirmation of loyalty and belief, its expression unavoidably conveys the message that the persons pledging loyalty are committed to what they are saying (raising

152. *Masterpiece Cakeshop* illustrates this factor as well. Baking and selling a cake is essentially conduct, not speech. *See generally id.* Much like a welcome mat, any message conveyed by the use of the mat (or a celebratory cake) reflects the expression of the purchaser, not the provider who creates and markets the product.

153. For example, a public university might impose a student activities fee on all students. The fees would be used to support student clubs and are allocated on a viewpoint neutral basis. One club elects to invite a religious speaker to deliver a lecture at one of its meetings. The connection between the student's payment of her fees and the religious message of the lecturer invited at the discretion of a subsidized club is too attenuated to warrant serious review as compelled speech. *See generally* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).

154. 319 U.S. 624 (1943).

155. *Id.* at 642.

156. *Id.* at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.").

misattribution problems). And it is an affront to human dignity for an individual to be coerced into inauthentically expressing a commitment to a political, moral, or religious position of importance to them.[157]

The 1977 case of *Wooley v. Maynard*[158] described earlier, provides another important step and extension of the protection provided against compelled speech. Here too, we agree with the Court's holding, but suggest that the case merits much more analysis than it received in the majority opinion.[159] The case includes (but does not analyze) several factors that deserve to be taken into account in adjudicating compelled speech cases.[160]

The majority opinion explained with considerable rhetorical force that the state could not require individuals to use their private property, their car, as a "mobile billboard" for the state's ideological message.[161] The First Amendment protects the right of individuals to refuse to foster a state message that they deemed morally objectionable.[162] Under strict scrutiny review, the regulation could not be constitutionally applied to dissenters, such as Mr. Maynard.[163]

The Court suggested that compulsion here was a less serious infringement of freedom of speech than the flag salute mandate at issue in *Barnette*, because the latter required an affirmative act while bearing the license plate motto on one's car was passive in nature.[164] The same core interest was invaded in both cases, however, and the difference between the two cases was a mere matter of degree—which did not require a different analysis or conclusion.[165] The Court

157. The same dignitary harm analysis explains why the Court was correct to invalidate laws that required a broad range of prospective government employees to swear a loyalty oath as a condition of public employment. *E.g.*, Keyishian v. Bd. of Regents of the State Univ. of N.Y., 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964); Wieman v. Updegraff, 344 U.S. 183 (1952). Given the array of jobs to which a loyalty oath requirement attached, it is hard to avoid the conclusion that the government was interested not just in ensuring faithful compliance of job duties, but was using the occasion of application for public employment as an opportunity to promote its own messages about patriotism. (Loyalty oaths for key, high-level government officials, like the President, who is required by the text of the Constitution to affirm fidelity to the Constitution, present a different question.) Further, as in *Barnette*, when a broad class of would-be public employees are required to affirm their loyalty, the government is able to disseminate its message very broadly and cheaply, and in a way that risks misattribution, such that democratic distortion concerns weigh heavily in judicial review of the government's actions.

158. 430 U.S. 705 (1977).

159. *Id.* at 715 ("The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.").

160. *Id.* at 714–17.

161. *Id.* at 715.

162. *Id.*

163. *Id.* at 716–17.

164. *Id.* at 715. *See generally* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

165. *Compare Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."), *with Wooley*, 430 U.S. at 715 ("Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life – indeed constantly while his automobile is in public view – to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.").

also noted that for most individuals driving a car was a necessity of daily life. It did not elaborate on the relevance or importance of that reality.[166]

The scope of the case's holding seems never to have been considered by the majority. To Justice Rehnquist and Justice Blackmun, writing in dissent, however, the open-ended reasoning of the majority opinion could lead "to startling and . . . totally unacceptable results."[167] What limits applied to the *Wooley* analysis? Might a similar compelled speech claim be asserted against the placement of the national motto "In God We Trust" on United States currency, which people also have to use on a daily basis?

We suggest that a more persuasive analysis of the issue in *Wooley* would have focused on several key factors we have highlighted in this Article. The fact that *Wooley* was not required to explicitly express or affirm the state's message and that the message on the license plate would not be attributed to the car owner by any reasonable observer was a significant distinction that, standing alone, might well justify a less rigorous standard of review than the strict scrutiny the Court applied.[168]

Other considerations, however, offer substantial support for the Court's conclusion. One important feature of the *Wooley* mandate was the lack of any connection between the state's message and the activity to which the state's message was coercively attached.[169] What does "live free or die" have to do with operating a car? One may certainly wonder whether *Wooley* would have been a different and harder case if the license plate was required to communicate a message relating to driver safety, such as "drive safely," "watch your speed," or "report reckless drivers to the police." Relatedly, the state's message was purely ideological and lacked any meaningful, utilitarian justification.

In part to respond to the dissent's concern about slippery slopes, we would have highlighted the individual personal autonomy interests imbued in an individual's choice about decorations and messages displayed on a person's or family's car.[170] A car in United States culture is often an important expression of individual personality to which personal dignity interests attach. Moreover, the widespread and pervasive communication of the state's message through the license plate requirement would also be relevant. As we explained earlier, the government's use of private parties to communicate a message broadly at little or no cost is a matter of concern, at least enough to trigger intermediate scrutiny review.[171] Here is the relevance of the ubiquity and necessity of the automobile in modern life—a fact the Court mentioned but never linked to any First Amendment principle.[172]

166. *Wooley*, 430 U.S. at 715.
167. *Id.* at 722 (Rehnquist, J., dissenting)..
168. *Id.* at 715 (majority opinion).
169. *Id.*
170. *Id.* at 722 (Rehnquist, J., dissenting).
171. *See supra* note 150 and accompanying text.
172. *Wooley*, 430 U.S. at 715 ("As a condition to driving an automobile – a virtual necessity for most Americans – the Maynards must display "Live Free or Die" to hundreds of people each day.").

In other cases, however, both the Court's holdings and the reasoning supporting them provide some solid material on which to ground doctrinal development. Perhaps the Court's strongest and best reasoned response to important instrumental concerns about compelled speech is its unanimous opinion in *Miami Herald Publishing Co. v. Tornillo*, which invalidated Florida's right-of-reply statute.[173] As noted, the challenged law provided that a candidate for office criticized in the editorial pages of a newspaper could demand that the newspaper print the candidate's response of equal length to the criticisms directed at him free of charge in a conspicuous location in the paper.[174]

The Court grounded its holding on two anchors.[175] First, the burden of having to print a reply which they would not choose to publish absent the compulsion of state law operated as penalty on the editorial decision of the newspaper to criticize the candidate.[176] To avoid that penalty, the newspaper editors "might well conclude that the safe course is to avoid controversy" and to forbear from printing criticisms of candidates for office in the first place.[177] This chilling effect on political discourse is anathema to free speech values.[178]

Second, the Court recognized the autonomy of newspaper editors and the editorial discretion they must be free to exercise in determining what to print on the newspaper's pages.[179] The right of reply statute intruded into that autonomy and granted the state some limited control over editorial decision-making.[180] This interference with "editorial control and judgment" was fundamentally inconsistent with the guarantee of a free press.[181]

We think *Tornillo*'s insights help explain and support the Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[182] a 1995 case striking down the application of Massachusetts's public accommodations law to require the organizers of the Saint Patrick's Day Parade to include a parade contingent of who sought to participate as an identified cohort of gay marchers. The fact that the public accommodations law at issue is generally directed at conduct rather than speech and does not require the communication of any explicit message would, standing alone, support a deferential, reasonableness standard of review.[183] Parades, like newspapers, however, are inherently expressive activities. Further, the risk of misattribution was significant and the organizers' ability to distance themselves from the group who were marching in the parade to celebrate gay pride was somewhat limited and awkward. Indeed,

173. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 249 (1974).
174. *Id.* at 244.
175. *Id.* at 256–58.
176. *Id.* at 256–57.
177. *Id.* at 257.
178. *Id.*
179. *Id.* at 257–58.
180. *Id.* at 258.
181. *Id.*
182. 515 U.S. 557, 561, 568 (1995).
183. *See id.* at 567–68.

the risk of unavoidable misattribution here had the potential to chill the organizers' speech by persuading them that their only resort, if their lawsuit was unsuccessful, would be to cancel the parade. The organizers were a group of noncommercial individuals, not a large corporation, with human dignitary interests that deserved respect.[184] Thus, the instrumental and dignitary concerns overwhelmingly counseled in favor of strict scrutiny.

Another case we find relatively easy (and correctly decided) is the *Rumsfeld v. FAIR*[185] ruling alluded to earlier. While the opinion failed to engage some prior cases in a serious way, the holding was clearly correct. At issue in *FAIR* was the constitutionality of a federal law providing that any college or university which denied military recruiters access to their facilities or provided access less favorable than the access provided to other recruiters would lose access to federal funding for which they would otherwise be eligible.[186] The law schools argued the law violated the First Amendment because it compelled them to host and provide resources to military recruiters—who discriminated in hiring against gays and lesbians.[187] Discrimination against gays and lesbians in hiring directly conflicted with law school policies prohibiting such discrimination.[188]

The Court, we think correctly, rejected the law school's compelled speech and association arguments.[189] This is a case that we argue should have been adjudicated under a deferential reasonableness standard or minimum rationality review. Most importantly, the regulation took the form of mandating certain conduct (providing access for employment interview sessions) with an extremely attenuated relationship to expression.[190] A law requiring the schools to provide access to military recruiters did not require the law schools to say anything. Put simply, recruiting and hiring law school graduates is transactional conduct undertaken by law firms, businesses, the government, and the military. Compelling the law schools to foster the military's recruitment activities by providing informational and logistical support does not constitute compelled speech or association.

In addition, the law schools challenging the law were large impersonal, corporate entities with limited dignitary interests.[191] Instrumental concerns were also negligible. There was no chilling effect. The law schools were being regulated not because of any prior expression in which they had engaged (all law

184. *Id.* at 560; *see also* Vikram Amar & Alan Brownstein, *A Different Take on the Supreme Court's Recent Decision Concerning Law Schools' First Amendment Rights and Campus Military Recruitment*, FINDLAW (Mar. 17, 2006), https://supreme.findlaw.com/legal-commentary/a-different-take-on-the-supreme-courts-recent-decision-concerning-law-schools-first-amendment-rights-and-campus-military-recruitment.html ("But unlike the teaching of classes, the facilitation of post-graduation employment doesn't trigger the kind of dignitary, autonomy interests that are present in cases like *Wooley* and *Miami Herald*.").

185. 547 U.S. 47 (2006).

186. *Id.* at 51, 55.

187. *Id.* at 53.

188. *Id.*

189. *Id.* at 64–65.

190. *Id.* at 65–66.

191. *Id.* at 64–65 (citation omitted); *see also* Amar & Brownstein, *supra* note 184 ("But unlike the teaching of classes, the facilitation of post-graduation employment doesn't trigger the kind of dignitary, autonomy interests that are present in cases like *Wooley* and *Miami Herald*.").

schools, not just those opposed to the military, were subject to the requirement). Moreover, there was no misattribution problem—law schools could easily and cheaply distance themselves from the policies of the military which they opposed. Finally, the government was trying to hire employees—not use law schools as a cheap way of promoting any particular government message, other than the generic idea that the military seeks to hire legally trained employees.[192]

A similarly easy case, also implicating in our view a deferential reasonableness standard of review, involving the alleged compelled speech of individual students rather than colleges themselves, is *University of Wisconsin v. Southworth*.[193] Here, the Court upheld the imposition of a student activity fee on undergraduate students, the proceeds of which were then given to various registered student organizations to support their varied student activities.[194] Because the money was distributed without regard to the viewpoint of the student organizations, there was no distortion concern.[195] Further, the fact that the payment of money had only an indirect and attenuated connection to the ultimate use of the money by student organizations for their expressive and nonexpressive activities negated any risk of misattribution.[196] This attenuation mitigated any dignity affront as well. If the student activity fee was wrapped into a general tuition payment, and distributed to student groups by the campus administration, it is difficult to understand why a student could claim that the use of these funds by student groups was any more of a constitutionally cognizable affront to their dignity than the use of the funds for teaching and research purposes which the students deemed morally objectionable. Separating out the student fees from other tuition payments should not alter the constitutional analysis.

The Court also reached the right result in *PruneYard Shopping Center v. Robbins*.[197] The Court there rejected a compelled speech challenge to a law that required a shopping center to permit leafletting on its grounds.[198] The government was not promoting any particular message (let alone an ideological one).[199] The varied messages of private individuals distributing leaflets or soliciting signatures on petitions on wide ranging subjects would not typically be attributed to the owners of a large shopping center. Further, the shopping center owner could easily counter and distance itself from any messages with whom it disagreed, thus, there was no real risk of misattribution or distortion. Nor would the shopping center owner have a dignitary claim, since it was a large commercial enterprise.[200] We would thus apply a deferential reasonableness review to uphold the law against First Amendment challenge. Requiring a homeowner to permit leafletting on her property would be a different matter, because of the distinctive

192. *See* Amar & Brownstein, *supra* note 184.
193. 529 U.S. 217 (2000).
194. *Id.* at 234.
195. *Id.*
196. *Id.* at 240 (Souter, J., concurring).
197. 447 U.S. 74 (1980).
198. *Id.* at 88.
199. *Id.* at 87.
200. *Id.* at 83.

dignitary interests of the individual and the special sphere of personal expressive autonomy we recognize in one's home.[201] Recognizing that difference supports the kind of multifactor analysis we are proposing in this piece.

Other cases are decidedly wrong in their outcomes. *PG&E v. Public Utilities Commission of California*,[202] for example, from which we quoted dissenting language earlier, seemed not to appreciate the teaching of *PruneYard* when it struck down a requirement that a public utility allow a public interest outfit to include mailers in the billing envelopes the utility sent out to its customers.[203] There were no discernible distortion effects of the law—despite the majority's argument to the contrary, PG&E was not chilled from billing or communicating with its customers.[204] Nor was there any likelihood of misattribution. Readers of the public interest group's newsletter could not plausibly have understood it to be communicating PG&E's message, and PG&E could easily have disclaimed any responsibility for the content.

Perhaps of most importance, the Public Utilities Commission ("PUC") concluded, and the Court did not dispute, that the ratepayers of California, not PG&E, owned whatever space in the billing envelope was available to distribute messages along with PG&E's billing statement.[205] As the representative of the ratepayers, it is difficult to understand why the PUC should be constitutionally prohibited from using the ratepayers' own space to provide them relevant, albeit sometimes critical, information about PG&E's operation. Yet, if the PUC could communicate to ratepayers in its own governmental voice without violating compelled speech prohibitions, there seems no basis for arguing that delegating this speech opportunity to a public interest group somehow created a greater risk of unduly influencing the polity than what would occur if the PUC, the government, spoke with its own voice.

Finally, PG&E suffered no constitutionally cognizable dignitary harm.[206] PG&E is a heavily regulated, commercial, public utility. It has no human dignitary interests warranting protection under the free speech clause of the First Amendment. Accordingly, we suggest that the Court should have applied deferential reasonableness review or minimum rationality review and ruled in favor of the government in this case.

Another case whose outcome we disagree with is *United States v. United Foods, Inc*.[207] There the Court struck down assessments placed on mushroom producers to be paid to an industry council organized by the Department of Agriculture for use in a generic advertising campaign to promote mushroom consumption and sales.[208] Here again, it is difficult to understand how the alleged

201. City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994); Stanley v. Georgia, 394 U.S. 557, 568 (1969).
202. 475 U.S. 1 (1986).
203. *Id.* at 12, 20–21.
204. *Id.* at 26 (Rehnquist, J., dissenting).
205. *Id.* at 5. (majority opinion)
206. *Id.* at 35 (Rehnquist, J., dissenting).
207. 533 U.S. 405 (2001).
208. *Id.* at 415–16.

compelled speech in this case causes any greater distortion than a parallel advertising campaign speaking in the government's own voice. Clearly, the government could impose an industry wide tax on mushroom producers and use all or part of the proceeds of the tax to promote the consumption of this product. Misattribution is unlikely in either scenario, but if a particular producer was concerned about such a possibility it could relatively easily distance itself from the generic advertising campaign. Obviously, the government was not engaged in any political or ideological messaging through this program (let alone doing so too cheaply). Put simply, we do not see that any instrumental values were compromised by the government's scheme. Moreover, even if one could stretch a producer's reluctance to participate in generic advertising to implicate dignitary concerns, mushroom agribusinesses, like the public utility in PG&E, do not have human dignitary interests and do not suffer dignity harms the way that individuals do. We would have rejected the compelled speech claim under rational basis review.[209]

Perhaps the most dubious case in recent decades is *Janus*,[210] where the Court held last year that Illinois could not require public employees to provide financial support to public sector labor unions even if the funds at issue were earmarked exclusively for collective bargaining and related activities and could not be deployed for political lobbying or partisan electoral contributions.[211]

Before we explain why we would argue that this case was wrongly decided, let us first look at *Janus* to see how it vividly illustrates the primary weaknesses of the Court's current doctrinal vacuum. Justice Alito's majority opinion spends just over a single page in explaining why the Illinois law at issue implicated the First Amendment such that an "exacting" or "strict" scrutiny standard of review should be applied.[212] (The Court never decided between the two, finding that the Illinois law failed both tests.) The Court's justification for its conclusion that a valid compelled speech claim was asserted in this case, and we are not exaggerating here, consisted of: its observation that freedom of speech includes the right to refrain from speaking at all (quoting and citing *Wooley*, *Barnette* and several other cases, most of which are inapposite, in a boilerplate way); its illustration of this point by a hypothetical in which Illinois "required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major parties"; an assertion that "forcing free and independent individuals to endorse ideas they find objectionable is always demeaning" which is why mandating "involuntary affirmation" is impermissible; and a quote from Thomas Jefferson indicating that "to compel a

209. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) and *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550 (2005) came out the other way, and we think they were correctly decided. *Glickman*, 521 U.S. at 467; *Johanns*, 544 U.S. at 556–67.

210. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

211. *Id.* at 2486 (majority opinion).

212. *Id.* at 2464–65.

man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical."[213]

The Court never explained why its hypothetical—which risks substantial misattribution, political distortion, and an affront to human dignity—is remotely similar to the payment of a fee (as opposed to the uttering or signing of an affirmation) used not for political/ideological purposes but to support workplace bargaining. As for the Jefferson quotation (which makes no mention of law but rather identifies what is "sinful"—many constitutionally permissible laws are sinful in the eyes of some), the Court likewise does not show why workplace collective bargaining involves "the propagation of [ideological] opinions," which some employees might disbelieve and abhor.[214]

Nor is the dissent in *Janus* any better at engaging the fundamental question of why First Amendment's values are or are not offended by the Illinois law in question. Justice Kagan spends most of her time arguing that the Court ignored principles of stare decisis, and when she does discuss the question of when compelled speech is constitutionally problematic, she does so only to ask the (wrong) question of whether compelled speech is more or less problematic than suppressed speech, not the (right) question of how such claims are fundamentally different and, accordingly, require a distinctive free speech analysis to adjudicate them.[215]

When we look at *Janus* through the perspective of basic First Amendment values, it is hard to see why the Illinois law was problematic.[216] To begin with, we suggest that the law challenged in *Janus* should have been characterized as the regulation of conduct—what would be generally described as labor relations transactions between government and public sector employees—rather than the compelling of speech. It is commonplace in the labor relations arena for labor law to regulate the activities of both management and labor, which are expressive in nature (for example, the prohibition against secondary boycotts, requirements to bargain in good faith, and a host of regulations that apply to both sides during union organizing campaigns).[217] To require that all such regulations must be rigorously reviewed under free speech doctrine would destabilize decades of labor law and intrusively constitutionalize attempts to work through disputes relating to public employment that are much more appropriately resolved through political deliberation than constitutional adjudication.

Of almost equal importance, this is another example of a situation in which the law alleged to compel speech creates no greater instrumental distortion than would result from the government acting through its own agents. Illinois could

213. *Id.* at 2463–64.

214. *Id.* at 2464.

215. *Id.* at 2487 (Kagan, J., dissenting).

216. *See* 5 ILL. COMP. STAT. 315/6(a) (2014), *invalidated by* Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448, 2487 (2018); Volokh, *supra* note 21, at 385–92.

217. Regarding labor regulations controlling expression, see, e.g., 29 U.S.C. §§ 158, 414; 29 C.F.R. § 215.1–8. Regarding secondary boycotts, see generally Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845 (2018).

have taxed public employees or paid them lower salaries and used the tax proceeds or salary savings to subsidize unions engaged in collective bargaining in order to promote the government's interests in public workplace fairness and harmony. This arrangement would could not be challenged as compelled speech, but it would leave employees opposed to unions in essentially the same place that they find themselves under the challenged Illinois law.

Moreover, it cannot reasonably be argued that the Illinois law struck down in *Janus* was an attempt by the government to communicate its own political or ideological message.[218] If the government subsidized union collective bargaining costs directly, there might well be a policy concern that union representatives on the government's pay role were shills for the government's position on labor issues. Yet that concern would not, by itself, support a constitutional challenge to such a system. The Illinois law at issue in *Janus*, however, avoids any such collusion.[219] By arranging for the union negotiating with the government to be supported by employee funding, the state virtually guarantees that the union it is negotiating with will reflect positions that are adverse to those of the government. It is certainly an unorthodox conception of compelled speech where the government is accused of compelling speech that is contrary to the government's position and message.[220]

There is also little likelihood of misattribution under the Illinois system. Opponents of unions or specific union policies can loudly challenge and make known their distaste for union leadership or the entire collective bargaining system. If such opportunities are not currently available, they could certainly be required to minimize any misattribution concerns. There remains the argument that subsidizing collective bargaining is an affront to the dignity of employees who resent having to support collective bargaining representatives who espouse positions they oppose. That concern is mitigated by the fact that such employees are not required to say anything directly and the degree of attenuation that exists between their required payments and any union bargaining positions. Ultimately, however, it is the conduct, rather than speech, identity of what is being subsidized that neutralizes their compelled speech grievance.

Janus is to be distinguished from *Abood v. Detroit Board of Education*,[221] where the Court rightly prohibited government from requiring public employees to financially support extraneous union actions such as lobbying, campaign contributions, and other expressly partisan political activities. We fully embrace this result because of the democracy-distortion effects that could otherwise ensue. These political activities cannot be subsumed under the rubric of the conduct of labor relations. They are separate expressive activities that extend substantially beyond the work of collective bargaining. Nor is this a situation in which the government could distort the marketplace of ideas to a similar extent if it acted through its own agents and resources. The government cannot use its own agents

218. *See* 5 ILL. COMP. STAT. 315/3–4, 6 (2014), *invalidated by Janus*, 138 S. Ct. at 2487 (2018).
219. *See id.*
220. *Janus*, 138 S. Ct. at 2459–60.
221. 431 U.S. 209, 234 (1997). *Keller v. State Bar of Cal.*, 496 U.S. 1, 4 (1990) is similar in this regard.

and resources to engage in partisan political activities and electioneering. Thus, the taxation option we identified in *Janus* simply is not available in *Abood*: government could not tax employees to raise money to give to unions if the money is to be spent on campaign contributions.[222] That would be analogous to the government requiring employees to contribute to incumbents or to a particular political party, an obviously unconstitutional distortion of the political process.

Another, more difficult, case from last year is *NIFLA*, where the Court struck down a California law requiring pregnancy crisis clinics—private, nonprofit, largely Christian counseling and treatment centers—to post placards in their lobbies informing visitors about the public programs that provide for low- and no-cost family planning and abortion services and the contact information of the relevant state entities offering such services.[223] The factors we believe the courts should take into account in determining the proper standard of review to apply in this case do not all point in the same direction. With regard to instrumental concerns, there is virtually no risk of misattribution here. The placards are clearly communicating the state's message, not that of the clinics, and prominent disclaimers posted by the clinics could clearly emphasize that distinction. Also, the information the state was seeking to promote—about the state's provision of services—was not ideological but factual and nonmisleading (even though it involves a controversial subject).[224] It is true that by mandating the posting of the placards the state was able to reach its intended audience (of women seeking family planning and pregnancy counseling and testing) in a way that was less costly than alternative means of doing so. It would have required some expenditure of funds for the state to hire employees to hand out leaflets near the entry to the clinics informing clinic clients of the information described on the placards. Given the relatively small number of clinics subject to the placard posting requirement, however, this is not the kind of a case where the state's cost savings facilitate its ability to magnify its voice and drown out or at least dominate competing messages.

On the one hand, the pregnancy crisis centers are in part expressive nonprofit entities that exist for the purpose of discouraging pregnant women from choosing to have an abortion.[225] As such, there are nontrivial dignitary interests here in the clinics not wanting their facilities to be used to inform women about the availability of abortion services. Their very reason for being is to discourage women from choosing to have abortions. The protection provided, however, to those dignitary interests by the free speech clause is necessarily limited because the crisis centers were engaged in conduct—the performing of certain medical procedures (such as pregnancy tests). In the regulation of medical procedures, California can designate what health care providers can and cannot say to their patients.[226] Indeed, in *Planned Parenthood v. Casey*,[227] the Court upheld against a First Amendment

222. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977).
223. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368 (2018).
224. *Id.* at 2369; *see* CAL. HEALTH & SAFETY CODE § 123472(a)(1) (West 2016).
225. *Becerra*, 138 S. Ct. at 2368.
226. *Id.* at 2372–73.
227. 505 U.S. 833 (1992).

challenge a requirement that doctors performing abortions provide their patients with some information about adoption, on the ground that the state was regulating professional conduct and that the speech compulsion was an incidental and permissible exercise of the state's authority to control the provision of medical services.[228] If medical professionals providing abortion services can be forced to convey information about adoption without violating the constitutional prohibition against compelled speech (and we think *Casey*'s First Amendment result was sound in this regard), why can't proponents of adoption be required to provide information about abortion?[229]

Because instrumental concerns are minimal, and the clinics' dignitary concerns are mitigated by the reality that the state is mandating expression by health care providers to their patients on matters relevant to the services they offer, we would evaluate the statute at issue in *NIFLA* under no more rigorous review than intermediate level scrutiny. In our view, the best argument in favor of *NIFLA*'s result under that standard of review would be one that the Court might have made but did not emphasize in any way—that the placard requirement was not sufficiently tightly linked to the provision of a medical procedure. In *Casey*, the abortion providers were obligated to give adoption information only to those women who were seeking abortion services, whereas in *NIFLA*, the lobby placards were intended to reach anyone who walked into the center, not just the subset of women who then went on to seek and obtain a pregnancy test.[230] We would need to know more than we do about the range of services provided by the clinics and the reasons clients visit them for counseling or other health care assistance to determine if a narrower mandate was necessary to withstand constitutional review.

The *NIFLA* Court's decision to strike down a separate provision of the California law—one that simply required clinics to post placards making it clear that neither the clinic nor their staff were licensed by the state in any way—is much harder to understand, let alone justify.[231] Under our framework, the requirement that clinics must express basic, truthful, relevant factual information concerning the presence or absence of licensed entities or personnel implicates neither distortion nor dignity concerns and would merit very deferential review. Perhaps the most that can be said is that other parts of the statute convinced the Court that California was singling out pregnancy crises clinics because of an aversion to

228. *Id.* at 833.

229. Justice Breyer emphasized this point in his dissent in *NIFLA* in arguing that there was no valid distinction between the compelled speech claim in *Casey*, which the Court rejected, and the compelled speech claim in *NIFLA*, which the Court accepted as meritorious. *NIFLA*, 138 S. Ct. at 2384–85 (Breyer, J., dissenting). The *NIFLA* majority's attempt to distinguish *Casey* was incomplete at best. *Id*.

230. *Compare id.* at 2369 (majority opinion) ("This notice must be posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in."), *with Casey*, 505 U.S. at 882 (1992) ("If the information the State requires to be made available to the woman [seeking an abortion] is truthful and not misleading, the requirement [to provide adoption information] may be permissible.").

231. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2375 (2018).

their ideological mission, and once the Court suspected the statute was invidiously motivated (even if the majority never explicitly reached that conclusion),[232] such an impression colored the Court's evaluation of the entire statute.

VII. CONCLUSION

We decided to write this Article to begin a conversation about compelled speech doctrine—a conversation we think is long overdue and critically necessary. The current meandering lines of authority in this area of constitutional law lack any firm, principled foundation and are unmoored from any serious doctrinal framework. Without foundation or framework, expansive applications of the prohibition against compelled speech will be construed as unjustified manifestations of political ideology that delegitimize the Court's decision-making authority.

Obviously, we think that the arguments we present in this Article deserve consideration in the development of compelled speech doctrine. We also recognize, however, that alternative contours of compelled speech doctrine will be part of the discussion. What we think cannot be seriously disputed is that the current judicial path of ad hoc and apparently unconstrained judicial holdings striking down laws on compelled speech grounds is hard to understand and even more difficult to defend.

232. *See id.* at 2368.