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## NIFLA and the Construction of Compelled Speech Doctrine

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## **NIFLA and the Construction of Compelled Speech Doctrine**

ROBERT POST\*

*First Amendment doctrine disfavoring compelled speech originated in 1943 in West Virginia State Board of Education v. Barnette. There are good and convincing explanations for the Court's decision in Barnette, but the Court's recent expansion of the doctrine, culminating in National Institute of Family & Life Advocates (NIFLA) v. Becerra, holds that compelled speech is in most instances "content-based" regulation requiring heightened judicial scrutiny.*

*Using examples ranging from professional malpractice to compulsory tax returns, this Article argues that the doctrinal rule of NIFLA is demonstrably incorrect. It suggests that the doctrinal category of "compelled speech" may itself be confused insofar as it imagines that all legal obligations to communicate are equally disfavored under the Constitution. Courts should scrutinize instances of compelled speech as necessary to protect threatened constitutional values, but the presence of these values will vary depending upon social context.*

*Courts must learn to read the constitutional geography implicit in distinct social landscapes. This Article offers some hints for how this might be done. Applying these insights to NIFLA, the Article argues that the outcome of the case actually depended upon preconscious and undefended suppositions about social context. Constitutional decisions like NIFLA can be made persuasive only if such suppositions are made explicit and justified.*

In recent years the Court has become increasingly aggressive in using compelled speech doctrine to strike down statutes under the First Amendment.<sup>1</sup> But the doctrine, as has frequently been noted, is haphazard, inconsistent, and in some respects incoherent.<sup>2</sup> The academy has responded by renewing its efforts to systematize the doctrine to endow it with shape and substance.<sup>3</sup>

It is now plain, for example, that the Court's first easy equation of "the right to speak freely" with "the right to refrain from speaking at all"<sup>4</sup> is far too glib. The Court has itself explicitly acknowledged this point in the context of commercial speech. In *Zauderer v. Office of Disciplinary Counsel*,<sup>5</sup> the Court held that the constitutionality of restrictions on commercial speech should be decided using the elevated scrutiny of the four-part *Central Hudson* test,<sup>6</sup> whereas mandated

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1. See, e.g., Nat'l Inst. of Fam. & Life Advocs. (*NIFLA*) v. Becerra, 138 S. Ct. 2361 (2018); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018); see also *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1740 (2018) (Thomas, J., concurring in part).

2. Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 ILL. L. REV. 1, 6; Seana Valentine Shiffirin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPP. L. REV. 731, 735–36 (2020); Clay Calvert, *Wither Zauderer, Blossom Heightened Scrutiny? How the Supreme Court's 2018 Rulings in Becerra and Janus Exacerbate Problems with Compelled-Speech Jurisprudence*, 76 WASH. & LEE L. REV. 1395, 1399 (2019); Martin H. Redish, *Compelled Commercial Speech and the First Amendment*, 94 NOTRE DAME L. REV. 1749, 1750 (2019); Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 357 (2018).

3. See, e.g., *supra* note 2; R. George Wright, *The Compelled Commercial Speech Cases: Why Not Just Flip a Coin*, 71 MERCER L. REV. 585 (2020); Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61 (2019); Lauren Fowler, *The "Uncontroversial" Controversy in Compelled Commercial Disclosures*, 87 FORDHAM L. REV. 1651 (2019); Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L. J. 1351 (2019); Redish, *supra* note 2; William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171 (2018); Abner S. Greene, *"Not in My Name" Claims of Constitutional Right*, 98 B.U. L. REV. 1475 (2018); Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 ARIZ. L. REV. 421 (2016); Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277 (2014); Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 404–15 (2014); Steven H. Shiffirin, *What is Wrong with Compelled Speech?*, 29 J.L. & POL. 499 (2014); G. Edward White, *The Evolution of First Amendment Protection for Compelled Commercial Speech*, 29 J.L. & POL. 481 (2014); Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087 (2005); Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411 (2004). I have contributed a bit to this literature: Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 ILL. L. REV. 939; Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195; Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555 (2006).

4. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

5. 471 U.S. 626 (1985).

6. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566

commercial disclosures of “purely factual and uncontroversial information”<sup>7</sup> are constitutional so long as they are “reasonably related” to an appropriate state interest.<sup>8</sup> The asymmetry follows from the fact that the constitutional value of commercial speech inheres in its “informational function.”<sup>9</sup> Restrictions on commercial speech impede this function whereas the mandated disclosure of commercial information advances it.<sup>10</sup>

*Zauderer* is a foundational decision. Among other implications, it signifies that the constitutional values at stake in compelled speech cases differ depending upon social context. *Zauderer* challenges us to unpack these distinct contexts and to

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(1980):

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Zauderer* applied the *Central Hudson* test to the restrictions on commercial speech at issue in the case.

7. 471 U.S. at 651.

8. *Id.* For an explication of the Court’s reasoning, see Post, *Compelled Commercial Speech*, *supra* note 3, at 877–79, 882–83.

9. *Central Hudson*, 447 U.S. at 563 (“The First Amendment’s concern for commercial speech is based on the informational function of advertising.”).

10. *Zauderer*, 471 U.S. at 650–51:

Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. . . .

But the interests at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio has not attempted to “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.” 319 U.S., at 642. The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant’s constitutionally protected interest in not providing any particular factual information in his advertising is minimal.

explain the particular First Amendment values that compelled speech doctrine may be summoned to protect in various circumstances.<sup>11</sup>

Contrast, for example, the Court's first two major compelled speech decisions. In 1943, the Court decided *West Virginia State Board of Education v. Barnette*,<sup>12</sup> the original and undoubtedly most eloquent of the Court's compelled speech opinions. At issue in *Barnette* was West Virginia's requirement that school children begin each day by reciting a pledge of allegiance to the flag, accompanied by "the 'stiff-arm' salute, the saluter to keep the right hand raised with palm turned up."<sup>13</sup> Justice Jackson's opinion for the Court made plain that the case was not merely about compelled speech, but also about a forced *pledge*, a "compulsion of students to declare a belief."<sup>14</sup> A compulsion of this nature threatens a very specific constitutional value, which has been powerfully summarized by Seana Shiffrin in her explication of what she calls "a thinker-centered approach" to the First Amendment.<sup>15</sup> This value is compromised whenever the state "objectionably interfere[s] with the free development and operation of a person's mind."<sup>16</sup> The compulsory pledge in *Barnette* is a textbook case of such interference:

Requiring potentially insincere recitation, and especially rote and periodic recitation, poses constitutional problems because it utilizes disrespectful methods of communication and persuasion. These methods constitute efforts forcibly to inculcate and to instill rather than to persuade through direct, transparent arguments, reasons, or even direct, transparent emotional appeals. By employing such disrespectful methods, the government contradicts presuppositions about moral character that underlie the First Amendment.<sup>17</sup>

It is extremely doubtful, however, that any such interference with the development or functioning of an independent thinker was at stake in 1977 in the

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11. Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006).

12. 319 U.S. 624 (1943).

13. *Barnette*, 319 U.S. at 628–29. The similarities to "Hitler's" salute did not go unnoticed. *Id.* at 627.

14. *Id.* at 631. "It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind." *Id.* at 633. The Court framed the question as raising the "validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent." *Id.* at 634.

15. Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011).

16. *Id.* at 287.

17. Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in CONSTITUTIONAL LAW STORIES 434 (Michael C. Dorf, ed., 2d ed. 2009); see Shiffrin, *supra* note 15, at 302:

Compelled speech of this kind threatens (or at least aims) to interfere with free thinking processes of the speaker/listener and to influence mental content in ways and through methods that are illicit: nontransparent, via repetition, and through coercive manipulation of a character virtue, namely that of sincerity, that itself is closely connected to commitments of freedom of speech.

Court's second major compelled speech decision, *Wooley v. Maynard*.<sup>18</sup> *Wooley* involved a challenge to the coerced display of license plates stamped with the New Hampshire state motto: "Live Free or Die."<sup>19</sup> The litigant in *Wooley*, a Jehovah's Witness named George Maynard, objected to putting a license plate with this motto on his car. He did not allege that he had been required to "declare a belief"; he did not allege that he had been compelled insincerely to repeat what he did not believe to be true. He complained instead that he had been forced "into advertising a slogan which I find morally, ethically, religiously and politically abhorrent."<sup>20</sup>

The vices of iteration, inculcation, manipulation, and insincerity, identified by Shiffrin as essential to the holding in *Barnette*, were almost entirely absent in *Wooley*. Maynard did not allege, nor is there any reason to believe, that the independence of his mind was undermined by the texts imprinted on his car's license plates.<sup>21</sup> But the Court nevertheless sought to invoke *Barnette* as a precedent. To do this it articulated a very abstract principle of constitutional law: it asserted that the "right to speak and the right to refrain from speaking" are "complementary" concepts.<sup>22</sup>

*Zauderer* teaches us that this simple equation is incorrect. The Court in *Wooley* nevertheless relied on this false equivalence to sidestep its obligation to explain the exact nature of the constitutional values threatened by New Hampshire's license plates. Modern compelled speech doctrine thus began with a serious sin of omission. If the purpose of a constitutional right is to safeguard specific constitutional values, the doctrinal contours of the right cannot be responsibly fashioned without knowing the precise constitutional values requiring protection. It is no wonder, then, that compelled speech doctrine has overreached its proper boundaries and become dangerously incoherent.

In cutting that doctrine down to size, our first task must be to ascertain the exact constitutional values that compelled speech doctrine ought to be fashioned to protect. The text and original meaning of the First Amendment are unfortunately not going to provide much helpful guidance. The text of the amendment is opaque. It says merely that "the freedom of speech" will not be abridged.<sup>23</sup> From the time of the First Amendment's ratification until about two decades into the twentieth century, federal courts equated "the freedom of speech" with Blackstone's interpretation of press

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18. 430 U.S. 705 (1977).

19. *Id.* at 706.

20. *Id.* at 713.

21. See *supra* text accompanying note 20. Shiffrin herself seems to disagree with this conclusion. Blasi & Shiffrin, *supra* note 17, at 444–45; Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association*, 99 NW. U. L. REV. 839, 854 (2005). Yet unlike the children in *Barnette*, who were forced every day publicly to affirm to be true what they did not believe to be true, the litigant in *Wooley* was not forced to affirm anything. He was merely required to use his "private property as a 'mobile billboard' for the State's ideological message." *Wooley*, 430 U.S. at 715. There does not seem to be a convincing connection between what is written on my license plate and my individual "freedom of thought and mental autonomy," Shiffrin, *supra*, at 854, which Shiffrin places at the core of her "thinker-based approach," Shiffrin, *supra* note 15. One might as well say that the free development of my mind is impaired by the required texts on my passport, or on my driver's license, or on the dollar bills that I carry every day in my wallet.

22. *Wooley*, 430 U.S. at 714.

23. U.S. CONST. amend. I (emphasis added).

freedom:<sup>24</sup> “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.”<sup>25</sup> As late as 1907 the Court could assert that “the main purpose” of the First Amendment was “to prevent all such *previous restraints* upon publications as had been practiced by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.”<sup>26</sup>

If text and original meaning are no guide, how should we interpret the proper reach of the compelled speech doctrine? Perhaps we might best approach this delicate and complex question by hypothesizing concrete examples of compelled speech about whose constitutionality or unconstitutionality we generally agree; we can then generalize the pattern formed by these examples, after which we can test and re-evaluate our generalizations by postulating new hypothetical examples; we can then modify our initial generalizations in light of these new examples; and so forth and so on, *ad infinitum*. We might, in other words, develop the First Amendment doctrine

24. The Court has instructed us that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right,” and that in such circumstances the Court has looked to the writings of William Blackstone, whose works “constituted the preeminent authority on English law for the founding generation.” *District of Columbia v. Heller*, 554 U.S. 570, 592–94 (2008). *Heller* rightly notes that it was not until 1931 that “this Court first held a law to violate the First Amendment’s guarantee of freedom of speech . . . almost 150 years after the Amendment was ratified.” *Id.* at 625–26.

25. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 151 (Boston, T.B. Wait & Sons 1818); see JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 731–37 (Boston, Hillard, Gray & Co. 1833). Story waxed eloquent on the limited reach of the First Amendment:

That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy, at his pleasure, the reputation, the peace, the property and even the personal safety of every other citizen. . . . Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance, to make up for the deficiencies of the law . . . . It is plain, then, that the language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without prior restraint, so always, that he does not injure any other person in his rights, person, property, or reputation, and so always, that he does not thereby disturb the public peace, or attempt to subvert the government.

*Id.* at 732. Story quotes Blackstone with approval: “Every freeman has an undoubted right to lay what sentiments he pleases before the public . . . . But, if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.” *Id.* at 736; see BLACKSTONE, *supra*, at 151.

26. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (per Holmes, J.); see ROBERT POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 38–39 (2014); DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997). On Holmes’s invention of modern First Amendment doctrine in November 1919, see Robert Post, *Writing the Dissent in Abrams*, 51 SETON HALL L. REV. 21 (2021).

of compelled speech by using the old-fashioned common law method employed by British and American courts for centuries.<sup>27</sup>

I know that certain Justices are methodologically opposed to conflating constitutional interpretation and the common law method.<sup>28</sup> Yet, in the context of the First Amendment, we do not seem to have any alternative. The text and original meaning of the Amendment have abandoned us to our best instincts and precedents. Since we are dealing with constitutional restraints on laws and policies that are produced by democratically responsive institutions, and since we face uncertainty about when and why compelled speech might threaten constitutional values, courts would be well advised to approach this process with caution. They ought to confine their decisions to the specific circumstances of particular cases until they can confidently venture more abstract generalizations.

Unfortunately this is not the path that Supreme Court has chosen to pursue, and the consequences, as one might have predicted, have been truly dreadful.<sup>29</sup> In this brief talk, I shall take as my example the Court's recent decision in *National Institute of Family & Life Advocates (NIFLA) v. Becerra*.<sup>30</sup> NIFLA concerned the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act,<sup>31</sup> which, to speak quickly and roughly, required "crisis pregnancy centers (CPCs) to provide notices to women that visit their clinics that California provides free or low-cost reproductive health services. The law also mandated that unlicensed CPCs notify women that California had not licensed the clinics to provide medical services."<sup>32</sup> CPCs are typically associated with political or religious organizations "whose stated goal is to prevent women from accessing abortions."<sup>33</sup>

Writing for a Court of five, Justice Thomas held that FACT was a "content-based regulation of speech" because it compelled "individuals to speak a particular message."<sup>34</sup> Thomas held that "as a general matter" content-based regulations "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."<sup>35</sup> Thomas declined to apply strict scrutiny, however, because "the licensed notice cannot survive even intermediate scrutiny."<sup>36</sup>

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27. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

28. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

29. For an overall indictment of the Court's recent decision-making in the area of compelled speech, see Alexander Tsesis, *Compelled Speech and Proportionality*, 97 IND. L. J. 811 (2022).

30. 138 S. Ct. 2361 (2018).

31. CAL. HEALTH & SAFETY CODE §§ 123470–123473 (West 2018).

32. Chemerinsky & Goodwin, *supra* note 3, at 63.

33. *Id.* at 70.

34. *NIFLA*, 138 S. Ct. at 2371.

35. *Id.* In an opinion joined by Justice Thomas, Justice Gorsuch has remarked that "[t]he whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard." *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (Gorsuch, J.).

36. *NIFLA*, 138 S. Ct. at 2375.

*NIFLA* is not a modest opinion. It strives to enunciate general and abstract rules of constitutional law. Although Thomas has often professed to be bound by eighteenth century text and meanings,<sup>37</sup> none of the doctrinal rules announced in *NIFLA* can in any way be traced to these sources.<sup>38</sup> They are entirely modern constructions that purport to bring comprehensive order to the field of compelled speech.

I shall focus on two aspects of these rules. First, *NIFLA* categorizes government compelled speech as “content-based regulation” insofar as it requires “individuals to speak a particular message.” Content-based regulation is subject to elevated scrutiny, which *NIFLA* describes as typically strict scrutiny,<sup>39</sup> but which it also indicates should at a minimum be intermediate scrutiny.<sup>40</sup> Second, *NIFLA* asserts that courts ought to assess the constitutionality of government-mandated speech by using an approach that employs tiers of scrutiny. Tiers-of-scrutiny doctrine does not engage relevant First Amendment values but instead characteristically queries whether a rule is over- or underinclusive.<sup>41</sup> We have become so inured to shapeless doctrine of this

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37. See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1583 (2020) (Thomas, J., concurring); *McKee v. Cosby*, 139 S. Ct. 675 (2019); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 821 (2011) (Thomas, J., dissenting).

38. “The words ‘strict judicial scrutiny’ appear nowhere in the U.S. Constitution. Neither is there any textual basis, nor any foundation in the Constitution’s original understanding, for the modern test under which legislation will be upheld against constitutional challenge only if ‘necessary’ or ‘narrowly tailored’ to promote a ‘compelling’ governmental interest.” Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2007).

39. See, e.g., *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020) (“Under the Court’s precedents, a ‘law that is content based’ is ‘subject to strict scrutiny.’”); *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) (“Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny.”).

40. *NIFLA*, 138 S. Ct. at 2375.

41. Strict scrutiny “requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015). The Court has offered many formulations for intermediate scrutiny, but a typical passage asks if state regulation “advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Holder v. Humanitarian L. Project*, 561 U.S. 1, 26–27 (2010). See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661–62 (1994). In its wisdom, the Court has in recent years in First Amendment cases invented new and apparently distinct tiers of scrutiny, some of which do not focus so exclusively on over- and under-inclusiveness, but none of which require courts directly to confront relevant First Amendment values. For example, in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, the Court announced that in the context of compelled subsidization of speech—a topic that I do not discuss in this short paper but that I do evaluate in *Post, Compelled Subsidization of Speech*, *supra* note 3—courts ought to apply “‘exacting’ scrutiny,” a “less demanding test than the ‘strict’ scrutiny that might be thought to apply outside the commercial sphere.” *Janus* instructs us that the test for “exacting” scrutiny is that “a compelled subsidy must ‘serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.’” 138 S. Ct. 2448, 2465 (2018). See *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 197 (2014). In *Citizens United v. FEC*, 558 U.S. 310, 366 (2010), the Court offered a different definition of “exacting scrutiny,” which

kind that it comes as something of a shock to realize that in *Barnette* Jackson did not ask whether the compelled flag salute was “narrowly tailored.” He did not fret about what tier of scrutiny to apply. Instead, he asked simply whether, given relevant First Amendment values, a compulsory flag salute could be justified.

The first and most far-reaching doctrinal innovation of *NIFLA* is to equate compelled speech with disfavored content-based regulation. How might we evaluate the desirability of such a blunt doctrinal rule? My suggestion is simple. We should use the technique that every law school teaches in its first year. We should imagine two or three situations in which our intuitions about the constitutionality of compelled speech are clear, and we should use these situations to test the reach and force of *NIFLA*'s proposed rule.

Suppose, for example, that Sam visits his doctor because of an injury to his leg. Sam's doctor fails to instruct him to schedule a follow-up visit to check for a possible infection. Infection does set in, and Sam unfortunately loses his leg. We know that Sam's leg would not have been amputated if his doctor had given him proper advice. Sam therefore sues his doctor for malpractice, alleging that his doctor had violated relevant medical standards of competence.<sup>42</sup>

I construct this example precisely because it is so prosaic and unexceptional. Notice, however, that it involves compulsory speech. The doctor's liability depends upon his failure to communicate “a particular message” that he was under a legal obligation to express. The imposition of this duty is an example of what *NIFLA* condemns as content-based regulation. Should this perfectly ordinary application of basic medical malpractice law be subject to the strict or intermediate constitutional scrutiny we associate with disfavored content-based regulation?<sup>43</sup>

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it said should apply to “disclaimer and disclosure requirements”: “The Court has subjected these requirements to ‘exacting scrutiny,’ which requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” See *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010). Most recently, the Court has held that “while exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government’s asserted purpose.” *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021). Still other definitions of “exacting scrutiny” may be found in *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 442 (2015). The Court has also referred to, but not exactly defined, something called “heightened scrutiny,” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011), and in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Court referred to some unspecified and unlabeled tier of scrutiny that was more than intermediate but less than strict. *But see McCullen v. Coakley*, 576 U.S. 464, 478 (2014) (inferring that the law in *Holder* survived “strict scrutiny”).

42. See, e.g., *Malone v. La. Dep’t of Health & Hum. Res.*, 569 So. 2d 1098 (La. Ct. App. 1990).

43. *NIFLA* seems fundamentally confused about how it wishes to conceptualize a hypothetical like this. On the one hand, it sneers at the possibility that “professional speech” might constitute “a separate category of speech” that might merit less rigorous constitutional review. “Speech is not unprotected merely because it is uttered by ‘professionals.’” *NIFLA*, 138 S. Ct. at 2371–72. *NIFLA* invokes the “marketplace of ideas” as a constitutional value that ought to give full protection to professional speech. *Id.* at 2374–75. It thus echoes lower court decisions that have brought elevated scrutiny to bear on state regulations of doctors’ professional communications with their patients, on the ground that “speech is speech, and it must be analyzed as such for purposes of the First Amendment.” *Wollschlaeger v. Governor*,

My guess is that most would resist the conclusion that large swaths of state medical malpractice law should be constitutionalized. Lawyers, of course, deal with their clients entirely through the medium of speech. Most would probably agree that lawyers who commit malpractice by violating their affirmative duties to speak should not be able to assert First Amendment immunity from liability.<sup>44</sup> The same would hold true of accountants.<sup>45</sup> In fact, malpractice actions involving mandated professional speech proceed every day without anyone so much as raising a First Amendment question of compelled speech.

Take a different example. Suppose Amy is a witness in a trial and suppose that an attorney is interrogating Amy in ways that Amy would rather not answer. Imagine that Amy has no legal excuse for failing to respond to these questions; Amy has no viable claim of privilege. If Amy nevertheless refuses to answer, and if the judge places Amy in civil contempt in an effort to compel Amy to give testimony, is the government engaged in content-based regulation that merits elevated constitutional scrutiny?<sup>46</sup> Courts constantly compel the speech of witnesses, parties, and lawyers. Courts require that such persons speak particular messages; namely, that they provide whatever information they have in response to the specific questions they have been asked. Except in very unusual cases, no one even thinks to raise a First Amendment question of compelled speech.

It is literally child's play to think of examples where government compels speech, but where *NIFLA*'s rule is not invoked and nobody would think it a good idea if it were. If the President fires the Secretary of State for failing to issue a statement supportive of the President, should that decision receive elevated judicial scrutiny under the First Amendment?<sup>47</sup> Should a court use elevated scrutiny to review the

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State of Florida, 848 F.3d 1293, 1307 (11th Cir. 2017) (en banc) (quoting *King v. Governor of N.J.*, 767 F.3d 216, 229 (3d Cir. 2014)). On the other hand, *NIFLA* gives a free pass to “[l]ongstanding torts for professional malpractice” that regulate “professional conduct.” 138 S. Ct. at 2373. It is impossible to know what *NIFLA* might mean by this baffling invocation of the notoriously vague and indeterminate speech/conduct distinction. When a doctor gives advice to a patient, in writing or orally, is his speech “speech”? Or is it conduct? And how would we know the difference? In the end, *NIFLA* is content to leave the question in a state of explicit disarray: “[N]either California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny.” *Id.* at 2375.

44. See, e.g., *Estate of Spencer v. Gavin*, 946 A.2d 1051 (N.J. Super. Ct. App. Div. 2008).

45. See, e.g., *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040 (11th Cir. 1986); *Robert Wooler Co. v. Fidelity Bank*, 479 A.2d 1027 (Pa. Super. Ct. 1984).

46. See, e.g., *Simkin v. United States*, 715 F.2d 234 (2d Cir. 1983).

47. See *Lewis v. Cowen*, 165 F.3d 154, 166 (2d Cir. 1999) (“A well-respected senior policymaking employee with public speaking responsibilities who objects to a position held by his superior frequently may be forced to choose between speaking out in favor of his supervisor’s program and keeping his job, or voicing his personal opinion and perhaps losing his job.”). Consider, for example, President Roosevelt’s dismissal of the chairman of the Board of Directors of the TVA for making “grave and libelous charges of dishonesty” and for then “refusing to give the Chief Executive the facts, if any, upon which he based his charges of malfeasance.” Franklin D. Roosevelt to the Congress (March 23, 1938), in *Message from the*

decision of a teacher at a state school to sanction a student for failing to take an examination or to produce an assigned paper?<sup>48</sup> Should questions in state mandatory tax forms receive elevated judicial scrutiny?<sup>49</sup> Should the disclosures required by the Truth in Lending Act (TILA)<sup>50</sup> be subject to elevated judicial review under the First Amendment?<sup>51</sup>

Examples like these suggest that *NIFLA*'s abstract equation of compelled speech with the kind of content-based regulation that triggers elevated judicial scrutiny is seriously deficient. It may make sense in some circumstances, but there are plenty of contexts where almost no one would agree that it makes any sense at all. This is because the values that compelled speech doctrine seeks to protect are threatened in some circumstances, but not in others. Without a convincing analysis of these values, we cannot distinguish the former from the latter except by reference to the kind of hypothetical intuitions that we have been exploring. Until we have carefully canvassed these intuitions, it is the height of foolish intemperance to pronounce an abstract, context-independent rule that purports to prejudge the myriad of delicate situations in which state-mandated speech may occur.

What makes *NIFLA*'s proposed rule especially ill-considered is that it essentially compresses complex issues of compelled speech into the simple tiers-of-scrutiny framework that in the early 1970s began to infiltrate First Amendment doctrine from the distant field of Equal Protection jurisprudence.<sup>52</sup> Tiers-of-scrutiny analysis typically instructs a court to examine the over- or under-inclusiveness of a state regulation, as well as the strength of the state interest that supports it. The latter is of course always important to assess, but it is difficult to explain why the former should be placed at the heart of First Amendment doctrine.

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*President Relative to Removal of Arthur E. Morgan*, SEN. DOC. NO. 155, 75TH CONG. 3D. SESS. (1938), at iii. In deciding the constitutionality of the dismissal, no court even considered the applicability of the First Amendment and the doctrine of compelled speech. *Morgan v. Tenn. Valley Auth.*, 115 F.2d 990 (6th Cir. 1940).

48. *Nicholl v. Olens*, No. 1:17-CV-4518-AT, 2018 WL 8949446 (N.D. Ga. 2018); *Jemaneh v. Univ. of Wyo.*, 82 F. Supp. 3d 1281, 1295 (D. Colo. 2015).

49. *Gillispie v. Sherlock*, 929 P.2d 199 (Mont. 1996); *Dep't of Revenue v. Hoyt*, 8 Or. Tax 367 (1980).

50. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968).

51. Courts to date do not seem to think there is any First Amendment issue with enforcing the disclosures required by the TILA. *See, e.g., Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296 (5th Cir. 1976); *Bradley v. Marshall Bros. Lincoln Mercury*, 698 F.2d 1286 (5th Cir. 1983).

52. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124–28 (1991) (Kennedy, J., concurring). *See, e.g., Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). Fallon, *supra* note 38, at 1278–79, suggests that some elements of strict scrutiny, like the necessity of a compelling government purpose, were actually initially developed in the First Amendment context. In this Article, however, I am specifically focusing on tiers-of-scrutiny as a feature of doctrinal analysis. The contemporary dominance of this form of analysis is evident in an article like Clay Calvert, *Is Everything a Full-Blown First Amendment Case After Becerra and Janus? Sorting Out Standards of Scrutiny and Untangling "Speech as Speech" Cases from Disputes Incidentally Affecting Expression*, 2019 MICH. ST. L. REV. 73 (2019).

The Court initially began to scrutinize laws for over- and under-inclusiveness in the context of enforcing the Equal Protection Clause, where the methodology roughly sought to vindicate the value of equality by insuring that like persons would be treated alike.<sup>53</sup> But the core of the First Amendment involves quite different values, which is why classic First Amendment decisions before the 1970s did not think to use tiers-of-scrutiny analysis.<sup>54</sup> Instead, like Justice Jackson in *Barnette*, these decisions directly evaluated the justification for state regulations in light of the First Amendment values potentially impaired by those regulations. *NIFLA*'s blithe indifference to the specific values at issue in compelled speech cases is compounded and encouraged by its recourse to tiers-of-scrutiny doctrine, which does not require any encounter at all with the particular substantive values protected by the First Amendment.

Recent scholarship has begun to articulate constitutional values that may be at issue in compelled speech cases. These values range from the autonomy of the speaker,<sup>55</sup> to the autonomy of the audience,<sup>56</sup> to the distortion of the marketplace of ideas,<sup>57</sup> to the chilling of speech,<sup>58</sup> to the "epistemic harm" of undermining professional knowledge,<sup>59</sup> to government shifting the cost of its own expression onto private parties.<sup>60</sup> Scholars have identified values that range from avoiding misattribution<sup>61</sup> to preserving the free formation of the thinking subject,<sup>62</sup> from the freedom from being obliged to foster another's message<sup>63</sup> to preventing an "unwanted connection" with the views of another.<sup>64</sup> None of these distinctively First Amendment values can be recognized and explored when doctrine asks only whether a government regulation is narrowly tailored.

Even a cursory review of contemporary literature would suggest that the range of possible justifications for compelled speech doctrine is enormous. We may perhaps sort through possible candidates by subjecting them to the same hypothetical examples we used to evaluate *NIFLA*'s proposed rule equating compelled speech with invalid "content-based regulation." We can immediately see that particular justifications will have bite in some circumstances, but not in others. Take, for example, the "thinker's" rationale propounded by Shiffrin, which is so attractive and

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53. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964).

54. Consider such classic cases as *Cohen v. California*, 403 U.S. 15 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Schneider v. Irvington*, 308 U.S. 147 (1939); and *Stromberg v. California*, 283 U.S. 359 (1931).

55. Corbin, *supra* note 3, at 1298.

56. *Id.* at 1300.

57. *Id.* at 1294.

58. *Id.* at 1293.

59. Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 491 (2019).

60. Amar & Brownstein, *supra* note 2, at 7.

61. Greene, *supra* note 3, at 1491.

62. Shiffrin, *supra* note 15.

63. Greene, *supra* note 3, at 1493.

64. *Id.* at 1482.

so convincing in the context of *Barnette*. Try to apply that rationale in the context of medical malpractice.

There are doctors who sincerely and authentically hold false scientific beliefs. Stella Immanuel, for example, who is a licensed MD in Texas, claimed with complete conviction that hydroxychloroquine cured COVID-19.<sup>65</sup> If Dr. Immanuel had given this advice to a patient, and if she had been sued for medical malpractice, I would be bold to say that she could not have invoked a First Amendment defense. She would not have been permitted to say to an injured patient: “My advice to you was, to quote Holmes’s immortal language in *Abrams v. United States*,<sup>66</sup> ‘an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.’”<sup>67</sup> In the eyes of the law, a licensed MD is not entitled to force patients to wager their salvation on the experiment of a professional’s wayward opinion. The marketplace of ideas is incompatible with the competent practice of medicine.

This is because law constructs physician-patient relationships to underwrite patients’ warranted expectations of competent medical care.<sup>68</sup> Law both sanctions incompetent medical advice and compels the provision of necessary advice; in the

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65. Dickens Olewe, *Stella Immanuel—The Doctor Behind Unproven Coronavirus Cure Claim*, BBC NEWS (July 29, 2020), <https://www.bbc.com/news/world-africa-53579773>. Dr. Immanuel also believes that certain medical conditions are caused by “witches and demons.” *Id.* The mere fact that someone is licensed to practice medicine does not guarantee that they are scientifically competent.

66. 250 U.S. 616 (1919).

67. *Id.* at 630.

68. Hence the breathtaking inanity of Thomas’s invocation of the “marketplace of ideas” in the context of professional speech. Thomas writes:

Further, when the government polices the content of professional speech, it can fail to “‘preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.’” Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market,” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), and the people lose when the government is the one deciding which ideas should prevail.

*NIFLA*, 138 S. Ct. at 2374–75 (citation omitted). I surely hope that Justice Thomas’s physicians do not conceive their medical practice along the lines he theorizes in *NIFLA*. Of course, there are contexts in which we do wish to preserve a marketplace of ideas for the exchange of professional views. Professional and scholarly journals are a good example. But professional speech, meaning the professional advice given by a professional in the course of professional treatment, see Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1247–48 (2016), is certainly not one of these contexts. The law constructs such professional relationships to protect the reliance interests of patients and clients. It does not construct such relationships to embody the value of caveat emptor, as does the marketplace of ideas.

context of malpractice, the distinction between restrictions on physician speech and mandated physician speech is irrelevant.<sup>69</sup> Each is routinely regulated. A physician's personal claim to "freedom of thought and freedom of conscience"<sup>70</sup> is overridden by the obligation to provide competent medical care. The personal beliefs of Dr. Immanuel are immaterial. What matters is only that she provide care that meets relevant professional standards.

Without question malpractice law instrumentalizes physicians to achieve its goal of ensuring competent medical care.<sup>71</sup> If we are to speak strictly, law defines the role that physicians must play so as to achieve this goal, and it then demands that individual physicians fulfill the obligations of that role. If Dr. Immanuel were to be sued for malpractice, the case might well disclose a great gulf between her sincere personal beliefs and the reiterated, compulsory, instrumentalized requirements of a physician's legally defined role. Despite the obvious potential for such disjunction, courts in malpractice cases do not weigh a doctor's First Amendment interests in being an independent thinker against a patient's interests in receiving competent medical treatment.<sup>72</sup> Nor do they permit doctors to experiment on patients in order to protect the marketplace of ideas. Nor for that matter do they ask if particular judgments of medical malpractice are narrowly tailored to a compelling state interest.

In this simple, commonplace example, we can see that the constitutional value of developing and protecting an independent mind, which Shiffrin convincingly puts at the heart of *Barnette*, is largely absent from the legal construction of a physician's appropriate role. The role is impersonal because it is designed for instrumental reasons. It does not matter that the rules of professional malpractice compromise the

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69. The law would equally sanction Dr. Immanuel if she affirmatively advised her patients that hydroxychloroquine would prevent COVID-19, or if she failed to caution against the actions of a patient whom she knew was acting dangerously in the false belief that hydroxychloroquine prevented covid.

70. Blasi & Shiffrin, *supra* note 17, at 433–34.

71. Shiffrin, in true Kantian fashion, is quite distressed whenever the law treats persons in this instrumental fashion. "Using the speaker merely as a means for disseminating and saturating the environment with the government's message fails to exhibit respect for individual dignity and intellectual independence." Blasi & Shiffrin, *supra* note 17, at 435.

72. This is not to say that in certain circumstances doctors may not assert First Amendment interests against state regulation. For example, if the state were to pass legislation requiring physicians to advise patients that hydroxychloroquine offers complete protections against COVID-19, doctors should, in my view, be able to sue for a violation of their First Amendment rights. See, e.g., Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 952–90; ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM AND A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012). Properly speaking, however, the First Amendment rights of physicians in such a context are a vehicle for asserting the interests of patients in receiving competent medical advice. In this sense they would be analogous to the commercial speech rights of speakers, which have traditionally been conceived as serving the interests of listeners in receiving information. See *supra* notes 3–9 and accompanying text. The personal autonomy interests of the physician might be at stake, however, if a state were to require physicians to recite the Republican Party platform before treating a patient. This is because the regulation imposes on the doctor the requirement of compelled ideological speech that by hypothesis has nothing to do with the professional role of the physician.

autonomy of a doctor. It does not matter that they force a doctor to speak words with which she may personally disagree. It does not matter that they may force the doctor to be connected with others in ways that she finds personally objectionable. It does not matter that they chill what the doctor might otherwise personally wish to say. The marketplace of ideas, which *NIFLA* somehow puts at the heart of professional speech, is irrelevant. All that matters is that the rules of professional malpractice establish a doctor-patient relationship incentivized to provide competent medical care. That is why we almost never see any mention of the First Amendment in the myriad of malpractice cases decided by courts that involve compelled professional speech.

Doctor-patient relationships are certainly not the only area of social life where the law constructs instrumentally justified and legally enforced social roles. It happens in the construction of most professional behavior, like that of lawyers or accountants. It also routinely occurs in what I have elsewhere described as “managerial domains.”<sup>73</sup> These are the swaths of behavior managed by government organizations in order to fulfill organizational missions.

Courts are a good example. Judges are authorized to manage speech within their courtrooms in ways that establish and enforce the proper roles of witnesses, lawyers, and parties, and these roles are in turn defined in terms of the overall mission of the court to dispense justice.<sup>74</sup> That is why, in the second example we discussed, judges routinely compel speech within courtrooms without the interference of any First Amendment doctrine. The question in such cases is whether a judge has properly interpreted the substantive rules that define the proper roles of witnesses, lawyers, and parties.<sup>75</sup> Difficult constitutional questions do arise, however, when we must define the limits of the managerial domain of courts, as for example when judges, in order to preserve the integrity of their mission, seek to reach out and constrain the ability of lawyers to speak to the public outside of a courtroom.<sup>76</sup>

The implication of this perspective is that compelled speech doctrine will be of limited value in the many cases that involve government institutions. Government institutions must instrumentally define roles to advance their goals. Legal enforcement of these roles will depend upon their institutional justification. If an employee of the social security administration objects to the ruling of her superior and chooses to speak to clients in ways that are true to her authentic personal beliefs

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73. Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

74. See, e.g., *In re Hawver*, 339 P.3d 573 (Kan. 2014); *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005), cert. denied, 547 U.S. 1111 (2006); *Heckard v. Murray*, 428 P.3d 141 (Wash. Ct. App. 2018).

75. We might note that Rule 11 sanctions strictly constrain the marketplace of ideas within a courtroom. FED. R. CIV. P. 11.

76. See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). *Gentile* is in my view most profitably analyzed as about the boundary between public discourse and the managerial domain of the Court. See Post, *supra* note 73, at 1788–97. Analogous to *Gentile* are the many cases where courts must explore the limits of the managerial domain of schools, both for employees, see *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and for students. See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021); *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc).

but that contradict the official policy of her bureau, the First Amendment will offer no solace when she is disciplined.<sup>77</sup> Employees can be required to mouth official policy when speaking as employees, whether or not it conforms to the independent dictates of their own minds. The constitutional value of the independent thinker identified by Shiffrin does not play a significant role.

Of course, *Barnette* itself also involves a managerial government institution. *Barnette* is about compelled speech within public schools, which routinely restrain and compel speech in ways deemed necessary to accomplish their mission of education.<sup>78</sup> Schools regularly prevent students from communicating in ways that would disrupt their pedagogical mission,<sup>79</sup> and they regularly require students to speak in ways that serve that mission—whether through homework, paper assignments, recitations, or examinations.<sup>80</sup> Much of this compelled speech seems superficially to have the same properties that Shiffrin finds objectionable in *Barnette*—it is manipulative, repeated, and designed to overpower the autonomy of individual students. Think, for example, of how frequently schools require students to memorize and recite the multiplication tables, or the alphabet, or the Gettysburg Address.

Shiffrin distinguishes these many examples by invoking the “important constitutional distinction . . . between compulsory education and compulsory inculcation.”<sup>81</sup> She is right to do so. But of course the distinction raises the obvious question of how we can distinguish one from the other. On most accounts, the difference between education and inculcation derives from a substantive account of the proper ambitions of education.<sup>82</sup> If we believe that education must aspire to produce students with a competent independence of mind, we might distinguish between the compulsion necessary to internalize the multiplication tables, and the compulsion necessary to internalize a respect for the flag. Internalization of the former, we might say, is necessary for a truly competent independent mind to function, but internalization of the latter forecloses precisely that independence.

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77. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

78. Aaron Saiger, *Deconstitutionalizing Dewey*, 13 FIU L. REV. 765 (2019); Robert C. Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, in *THE FREE SPEECH CENTURY* 106 (Lee C. Bollinger and Geoffrey R. Stone eds., Oxford University Press 2019).

79. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007).

80. *Larson v. Burmaster*, 720 N.W.2d 134 (Wis. Ct. App. 2006); *Sutton v. Stony Brook Univ.*, No. 18-CV-7434(JS)(ARL), 2020 U.S. Dist. LEXIS 206999, at \*39 (E.D.N.Y. Nov. 4, 2020).

81. Blasi & Shiffrin, *supra* note 17, at 441. Blasi and Shiffrin write, “Educational methods convey information, arguments, ideas, and views to children, often by means of required exercises. But they do so in ways that explicitly implicitly treat the child as a distinct, independent mind whose genuine understanding is the objective.” *Id.* This does not seem to me a convincing account of how schools seek to impress the multiplication tables on young students. It certainly does not describe how I experienced my school’s requirement that I memorize the tables.

82. See, e.g., MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD* 82–100 (2009) (discussing the distinction between education and indoctrination as constructed within the law of academic freedom).

I should note that the Court has at times articulated a theory of education that requires schools precisely to aim at producing students who can think for themselves. In *Tinker v. Des Moines School District*,<sup>83</sup> for example, the Court struck down school censorship on the ground that it was incompatible with producing this mental independence. “In our system, state-operated schools may not be enclaves of totalitarianism,” the Court said. “In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.”<sup>84</sup>

I should also note, however, that in other decisions the Court has adopted a very different theory of education. On more than one occasion it has upheld the censorship of student speech on the ground that

The role and purpose of the American public school system were well described by two historians, who stated: “[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must *inculcate* the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”<sup>85</sup>

*Barnette* is plainly a decision in the tradition of *Tinker*. Perhaps, then, we can best understand *Barnette* as assessing the constitutionality of the mandatory pledge of allegiance in light of a particular understanding of the mission of public education. That mission is to create democratic citizens who can exercise competent independent judgment. It is a mission that certainly seems to underlie *Barnette*’s soaring and memorable rhetoric: “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.”<sup>86</sup>

Although this rhetoric is unforgettable, it also raises many conceptual puzzles. Presumably Jackson believed that it was acceptable to impose an “orthodox” understanding of the multiplication tables. Perhaps he believed that rote recitation of those tables involves facts, rather than “opinion,” and so was compatible with “intellectual individualism.”<sup>87</sup> But surely the same could not be said about rote memorization and recitation of the Gettysburg Address, or for that matter of any poem that might be assigned in the English curriculum.<sup>88</sup> If such assignments are

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83. 393 U.S. 503 (1969).

84. *Id.* at 511.

85. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (emphasis added). *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007).

86. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

87. *Id.* at 641.

88. *See, e.g., James Weinstein, Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 CONST. COMMENT. 361, 375–76 (2011) (“[I]t is inconceivable that the *Barnette* Court (or any Court before or since) would have recognized the constitutional right of a public school child to refuse to recite a poem that offended the child’s aesthetic sensibilities. (‘I’m sorry Miss O’Grady, but being required to recite drivel such as “Stopping by Woods”

constitutional, then it must be because they do not “force” students “to confess . . . their faith.” They do not involve a *pledge* of adherence.<sup>89</sup> But this explanation rather sharply deflates the soaring rhetoric of the opinion and brings the decision down to the rather prosaic ground of a substantive theory of proper education.

More importantly, however, it is important to note that although *Barnette* proclaims constitutional values in universal terms, it advances values that have constitutional purchase in only limited domains of application. So, for example, *Barnette* instructs us that the state cannot prescribe what is orthodox in matters of *opinion*, yet government routinely imposes liability on lawyers for malpractice for producing incompetent *opinion* letters.<sup>90</sup> And in these cases there is not even a whisper of the First Amendment or of *Barnette*.

Ultimately, the compartmentalization of modern society functions to cabin the constitutional values proclaimed by *Barnette*. We all occupy numerous different social roles, and these roles are typically organized according to distinct logics. In the context of freedom of expression, the effort to impose a single, universal constitutional value—like independence of mind—will inevitably run headlong into the highly differentiated social landscape that we actually inhabit.<sup>91</sup> The distinct social logics of that landscape tend to domesticate, if not emasculate, abstract constitutional values. That is why, for example, no one would think to claim that a President cannot seek to prescribe what is “orthodox” by firing a Secretary of State who refuses to endorse the President’s policies.

*Barnette*’s special and generative power derives from the fact that it interprets the educational mission of schools to accurately and eloquently chime with a constitutional value that does actually define a major category of First Amendment doctrine. What we have come to categorize as *ordinary* First Amendment protections, like those against content- or viewpoint-based regulation, apply to what I have called “public discourse,” which is the set of speech acts that courts view as necessary for the formation of public opinion.<sup>92</sup> As Chief Justice Roberts has explained, a “vibrant public discourse . . . is at the foundation of our democracy.”<sup>93</sup>

Briefly stated, ordinary First Amendment doctrine is constructed according to the following logic. Self-government is a fundamental constitutional value; democracy is the form of government that embodies this value. Democracy in modern states is

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disrespects my autonomy; I would, however, agree to recite one of Tennyson's better works. Otherwise, please speak to my lawyer.’”).

89. *Barnette*, 319 U.S. at 628. For a discussion, see Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451 (1995). See *Keeton v. Anderson-Wiley*, 664 F.3d 865, 878–79 (11th Cir. 2011).

90. See, e.g., *Montgomery Cnty. v. Jaffe, Raitt, Heuer & Weiss*, 897 F. Supp 233 (D. Md. 1995); *Petrillo v. Bachenberg*, 655 A.2d 1354 (N.J. 1995); *Taylor v. Riley*, 336 P.3d 256 (Idaho 2014).

91. See, e.g., ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 10–13 (1995).

92. See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 *HARV. L. REV.* 601 (1990); Post, *supra* note 78, at 107–08.

93. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 373 (2010) (Roberts, C.J. concurring).

essentially “government by public opinion.”<sup>94</sup> By ensuring that all can freely participate in the creation of public opinion, the First Amendment protects the constitutional value of “democratic legitimation,”<sup>95</sup> which is the public’s sense that it is indeed engaged in the project of collective self-determination. As the Court announced in *Citizens United v. FEC*,<sup>96</sup> “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”<sup>97</sup> The First Amendment serves as the “guardian of our democracy”<sup>98</sup> by casting speakers, when they participate in public discourse, in the role of autonomous sovereigns who are immunized from government control when they deliberate about how to direct the ship of state.

*Barnette* interpreted the function of public education to be that of preparing students to participate in these autonomous deliberations. *Barnette* insisted that schools treat students in ways that would facilitate their becoming independent thinkers, so that later in life they could exercise their democratic responsibilities as sovereign citizens. As *Barnette* crisply asserts: “Authority here is to be controlled by public opinion, not public opinion by authority.”<sup>99</sup>

The values asserted by *Barnette* thus chime with those that are used by the contemporary Court to protect public discourse. And these values do indeed proscribe compelled speech. The government cannot compel public discourse because government would then be manufacturing the very public opinion to which it is supposed to be responsive. Compelled public discourse contradicts the foundational value of democratic legitimation because it alienates persons from the very speech that is meant to underwrite their experience of self-government.

Notice that the prohibition of compelled speech within public discourse does not follow from the application of “strict” or “intermediate” scrutiny, which are indifferent not only to substantive First Amendment values, but also to the many different social roles that persons must inhabit in modern society. The prohibition flows instead from the specific values that the First Amendment is designed to protect within public discourse. This implies that although the rule announced by *NIFLA* may be correct within public discourse, it may have no application at all in other contexts, like for example the professional practice of medicine. It should be immediately obvious that the application of strict scrutiny to the abstract category of compelled speech would make hash of everyday practices within schools or courts,

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94. CARL SCHMITT, *CONSTITUTIONAL THEORY* 275 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

95. POST, *supra* note 72, at 1–25.

96. 558 U.S. 310 (2010).

97. *Id.* at 339 (citation omitted).

98. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982); see James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).

99. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). “We set up a government by consent of the governed,” Jackson writes, “and the Bill of Rights denies those in power any legal opportunity to coerce that consent.” *Id.* It is central to Jackson’s opinion that he regarded the compulsory flag salute as “a ceremony so touching matters of opinion and political attitude.” *Id.* at 636.

where speech is routinely compelled as necessary to fulfill the constitutional missions of education or justice.

We can now understand why the disclosures regularly compelled by the Truth in Lending Act ought not automatically to receive elevated scrutiny. These communications do not occur in public discourse, but in the realm of commercial speech, which, as we know from *Zauderer*, is subject to very different constitutional protections than public discourse.<sup>100</sup> Even *NIFLA* was willing to endorse “the *Zauderer* standard” for compelled commercial disclosures of “purely factual and uncontroversial information about the terms under which . . . services will be available.”<sup>101</sup>

The disclosures compelled by tax returns are also not public discourse. Yet they pose something of a puzzle. We do not yet have a good analysis of the specific constitutional values that might be threatened when the state requires us to file tax returns. Perhaps the closest analogy might be compulsory testimony. But this analogy is not perfect because the role of a witness is largely determined by the rules defining the institutional necessities of a court system. There is no analogous institutional mission to which we might turn to define and limit the distinct role of a taxpayer.<sup>102</sup>

I certainly do not wish to deny the existence of the many generic First Amendment values that excellent commentators have so far identified as implicated in compelled speech cases.<sup>103</sup> In any particular circumstance these values may be triggered and influence the exercise of constitutional judgment. But because social roles and institutions are so significantly constituted by the speech of those who inhabit them, the functional needs of these roles and institutions will largely subordinate free-standing constitutional values when it comes to the regulation of speech. The point is well illustrated in the various hypotheticals we have so far examined. This implies, however, that to focus on the abstract doctrine of compelled speech may be to examine the First Amendment through the wrong end of the telescope. In most situations, how we regard compelled speech will be determined by the social roles and institutions we wish to use the First Amendment to produce, rather than the reverse.

We should understand clearly that social roles and institutions do not exist in nature without human intervention. They are socially produced, through judicial decisions as well as through other forms of social reproduction. Determining how to characterize any particular speech act for First Amendment purposes is thus partly performative; it contributes to the definition and boundaries of social roles and institutions. A simple example might be the soldier in his bunk who writes his local newspaper that his commanding officer is an incompetent sadist. If we characterize the letter as public discourse, the soldier will be constitutionally immunized from reprisal. His speech is protected because he is writing as a sovereign citizen. But if we instead characterize the letter as a violation of appropriate military discipline,

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100. See *supra* notes 5–10 and accompanying text; Post, *Compelled Commercial Speech*, *supra* note 3.

101. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2372 (2018).

102. Cf. *Barenblatt v. United States*, 360 U.S. 109 (1959).

103. See *supra* text accompanying notes 55–64; Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353 (2000).

imposed by the army to achieve its mission of national defense, then the soldier might well be punished for insubordinate speech. As courts characterize whether the soldier has written the letter as a citizen or as a private in the army, so they will draw the boundaries of the managerial authority of the military.

Many of the hottest debates in First Amendment jurisprudence can best be understood as controversies about the categorization of speech acts. In *NIFLA*, for example, we might ask how a court should categorize the notices required by California. Should we classify these notices as the speech of the state itself? Or should we instead regard them as the compelled public discourse of the CPCs? Or, as a third possibility, ought we to categorize the notices as the kind of mandated commercial disclosures that are commonplace in the world of public health services providers? We might even adopt a fourth framework and conceive the notices as simply government mandates that happen to impair the attempted public discourse of the CPCs, in which case *NIFLA* does not present an issue of compelled speech at all. It is merely an example of what happens when official regulations, taken for presumably proper purposes, impair expression.

Notice that entirely different regimes of First Amendment doctrine apply to each of these distinct frameworks of analysis. If we figure the required notices as government speech, then we are told that “the Government’s own speech . . . is exempt from First Amendment scrutiny.”<sup>104</sup> If we instead imagine the notices as the forced public discourse of the CPCs, then black-letter strictures against compelled public discourse apply. “It is . . . a basic First Amendment principle that ‘freedom of speech prohibits the government from telling people what they must say.’”<sup>105</sup> If we understand the notices to be the kind of ordinary mandated disclosures that often accompany commercial transactions, then the “reasonably related” test of *Zauderer* would govern.<sup>106</sup> Finally, if we conceptualize the notices as state regulations taken for legitimate reasons but having the effect of chilling public discourse, then something like balancing would apply.<sup>107</sup> Of course if we believe that the notices were imposed *for the purpose* of undermining the public discourse of the CPCs, then likely they are *prima facie* unconstitutional.<sup>108</sup>

How should we decide among these many different normative characterizations of the facts in *NIFLA*? The women using the CPCs might justifiably expect that California ensure that they not be misled by those offering health services to the public. California in fact had good reason to believe that the CPCs were engaged in deceptive marketing that induced women into believing that they would be offered “medical services such as abortions.”<sup>109</sup> Commercial speech doctrine generally takes the point of view of consumers, giving government considerable leeway to protect

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104. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005); see *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009).

105. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l*, 570 U.S. 205, 213 (2013).

106. See *supra* notes 5–10.

107. *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002). Notice that *Watchtower* conducts this balance differently depending upon whether the chilled speech is public discourse or commercial speech.

108. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); see *infra* note 113.

109. *Chemerinsky & Goodwin*, *supra* note 3, at 70–71.

them from being misled by requiring the disclosure of factual information. This is the principle that underlies *Zauderer*.

The CPCs, by contrast, likely regarded the compulsory notices as efforts to undermine their attempts to convince women to respect unborn life. From the CPCs' perspective, it is as if the state had imposed a kind of "fairness doctrine" on their political outreach.<sup>110</sup> First Amendment doctrine applicable to public discourse generally takes the point of view of the speaker, protecting speakers from influences that may chill or alter their speech.<sup>111</sup> From the perspective of California, moreover, the notices were likely a simple and convenient method for distributing information deemed necessary to provide the public with relevant facts about state-supplied services.

There is at present no known doctrine for adjudicating among these competing perspectives, each with its own distinct constitutional consequences. It seems to me plain, however, that the outcome of the case would have been much more cogently justified if the Court had chosen to explain how it decided constitutionally to characterize the California notices than it was by any of the doctrinal moves actually made by the Court.

Speaking for myself, I find it implausible to conceptualize the notices as the compelled speech of the CPCs, because the content of the notices is so obviously attributable to California rather than to the CPCs.<sup>112</sup> I find it more convincing to imagine the mandated notices as state requirements that potentially undermine what

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110. See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

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

112. I realize that classifying the notices as compelled speech might seem follow from the holding of *Wooley*. But, as I have suggested, *Wooley* is itself rather problematic as a compelled speech case. See *supra* text accompanying notes 18–22. The mere fact that one has been forced to carry official notices on one's property does not seem to me equivalent to being forced to speak in one's own name. If that were the objection, Maynard might equally have objected to having to use any license at all that displayed identifiable information. I doubt that any court would characterize the required display of a license with numbers and letters, *simpliciter*, as compelled speech. What carries weight in *Wooley* is that the objectionable message was overtly political and ideological. I can understand how a property owner might object to being forced to post official signs saying, in what everyone recognizes as the state's own voice, that capitalism is liberating. See Greene, *supra* note 3. Whether this objection should sound in compelled speech or in some other doctrinal framework, however, seems to me an open question. In any event, the notices involved in *NIFLA* were not, as in *Wooley*, overtly political or ideological. They simply recited true facts. In that sense, they raise issues that are more analogous to the case of objecting to simple information on a license plate than to issues raised by *Wooley*. I doubt very much if the CPCs could make a compelled speech claim against the required posting of accurate information required by California Proposition 65 if it were alleged that they were offering customers water improperly infused with lead. See *Safe Drinking Water and Toxic Enforcement Act of 1986*, CAL. HEALTH & SAFETY CODE §§ 25249.5–25249.14 (West 2019); *Mateel Env't Just. Found. v. Edmund A. Gray Co.*, 9 Cal. Rptr. 3d 486 (Cal. Ct. App. 2003); *Consumer Cause, Inc. v. Smilecare*, 110 Cal. Rptr. 2d 627 (Cal. Ct. App. 2001). Seen from this perspective, *NIFLA* may not involve a question of compelled speech doctrine at all. It might be simpler instead to conceptualize the case as involving government requirements that interfere with and undermine messages that the CPCs wished to communicate.

the CPCs regarded as their own efforts to persuade women to repudiate abortions.<sup>113</sup> On this account, the case should ultimately turn on whether the speech of CPCs should constitutionally be characterized as public discourse or as commercial speech, a question which effectively turns on whether the CPCs should be regarded as speakers advancing a public cause or instead as providers of health services to the public. California manifestly regarded the CPCs as the latter; the Court just as clearly regarded the CPCs as the former.<sup>114</sup>

Many of the women using the CPCs no doubt regarded them as health care providers; the CPCs no doubt understood themselves as participants in public discourse. The issue is whose perspective should control the application of First Amendment doctrine. The Court plainly had a choice, which illustrates the dependence of First Amendment doctrine on the normative characterization of social practices. *NIFLA* makes crystal clear how constitutional doctrine sometimes depends on an interpretation of social facts that precedes the application of the doctrine. This does not make such interpretations lawless, but it does illustrate the dependence of doctrine upon powerful but implicit normative characterizations.

The choice framed in *NIFLA* should give pause to the present trend of scholarship about compelled speech. That the very same communicative acts can be characterized in such entirely different ways suggests that compelled speech is not itself a natural category, protected by its own distinctive constitutional values. This in turn implies that scholarly inquiry is better directed to the question of how compelled speech intersects with distinct social practices, and how a court may recognize and categorize these practices. The perception and valorization of these practices correspond to our lived experiences of distinct social roles and institutions. I suspect that this is what Holmes might have meant when, appealing to the “felt necessities of the time,” he said that “The life of the law has not been logic: it has been experience.”<sup>115</sup> His well-worn aphorism might well inform the thrust of contemporary compelled speech scholarship.

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113. In contrast to Thomas’s opinion for the Court, Kennedy’s concurring opinion in *NIFLA* is all but explicit that the *purpose* of California’s notices was to illegitimately undermine the public discourse of the CPCs. Kennedy characterized the case as an effort by government “to impose its own message in the place of individual speech, thought and expression. . . . [T]he history of the Act’s passage and its underinclusive application suggest a real possibility that these individuals were targeted *because of* their beliefs.” *NIFLA v. Becerra*, 138 S. Ct. 2361, 2379 (Kennedy, J., concurring) (emphasis added).

114. From the perspective of the Court, therefore, the decisive constitutional question should have been the extent and nature of the intrusion on the CPCs’ speech. This analysis is not helped by the Court’s characterization of the notices as content-based regulation.

115. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe, ed. 1963) (1881).