COMPELLED COMMERCIAL SPEECH AND THE FIRST AMENDMENT

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Introduction: Compelled Expression as a Violation of the First Amendment

For the most part, the First Amendment is viewed as a means of restricting government's authority to suppress expression. Both speakers and listeners are assumed to benefit from speech, and, therefore, the more communication of opinion and information, the better it is for both society and the democratic system. However, for a variety of important reasons, the courts have extended First Amendment protection to limit government's power to *compel* expression by private individuals and entities. The Court has wisely recognized that governmental compulsion to speak can often bring about many of the very same constitutional and democratic pathologies brought on by suppression.[1]

Despite their overlapping similarities, suppression and compulsion of speech have by no means been viewed as identical for First Amendment purposes by the Court.[2] On occasion, the Court has recognized that governmentally compelled speech may actually advance First Amendment interests more than undermine them.[3] Beginning with the work of famed free speech theorist Alexander Meiklejohn,[4] it has been widely recognized—even by the Court[5]—that the First Amendment right belongs at least as much to the listener as it does to the speaker.[6] After all, one can evolve morally, intellectu-

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1 *See infra* Part II.

2 *See infra* Part III.

3 *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

4 *See generally* Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People (1965).

5 *See, e.g.*, *Red Lion Broad. Co.*, 395 U.S. at 390.

6 Meiklejohn actually believed the right to be exclusively that of the listener; the speaker, he argued, should be deemed to have no independent First Amendment right. *See* Alexander Meiklejohn, Free Speech and its Relation to Self-Government (1948).

ally, or personally as much by reading great works of literature, science, or political theory as by expressing one's own views on the subject. Moreover, as Meiklejohn argued, if the First Amendment "springs from the necessities of . . . self-government,"[7] the voters—whom Meiklejohn called the true "governors" in a democratic society[8]—need to receive and absorb as much information and opinion as possible in order for the process of self-government to operate effectively. While Meiklejohn made the mistake of wishing to confine the First Amendment to this listener perspective, he was surely correct in recognizing the value of expression to the listener.

As a general matter, governmental suppression of all but the most consciously false communication undermines *both* listener- and speaker-centric values of free expression: the speaker is harmed by not being able to speak, and the listener is harmed by not being allowed to listen, see, or hear the intended communication. The constitutional analysis of governmentally compelled speech, however, is considerably more complicated, and, unfortunately, the Court has failed to provide a coherent theoretical explanation of its decisions on the subject. Even if the speaker is compelled to communicate against her will, thereby triggering the constitutional pathologies normally associated with compelled speech,[9] it is at least conceivable that such forced speech could benefit the recipients of the expression by providing them with valuable information that could conceivably aid them in the making of self-governing decisions, whether of the political or private varieties.[10] In this sense, compelled speech may actually *further* First Amendment values, by providing potentially valuable information to the voters that will aid them in performance of their self-governing function. In so doing, compelled speech enhances the intersection of democracy and free expression.

Traditionally, compelled speech by individuals in the noncommercial context has, for the most part, been held to be constitutionally prohibited.[11] But this is not so in all cases. For example, individuals who contribute to political candidates' campaigns are legislatively required to publicly reveal their names, and the Supreme Court has found these legislative directives to be constitutional.[12] This is at least in part designed to deter and expose possible corruption. But the requirement also provides valuable information to the electorate by notifying them of who has contributed to the various candi-

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However, one not need accept so extreme and questionable a position in order to conclude that an important element of the First Amendment right belongs to the listener. *See infra* Section III.B.

7 MEIKLEJOHN, *supra* note 6, at 26.

8 MEIKLEJOHN, *supra* note 4, at 9 ("If men are to be governed, we say, then that governing must be done, not by others, but by themselves.").

9 *See infra* Section II.B.

10 For a discussion of the differences and similarities between political and private forms of self-government, see MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 22–29 (2001).

11 *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

12 *See* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

dates for office. Thus, while there exists a strong presumption against compelled speech in traditional expressive contexts, the protection is not absolute.

To this point, the Supreme Court has generally (though not always) been less than receptive to pleas for First Amendment protection against compelled commercial speech.[13] This is so despite its long-established protection against compelled noncommercial speech. But a sharp dichotomy, for First Amendment purposes, between compelled commercial and noncommercial speech would represent the same misguided, superficial reasoning that for many years led to an equally sharp dichotomy between limitations on the *suppression* of commercial and noncommercial speech. For many years, the Supreme Court summarily dismissed the notion that commercial speech was deserving of First Amendment protection against governmental suppression.[14] The Court, however, has long since recognized its error, now providing substantial protection to truthful commercial speech in a manner approaching the level of protection extended to noncommercial speech.[15] The thesis of this Article is that it is time for the Court to recognize that the issue of compelled commercial speech is similarly far more complex, both doctrinally and theoretically, than it has previously thought. Moreover, the Article argues that recognition of these analytical complexities should logically lead to a substantial increase in First Amendment protection against compelled commercial speech.

Does this mean that compelled commercial speech should be deemed as constitutionally unacceptable as compelled noncommercial speech is widely recognized to be? Perhaps not. But if so, it is important to understand three points: (1) to a large extent, the difference, when properly understood, flows not from the fact that commercial speech is less valuable than its noncommercial counterpart, as a matter of First Amendment theory, but rather from the generally unique harms that are risked by commercial speech and which may be avoided by compelled speech; (2) to the extent noncommercial speech gives rise to the very same dangers of harm, compelled speech designed to avoid these very same harms in the context of noncommercial speech should be deemed just as constitutionally permissible in that context; and (3) even if one were to conclude that compelled commercial speech is more constitutionally permissible in that context than compelled noncommercial speech, such a conclusion has absolutely no relevance, logically or practically, to the constitutional analysis of *suppression* of commercial speech. That compelled speech may be deemed more constitutionally appropriate in the context of commercial speech than it is in the context of noncommercial

13 *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005); United States v. United Foods, Inc., 533 U.S. 405 (2001); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997).

14 *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 54 (1942).

15 *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

speech (a conclusion, I should emphasize, that I categorically reject) in no way justifies greater suppression of commercial speech than noncommercial speech, absent a showing that the commercial speech in question gives rise to more serious dangers of harm than comparable noncommercial speech.[16]

In determining the constitutionality of compelled commercial speech, the position taken here is that it is appropriate to employ the same analytical models that one employs, or at least should employ, in judging the constitutionality of compelled noncommercial speech. And those analytical models are parallel to the analytical models one should employ in measuring the constitutionality of the *suppression* of any form of expression. As a co-author and I have previously written, there are, broadly speaking, three such models: (1) speaker-centric, (2) listener-centric, and (3) regulatory-centric.[17] The speaker-centric model, as the name suggests, views the suppression of speech through the lens of the speaker: In what ways is the would-be speaker harmed by not being allowed to speak? Where a restriction on expression causes constitutionally pathological harm to the speaker, the restriction must—at least as a prima facie matter—be deemed a violation of the First Amendment. The listener-centric model similarly views the pathologies of expressive suppression through the lens of the listener: How is the listener harmed by being deprived of the opportunity to learn the information and opinion that the would-be speaker wishes to convey? Where a restriction on expression undermines the democratic values fostered by listener receipt of information and ideas, here too, the restriction must be deemed a prima facie violation of the First Amendment.[18]

Somewhat more complex in its operation is the regulatory-centric model. Under this model, the constitutional concern is with the need to preserve the implicit social contract between government and citizen in a liberal democratic society, and the extent to which the suppression of expression undermines that contractual relationship. Therefore, in applying this model one asks: To what extent does the government's suppression of expression reflect disrespect for the individual citizens as an integral whole, worthy of respect on the part of the government that represents them? A clear example of such pathological behavior by government is the selective suppression of truthful information on the basis of the paternalistic fear that the citizenry will make the wrong lawful choices on the basis of that information. Instead of trusting the citizens to make lawful choices on the basis of free and open debate, selective governmental suppression of one side of that debate represents a violation of the regulatory-centric model: government is exercising its regulatory authority in a democratically pathological manner.

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16 *See infra* Part IV.

17 Martin H. Redish & Peter B. Siegal, *Constitutional Adjudication, Free Expression, and the Fashionable Art of Corporation Bashing*, 91 TEX. L. REV. 1447, 1469 (2013) (book review).

18 By inserting the phrase "prima facie," I am allowing for the possibility that in the relatively rare instance in which a compelling governmental interest justifying the suppression is established, the First Amendment interest may be forced to give way.

One key to understanding how these three models function is to grasp that each model operates as a necessary, but not a sufficient, condition for satisfying the First Amendment. In other words, as a matter of First Amendment theory, it is not enough that a regulation satisfies any one of these three models. A violation of any one of them constitutes a significant disruption of the role performed by the First Amendment. Rather, to be held constitutional in the absence of the showing of a compelling interest, a restriction on expression must satisfy all three of these models. Thus, the fact that the constitutional interests fostered by free and open speaker communication are not undermined by an expressive restriction is irrelevant, if the listener's democratically protected interests are undermined by the same restriction. Similarly, if the restriction undermines the liberal democratic social contract by paternalistically reflecting governmental disdain for the citizens, the restriction sufficiently undermines First Amendment interests to be deemed unconstitutional. This is so even if one were to assume—if only for purposes of argument—that because of its uniquely profit-motivated expression, a commercial speaker is not fostering First Amendment values in the same manner as a noncommercial speaker.[19] The fact that listeners are deprived of the potentially valuable information or opinion that the would-be commercial speaker seeks to convey sufficiently undermines First Amendment values to render that regulation unconstitutional. Indeed, Meiklejohn long ago argued that the *only* relevant First Amendment interest is that of the recipient of the expression, because the essence of free expression is the extent to which it facilitates performance of the self-governing function by informing the voters of all relevant information and opinion.[20] While such an extreme position clearly goes too far in its categorical rejection of the speaker-centric model, it is certainly perceptive in recognizing that First Amendment values of individual development and the facilitation of life-governing decisions are significantly fostered by the receipt as well as the expression of information and opinion.

Admittedly, application of the three-pronged analytical framework for judging the constitutionality of governmental *suppression* of expression operates in a more complicated manner when it is employed to determine the constitutionality of *compelled* speech. I have long argued that suppression of commercial speech should be deemed just as constitutionally suspect as suppression of noncommercial speech, and for the most part,[21] the Supreme

19 *But see* MARTIN H. REDISH, THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY 39–43 (2013) (rejecting the dichotomy between commercial and noncommercial speakers, for First Amendment purposes, on the basis of the profit motivation of the commercial speaker).

20 *See* Meiklejohn, *supra* note 6, at 26.

21 The one glaring exception is suppression of false speech, where the Supreme Court categorically rejects First Amendment protection for false commercial speech but is far more protective of false noncommercial speech. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980). This is a view that I have in large part rejected, though here too, the issue is far more complex than many believe. *See generally* Martin H.

Court in recent years has approached acceptance of this position, even if it has not formally adopted it.[22] But for reasons already mentioned,[23] compelled speech gives rise to complications not present when the issue concerns the constitutionality of suppression. In order to understand those differences, especially for understanding how the three-pronged analytical model operates in this context, it is necessary to understand why compelled expression has traditionally been deemed pathological to First Amendment values. After explaining how that rationale is established as a constitutional baseline and reference point, we will be able to apply it to measure the constitutionality of compelled commercial speech. Once we understand the extent to which compelled commercial speech is appropriately deemed to violate at least one prong of the three-pronged analytical model that I have posited,[24] we will then be in a position to determine what sorts of compelling interests will nevertheless justify governmental compulsion.

II. WHY COMPELLED SPEECH IS UNCONSTITUTIONAL: ESTABLISHING THE FIRST AMENDMENT BASELINE

A. The Supreme Court and Compelled Speech

When one examines the Supreme Court's First Amendment doctrine of compelled speech, one naturally thinks of two cases: *West Virginia State Board of Education v. Barnette* and *Wooley v. Maynard*. These are the names of the two famous Supreme Court decisions that set out the Court's explication of the serious dangers to First Amendment values to which compelled speech gives rise. In *West Virginia State Board of Education v. Barnette*,[25] the Court held unconstitutional West Virginia's enforcement of a regulation requiring children in public schools to salute the American flag. The child in question was a Jehovah's Witness, a religion that construes the Second Commandment's prohibition on worshiping graven images to prohibit them from saluting the flag.[26]

In holding the regulation unconstitutional, Justice Jackson's opinion for the Court noted that the protection claimed by the student and her parents "stand[s] on a right of self-determination in matters that touch individual opinion and personal attitude."[27] Viewing the flag salute as "a form of utterance,"[28] the Court found that "the State . . . employs a flag as a symbol of adherence to government as presently organized. It requires the individual

Redish & Kyle Voils, *False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle*, 25 WM. & MARY BILL RTS. J. 765 (2017).

22 Coleen Klasmeier & Martin H. Redish, *Off-Label Prescription Advertising, the FDA and the First Amendment: A Study in the Values of Commercial Speech Protection*, 37 AM. J.L. & MED. 315, 339 (2011).

23 *See supra* text accompanying note 16.

24 *See supra* text accompanying notes 17–18.

25 319 U.S. 624 (1943).

26 *Id.* at 629.

27 *Id.* at 631.

28 *Id.* at 632.

to communicate by word and sign his acceptance of the political ideas it thus bespeaks."[29] The Court found no compelling justification for requiring students to salute the flag, and therefore held the compelled expression of allegiance to the state unconstitutional.[30] In his opinion for the Court, Justice Jackson wrote what has come to be known as among the most important statements of American constitutional democracy: "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."[31]

Some thirty-four years later, in *Wooley v. Maynard*,[32] the Court applied its reasoning in *Barnette* to invalidate the invocation of a New Hampshire criminal statute making it a misdemeanor to cover up lettering on a license plate to an effort by a Jehovah's Witness couple to cover up the state's license plate slogan, "Live Free or Die."[33] The Court noted that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[34] The Court held that the application of the statute to the couple's behavior was unconstitutional because "[t]he 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."[35]

Both *Barnette* and *Wooley* can be viewed as applications of the Court's general prohibition on viewpoint regulation—selective governmental suppression of expression grounded in nothing more than distaste for, or disagreement with, the viewpoint expressed.[36] Such suppression contravenes all three of the elements of my analytical model: it undermines the speaker's expressive interest in communicating, it undermines the listeners' interest in receiving information and opinion, and it undermines the regulatory-centric model's preservation of the implicit liberal democratic social contract. Though of course compelled speech does not directly involve suppression, the expressive pathology found to be present in both decisions was the government's attempt to use compelled speech as a means of either promoting acceptance of government as presently constituted or forcing private citizens to express viewpoints held by the government. The fact that in neither case

29 *Id.* at 633.

30 *See id.* at 633–34 ("[H]ere the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression.").

31 *Id.* at 642.

32 430 U.S. 705 (1977).

33 *Id.* at 706–07.

34 *Id.* at 714.

35 *Id.* at 715.

36 *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744 (2017); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Texas v. Johnson, 491 U.S. 397, 414 (1989). On the general issue of viewpoint discrimination, see REDISH, *supra* note 19, at 105–14.

did the state prohibit private individuals from expressing views counter to state-held orthodoxy did not deter the Court from finding the required utterance of or publicly displayed adherence to governmentally held positions sufficiently disruptive of First Amendment interests as to make them unconstitutional.

B. Compelled Speech and First Amendment Theory

In neither *Barnette* nor *Wooley* did the government put forth a seriously arguable compelling interest to justify the forced speech. Indeed, for the most part, the defense in both was simply that the state possesses the authority to require its citizens to spout normative political orthodoxy—the antithesis of a serious compelling interest.[37] Thus, at least on the basis of these two famous decisions, we cannot be sure how the Court would have ruled on a claim of First Amendment protection against compelled speech in situations in which the government has presented such an arguably compelling interest.

In order to make this determination, it is first necessary to reverse engineer the conclusion that, at least as a prima facie matter, the First Amendment prohibits compelled speech. To be sure, the opinions in both *Barnette* and *Wooley* waxed eloquent about the foundational precept that government cannot force-feed political orthodoxy to its citizens. But what if it is not political orthodoxy but potentially important factual information that the government wants a speaker—even a noncommercial speaker—to convey to readers or listeners? Without the benefit of some form of analysis of why, as a matter of the deep structure of American constitutional and political theory, the First Amendment is construed to prohibit compelled speech, it will be difficult to determine whether there are situations of compelled speech that fail to trigger the theoretical concerns underlying the holdings in *Barnette* and *Wooley* and to which the First Amendment right is therefore inapplicable. Moreover, it will be impossible to determine whether, even in cases where the First Amendment interest is triggered, there will ever be any competing governmental concerns so strong as to overcome the First Amendment interest in preventing forced speech. It is therefore appropriate to take the issue of compelled speech beyond the obviously egregious factual situations of these two decisions, and decide how the prohibition would operate under more nuanced circumstances.

In answering these questions, the appropriate place to begin is with my discussion of the issues in earlier writing. There, I argued that "[c]ompelled speech undermines the interests fostered by protection of free expression by giving rise to four distinct but related harms."[38] These harms may best be described as confusion, dilution, humiliation, and psychological manipula-

37 For an examination of the underlying theoretical framework of the decision in *Barnette*, see generally Leora Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817 (1986).

38 REDISH, *supra* note 10, at 175.

tion.[39] Compelled speech undermines the values of free expression by (1) potentially "confusing the populace as to the actual strength and popularity of substantive positions advocated by the government; (2) diluting the force of the speaker's persuasiveness" in support of his own views in the eyes of his readers or listeners; (3) publicly humiliating speakers by forcing them to utter positions with which they disagree, thereby possibly demoralizing them and undermining their resolve to maintain their own positions; and (4) psychologically manipulating speakers by continually forcing them to express views contrary to their own and eventually rationalizing such forced expression by subconsciously adopting the positions they have been forced to express.[40] Each of these four pathologies undermines the relationship between private citizen and government in a liberal democracy and threatens core constitutionally protected values of democratic discourse. Citizens' ability to perform the self-governing function is undermined by any one of these harms.

It is helpful to view these pathologies through the lens of the three-pronged analytical model I have proposed. The confusion pathology is best viewed as undermining the values fostered by the listener-centric model: intentional confusion of the populace by the government effectively renders the democratic process little more than a sham, for voters will be performing their electoral function on the basis of governmentally manipulated false information. Dilution of a speaker's persuasiveness, on the other hand, can appropriately be viewed as pathological from the perspective of both the speaker- and listener-centric models. Like the confusion pathology, the dilution danger undermines the populace's ability to perform its governing function by artificially altering its perception of a speaker's attempts to persuade them. A speaker who wishes to convince the populace to adopt position *X* can hardly be deemed an effective advocate for her position if he is simultaneously forced by government to advocate for position *Y*, or, even more concerning, position *Not X*. And this is likely to be true, if only on a subconscious level, even if listeners are made aware of the fact that the government is forcing the speaker to advocate on behalf of *Not X* or *Y*. Imagine, for example, that while Martin Luther King Jr. was permitted to advocate integration and equal rights, he was required by government at the outset of his speech to extoll the supposed values of segregation. No matter what he were to say at that point, the impact of his message would have been severely diluted by the proximately forced utterance of the diametrically opposed position. In addition to undermining the listener-centric model by distorting communication central to citizens' performance of the self-governing function, such forced expression would severely disrupt a speaker's desire to influence that process, thereby simultaneously undermining the speaker-centric value of free expression.

39 Note that this categorization represents a slight modification of my previous scholarship. *See id.*

40 *Id.*

The harms to the values of both free expression and the democratic process that likely follow from the humiliation pathology should also be clear. The personal demoralization that flows from a speaker being forced to utter supposedly factual or normative statements with which he disagrees might detract from his desire to continue to communicate, thereby undermining the speaker-centric model. The psychological manipulation that may result from continual and required repetition of statements with which the speaker disagrees is closely related to the demoralization and humiliation just discussed. At some point, the possibility arises that the speaker will subconsciously rationalize his forced statements by coming to believe them.

Will any of these psychological dangers *necessarily* arise in all instances? Unlikely. Some speakers who possess the intellectual, moral, and personal strength to resist such governmental manipulation may even become more committed to their original positions. But surely we must recognize at least the very real possibility that many speakers will be negatively impacted, both intellectually and personally, by forced repetition.[41]

All of the pathologies just described can, in one way or another, be deemed to undermine the liberal democratic social contract between government and citizen, and therefore fail the test of the regulatory-centric model. For all of the reasons just explained, governmentally compelled speech undermines the notion of the individual citizen as an integral whole, worthy of respect. The separation between government and individual is dangerously undermined by government's ability to disrupt communication between private speaker and private listener. It is thus not surprising that the courts have extended full First Amendment protection not only to governmental *suppression* of expression, but also to protection against *compulsion* of expression. Both forms of governmental manipulation of private expression lead to similar pathologies sought to be prevented by the First Amendment guarantee.

III. Compelled Commercial Speech

A. Compelled Commercial Speech in the Supreme Court

In the context of the suppression of commercial speech, the Supreme Court historically proceeded on the assumption that such speech restrictions could be justified more easily than could restrictions on more traditionally protected categories of expression.[42] Instead of testing the constitutionality of such restrictions on the basis of strict scrutiny, the Court traditionally

41 This is especially true of governmentally forced expression by school children. For a detailed description of these dangers, see Martin H. Redish, The Logic of Persecution: Free Expression and the McCarthy Era 187–90 (2005) (describing totalitarian use of forced expression as a means of gaining acceptance among school children).

42 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); *see also* Martin H. Redish, Freedom of Expression: A Critical Analysis 60–68 (1984).

employed the "intermediate scrutiny" of the so-called *Central Hudson* test.[43] More recently, however, the Court's approach has evolved, to provide a far more demanding level of protection to truthful commercial speech advocating purchase of a lawful product or service. This level of protection approaches, if not equals, that given to traditional forms of expression.[44]

While the Court has on occasion dealt with First Amendment questions surrounding compelled commercial speech, it has never fully explored the question of whether such compulsion is to be measured by the same standards as suppression of commercial speech. The one thing that does seem to be clear by this point is that the Court considers the First Amendment to extend at least some level of constitutional protection against such compulsion. But the contours of this protection are clouded in mystery.

The Court's decisions break down into two categories: (1) governmentally compelled payments to support generic advertising campaigns with which individual contributors may disagree, and (2) required disclaimers included in advertising to dispel potentially misleading claims. Three decisions fall into the first category: *Glickman v. Wileman Bros. & Elliott, Inc.*,[45] *United States v. United Foods, Inc.*,[46] and *Johanns v. Livestock Marketing Ass'n.*[47] Detailed understanding of the facts of these decisions is not essential to the explication of this Article's thesis. Suffice it to say that each decision involved a compelled assessment imposed on commercial food growers or producers to support a governmentally sanctioned or organized generic advertising campaign. While in *United Foods* the Court held that the program violated the First Amendment, in the other two decisions the Court upheld the compelled assessments. But in both of those cases, the Court relied on factors that, while highly questionable as a matter of either logic or practicality, at the very least leave open the possibility that as a general matter, such compelled assessments are constitutionally problematic.

In one sense, these decisions arguably differ from more traditional forms of compelled speech because they involve compelled assessments to support speech, rather than direct compulsion of speech by a private party.[48] More representative of this traditional form of compelled expression are disclaimers required by government designed to dispel potentially misleading commercial claims. The Court dealt with this issue primarily in *Zauderer v. Office of Disciplinary Counsel.*[49] There the Court authorized use of a required disclaimer in an attorney's advertisement in order to prevent the ad from

43 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

44 *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

45 521 U.S. 457 (1997).

46 533 U.S. 405 (2001).

47 544 U.S. 550 (2005).

48 *But see* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977) (holding that forced contributions for political expression constitute unconstitutional forced political speech), *overruled on other grounds by* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

49 471 U.S. 626 (1985).

potentially misleading readers.[50] But while it is true that the Court upheld the compulsion of expression by a private speaker, it is important to note the context in which the Court's ruling was made. The Court viewed such compulsion as a less invasive alternative to outright suppression of the advertisement. While indicating that *inherently* misleading advertisements could be constitutionally suppressed,[51] the Court found suppression of advertisements that are merely *potentially* misleading to violate the First Amendment.[52] Pointing to "material differences between disclosure requirements and outright prohibitions on speech," the Court noted that in insisting upon such disclosures the state "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."[53]

In upholding such required disclaimers, the Court—consistent with the established doctrinal view of the time—indicated that commercial speech receives reduced protection.[54] The Court nevertheless recognized that the First Amendment imposed meaningful limits on the state's power. The Court noted that in requiring the disclaimer, the state would be requiring the expression of "purely factual and uncontroversial information" about the services being offered.[55] "We do not suggest," the Court was careful to add, "that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that *unjustified* or *unduly burdensome* disclosure requirements might offend the First Amendment by chilling protected commercial speech."[56]

It is true that the Court went on to state that "an advertiser's rights are adequately protected as long as disclosure requirements are *reasonably related* to the State's interest in preventing deception of consumers."[57] Thus, the Court could be construed to have applied only a highly deferential "reasonableness" test to determine whether the forced disclosure will be upheld. But even assuming this to be a correct reading of the Court's intent, it is misleadingly incomplete today to rely on *Zauderer* as controlling doctrine without acknowledging the dramatic expansion of commercial speech protection in cases stretching from the mid-1990s to the present.[58] To do so would place one in a doctrinal time warp. Instead, *Zauderer* must today be read with the gloss of the far more protective subsequent line of commercial speech cases. Under that considerably more protective approach, the state bears "a heavy burden" to show that its restriction on commercial speech truly advances a

50 *Id.* at 650–51.

51 *Id.* at 641 (citing *In re* R.M.J., 455 U.S. 191, 203 (1982)).

52 *Id.* at 644.

53 *Id.* at 650.

54 *Id.* at 651.

55 *Id.*

56 *Id.* (emphasis added).

57 *Id.* (emphasis added).

58 *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552 (2011); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 176 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

state interest.[59] In any event, the key takeaway from *Zauderer,* for present purposes, is that while the Court expressed its willingness to uphold compelled disclosures involving commercial speech, it did so (1) to prevent deceiving consumers in a manner that could result in economic harm, and (2) only as a less invasive alternative to outright suppression.

B. Does Compelled Commercial Speech Trigger the Expressive Pathologies of Compelled Expression?

As described above, the four expressive pathologies to which compelled speech gives rise are (1) confusion, (2) dilution, (3) humiliation/demoralization, and (4) psychological manipulation. It is on the basis of these concerns that compelled speech has properly been held unconstitutional. Does compelled commercial speech trigger these same pathologies? It may not trigger *all* of them. But at least under certain circumstances, it is not difficult to see how compelled commercial speech could trigger one or more of them, and from the perspective of First Amendment theory, the pathologies should be deemed sufficient, rather than necessary conditions. Giving rise to any one of them should be deemed to render compelled commercial speech unconstitutional.

The first situation in which presumably all four could apply is when the commercial advertiser is an individual or group of individuals, rather than a corporation. If, for example, an individual honey seller sincerely believes that honey cures certain ills, the government's requiring him to include in his advertisements the statement that any claim that honey cures illness is false will undoubtedly confuse the populace, dilute the force of his message, bring about both humiliation and demoralization, and potentially result in psychological manipulation of the speaker. This is just as true when the honey seller is forced to include this information as when the writer of a magazine or blog article extolling the medicinal virtues of honey is required by the government to state that honey has no medicinal value. To be sure, it does not necessarily follow that such a governmentally imposed requirement should be held unconstitutional; it may well serve a compelling interest that would satisfy even fully protected exercises of First Amendment rights—an issue to which my analysis will return subsequently.[60] But at least as a prima facie matter, it is difficult to see how the honey seller's situation would be different from a traditional noncommercial compelled speech case. True, the honey seller is seeking to gain financially from acceptance of his speech, and as a result, he can hardly be deemed an objective observer. But surely we do not automatically disqualify self-interested speakers, or even those hoping for financial gain as a result of the acceptance of their expression, from substantial First Amendment protection.[61] Other than stark ideological opposition to the capitalism of which the honey seller's speech is one small part—

59 See cases cited *supra* note 58.

60 *See infra* Part IV.

61 For a more detailed exposition of this point, see REDISH, *supra* note 19, at 6–27.

hardly a principled ground for exclusion from the First Amendment's scope—there exists no logical basis to give protection against compulsion of his speech any less protection than one gives to the compelled expression of any speaker.

More difficult problems arise when, as is usually the case, the commercial speaker takes the form of a profit-making corporation. Application of the "four pathologies" analysis of compelled speech to such a speaker produces mixed and complicated results. For example, the idea that corporations can be demoralized by being forced to communicate must presume that a corporation has some sort of emotional framework similar to that of a human. Most will deem this a stretch, even for those who believe in the First Amendment rights of corporate speakers, though it is important to recall that behind every corporation are the humans who formed and benefit from it.[62] But just because one of the four pathologies is not triggered, it does not mean that *all* of them are similarly unaffected. And as long as any one of the four separate interests has been undermined, the First Amendment right itself has been undermined. For example, even if a speaker has not been demoralized, foundational interests of free expression are threatened if those receiving the information have been confused either about the level of private acceptance of the government's position or about the strength of the speaker's convictions. There is no reason that governmental satisfaction of one of the four should be deemed sufficient. For the right of free expression to thrive, triggering of any of the four pathologies should, at least as a prima facie matter, be deemed sufficient. This is because if a governmental compulsion to speak undermines any one of them, a serious First Amendment problem results.

In any event, the corporation issue is not confined to the commercial speech context. Commercial newspapers, books, and magazines are published by profit-making corporations. Governmentally compelled speech by these speakers no more gives rise to speaker demoralization than does compelled commercial speech by profit-making corporations. Of course, there are those who continue to argue that in *either* context—suppression or compulsion—commercial speech is deserving of either no protection or, at the very least, a level of protection far lower than that extended to noncommercial speech. Some even make the absurd suggestion that First Amendment protection for commercial speech is merely an outgrowth of *Lochner*-like economic substantive due process.[63] Such wrong-headed analysis confuses regulation of *conduct* with regulation of *expression*. By way of analogy, one has a First Amendment right to advocate violent overthrow, but one of course does not possess a First Amendment right to *engage in* attempted violent overthrow. For purposes of the First Amendment, there is a distinction between

62 *See generally* Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998) (explaining that what benefits corporations will benefit the public).

63 Lochner v. New York, 198 U.S. 45 (1905), *overruled in part by* Ferguson v. Skrupa, 372 U.S. 726 (1963).

regulating speech on the one hand and regulating conduct on the other. *Lochner* improperly extended constitutional protection to commercial *conduct,* not to commercial *speech.*

The response has been made, however, that because the sale of commercial products necessarily involves the use of language and communication, extension of full First Amendment protection to commercial speech will necessarily provide near-absolute protection to commercial sale, and all hell will break loose as a result.[64] Such an argument is, of course, complete nonsense. A bank robbery necessarily involves expression and communication—among the bank robbers, and between the bank robber and the bank teller. Does that mean that bank robberies are logically to receive full First Amendment protection? As stupid as this sounds, it is really no different from the misguided (or manipulative) argument used to suggest that extending full First Amendment protection to commercial speech would necessarily bring back the *Lochner* constitutional regime of the early twentieth century because commercial conduct and sale necessarily involve the use of language and communication and would therefore necessitate First Amendment protection if commercial speech receives protection.[65]

The fatal logical inconsistency inherent in the argument that commercial speech is undeserving of full First Amendment protection can be demonstrated by noting two points: (1) those who oppose protection for commercial speech have no problem extending full protection to speech about the relative merits of commercial products or services, because they are more than willing to extend it to *Consumer Reports* or Yelp; and (2) while it is true that, unlike either of those speakers, a commercial advertiser is seeking to profit from acceptance of his speech and therefore arguably a self-interested speaker, these very same commentators have no problem extending full First Amendment protection to speakers who both seek to gain financially from acceptance of their speech and are as suspect as self-interested speakers. Thus, those who oppose full First Amendment protection for commercial speech have no problem extending full protection either to comments about commercial products or services or to self-interested speech expressed solely for purposes of self-interest and personal gain.[66]

Under the three-pronged approach I have proposed to measure the extent of free speech protection each particular expression should receive,

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64 *See* STEVEN BRILL, TAILSPIN: THE PEOPLE AND FORCES BEHIND AMERICA'S FIFTY-YEAR FALL—AND THOSE FIGHTING TO REVERSE IT 243–44 (2018) (quoting Amanda Shanor, Yale Law PhD candidate).

65 *See, e.g.*, Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133; *see also* Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 880 (2015).

66 Some leading scholars assert that commercial speech deserves reduced protection because commercial advertisers are not seeking to contribute to public discourse. *See, e.g.*, Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1524 (1997) (book review). Such an approach, however, is both circular and question begging. Post provides no support for the view that commercially self-interested speech is somehow mutually exclusive with speech designed to contribute to public discourse. *See id.* He simply assumes his conclusion.

one could argue that there exists no speaker-centric interest being fostered by commercial speech, at least when the speaker is a corporation, because corporations cannot develop or evolve in the way individuals can.[67] The point is open to debate; it should never be forgotten that corporations are formed by humans to assist them in realizing their goals and potential, and thus they can plausibly be characterized as a form of catalytic self-realization. In any event, because satisfaction of any one of the three perspectives is a necessary rather than a sufficient condition to satisfy the First Amendment, this fact should in no way alter constitutional protection against governmental suppression of commercial speech.

It is true that in the case of the compulsion of commercial speech, the listener-centric model could conceivably be *advanced* by compelled speech, because such speech could often result in enrichment of the listeners in the performance of their private self-governing function. But the same could often be said of compelled noncommercial speech. In any event, in certain contexts, compulsion of commercial speech would seriously undermine both the confusion and dilution pathologies of compelled speech, thereby actually undermining the values of the listener-centric model. In short, in deciding whether compelled commercial speech violates the First Amendment, the devil is in the details. From the perspective of free speech theory then, there are occasions where compelled speech will not only fail to trigger the compulsion pathologies, it will actually foster free speech values. In other contexts, however, compelled speech will be very harmful to the interests of free expression. In Section III.C, I attempt to fashion a road map for determining whether compelled commercial speech should be deemed to violate the First Amendment, to advance its interests, or at least not to be inconsistent with its directives or the interests it is designed to foster.

C. Under What Circumstances Does Compelled Commercial Speech Violate the First Amendment?

In determining whether or not compelled commercial speech is constitutionally prohibited, one can employ either of two approaches. On the one hand, one could begin with the default presumption that compelled commercial speech is constitutionally prohibited, and the burden would then be on those seeking to compel such speech to provide sufficient reasons to overcome that presumed constitutionally dictated prohibition. On the other hand, one could begin the constitutional analysis with the opposite presumption: compelled commercial speech is permitted, unless those opposing such compelled statements can overcome that presumption by affirmatively demonstrating ways in which the compelled expression undermines important First Amendment values. It might be possible, however, to blend the two perspectives by imposing a standard that includes both "qualifiers" (i.e., prerequisites that compelled commercial speech needs to satisfy to be constitu-

67 *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 996 (1978).

tional) and "disqualifiers" (i.e., fatal defects automatically rendering compelled commercial speech unconstitutional). Such an approach would provide a significant level of protection for commercial speech while simultaneously recognizing the need for compelled expression in situations in which a showing of special need to protect and inform the public has been made.

To summarize the procedure envisioned by the model of compelled commercial speech advanced here: the initial burden would be placed on those seeking to justify compelled commercial speech. If they fail to satisfy that burden, compelled commercial speech is deemed unconstitutional. If, however, they satisfy that burden, then those opposing compelled speech can assert as an affirmative defense factors that effectively disqualify compelled speech, despite the initial showing of qualification.

The concept of the qualifier begins with the presumption of the baseline value of allowing any speaker to determine for itself what to communicate and what not to communicate to its listeners or readers. In two situations, however, government should be recognized to possess legitimate authority to compel a commercial speaker to convey information that it would not itself have chosen to communicate: (1) when the additional information is necessary to enable the listeners or readers to protect their health or keep them safe, or (2) when the additional information is necessary to protect the readers or listeners from being economically defrauded by the commercial speaker. In other words, health, safety, and fraud prevention are categorically to be deemed compelling interests, thereby justifying a departure from the presumption against compelled commercial speech. While at first glance these categorizations may appear to restrict government to only narrow situations in which it may compel commercial speech, as a practical matter these categories cover basically all of the reasons that government should be deemed to possess a legitimate concern in compelling commercial speech in the first place. An example of the first qualifier would be the required inclusion of the risk of possibly harmful side effects in advertisements for prescription drugs. The second qualifier is simply an incorporation by reference of the *Zauderer* doctrine, which upholds governmental requirements of disclaimers in commercial speech when, absent the disclaimer, there would exist a serious risk of misleading and ultimately defrauding the consumer.[68]

Under the blended approach I propose, however, the mere fact that a particular governmental compulsion falls within one of the compelling categorical justifications (or "qualifiers," as I have called them) does not automatically lead to a finding of constitutionality. In addition, the direction of compelled speech would have to avoid contravening the "disqualifiers" that must be imposed in order to keep government out of communications between private speaker and private listener in a constitutionally pathological manner. Those disqualifiers include the following situations: (1) when the commercial speaker reasonably disputes the factual accuracy of some or all of the information the government wishes to require it to communicate; and

68 *See supra* Section III.A.

(2) when communication of the required information would, purely as a physical matter, have the indirect impact of effectively interfering with the commercial speaker's ability to convey its own information or opinion to the reader or listener.

The first disqualifier is grounded in the need to avoid the confusion and dilution pathologies. But invocation of this disqualifier cannot serve as a "get out of jail free" card, effectively permitting a speaker to avoid compelled expression simply by asserting the conclusory claim that it disputes the factual or scientific accuracy of the government's required statements. It is only when the private speaker's dispute is reasonably grounded in plausible scientific theory or fact that the pathologies of compelled speech are triggered. In other words, the court must be convinced that there exists a reasonable scientific dispute on the issue in question. Here, too, the devil will ultimately be in the details. One might therefore understandably criticize acceptance of this disqualifier on the ground that it will require the reviewing court to immerse itself in factual or (even worse) scientific disputes to determine the reasonableness of the private speaker's dispute with the government. But much like Churchill said about democracy, this approach is the worst one—except for all the others.[69] Neither of the conceivable alternatives, which require the court to delve into the reasonableness of the speaker's dispute of the substance of the government's compelled expression, is particularly palatable. On the one hand, one could posit that anything government wishes the private speaker to say is constitutionally acceptable, regardless of how legitimate the speaker's dispute with the substance of the government's compelled speech may be. Such an approach would risk triggering most or all of the pathologies brought about by compelled speech.[70] On the other hand, to permit the speaker to exercise an unreviewable veto power over compelled speech would certainly be an abuse of the First Amendment right against compelled speech. The only viable alternative, with all of its warts, is to require the court to proceed case by case, determining the reasonableness of the speaker's objection to the substance of the compelled speech.

In making a determination of the reasonableness of the speaker's scientific dispute with the government's dictated speech, a court need not find the speaker's version of the facts or science to be conclusively accurate and the government's version indisputably wrong. All that should be necessary to support a finding in favor of the speaker should be a showing of some plausible scientific or factual evidence supporting the speaker's version. To put the issue in technical procedural terms, the court should ask whether it would grant summary judgment against the speaker's position on the basis of the inadequacy of the evidence the speaker presents in support of its position. If it would deny such a hypothetical motion against the speaker, the

69 "No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time." THE OXFORD DICTIONARY OF QUOTATIONS 150 (3d ed. 1980) (quoting Winston Churchill, Speech in the House of Commons (Nov. 11, 1947)).

70 *See supra* Section II.B.

court should find the governmentally dictated compelled speech to violate the First Amendment.

This does not mean that the government's version is necessarily inaccurate; it means only that the speaker's rejection of the government's version has some reasonable grounding, and therefore to require the speaker to parrot the government's version likely triggers all four of the pathologies to which compelled speech gives rise. Nor does it mean that government is powerless in its efforts to convince the populace of the correctness of its version of the facts. The government can conduct its own publicity campaign to disseminate its view in an effort to convince the populace of its correctness. What it cannot constitutionally do is use the private speaker as a conduit for that dissemination, lest it risk the very same kind of confusion, dilution and psychological manipulation that the First Amendment's prohibition on compelled speech is designed to prevent.

The second disqualifier contemplates a situation in which the potential First Amendment problem is not the substance of the compelled speech, but rather its size in relation to the physical space available for the private speaker's message. In considering this disqualifier, it is important to keep in mind that commercial advertisers are generally not giving speeches or publishing articles. Commercial speech generally takes a variety of forms—billboards, pop-up internet ads, radio and TV ads, newspaper ads, and packaging information. It is conceivable that government could require the commercial speaker to include pictures or wording of such a nature as to effectively consume most or all of the physical space available for the commercial speaker to convey its message to the consuming public. Under this analysis, it does not matter whether or not the substance of the compelled speech is factually indisputable and important in protecting the public's health or safety. Such compulsion indirectly operates as suppression by severely limiting the commercial speaker's ability to convey its message, due simply to the physical realities of the expressive platform.

An example that should at least trigger First Amendment inquiry under the analysis of this disqualifier is the government's effort to require cigarette packages to include graphic pictures vividly underscoring the health dangers of smoking.[71] The First Amendment issue for present purposes is not whether the required pictures convey a factually or scientifically accurate message (though it is at least conceivable that such an issue could arise as well), but rather whether the required presence of the graphic messages as a practical matter leaves the commercial speaker with sufficient room on the pack to convey its message to the consumers in an effective manner. I make no judgment on how that issue should be resolved. The resolution would turn on the specifics of the individual case. Rather, I am merely suggesting that the case lends itself to such a First Amendment inquiry to determine whether the indirect suppressive disqualifier should be deemed applicable.

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

When the dust settles, the approach to compelled commercial speech proposed here requires that government satisfy two disqualifiers and at least one of the two qualifiers before it can constitutionally compel a commercial speaker to include specific statements in its advertising: First, in order to qualify for constitutional validity, the compelled speech in question must either further the government's legitimate interest in protecting the health or safety of the public, or prevent imposition of fraud on the public that could reasonably be expected to result in a financial loss. Even if the compelled speech in question satisfies one or the other of the two qualifiers, in order to satisfy the First Amendment it must also avoid contravening either one of the two disqualifiers: it must not require the commercial speaker to utter a statement whose accuracy it reasonably disputes, either on a factual or scientific level, and it must not consume so much of the available space as to significantly undermine the ability of the commercial speaker to express its message to the consuming public.

Admittedly, the standard proposed here will not always be easy or simple in its application to specific situations. This fact will no doubt upset those who yearn for reflexive, easy solutions to First Amendment problems. But when one realizes that either of the two options that potentially result from the use of a superficial, mechanical standard—i.e., either automatic protection or automatic exclusion from the First Amendment's protective scope—give rise to extremely dangerous consequences, one should recognize the need for the reviewing court to do the heavy intellectual lifting required by a more refined categorical analysis of the competing constitutional and policy interests involved.

IV. Compelled Commercial Speech and the Equivalency Principle: May Noncommercial Speech Ever Be Compelled?

I have argued in my prior scholarship that it is illogical and unprincipled to assert that, at least in the context of suppression, commercial speech is deserving of less First Amendment protection than noncommercial speech.[72] To be sure, this is not the view taken by a number of leading First Amendment scholars who have written on the subject.[73] But I have already explained in this Article, in the simplest terms possible, why this is so,[74] and I have never seen a persuasive response to this reasoning. I have referred to this theory as the "equivalency principle."[75] This does not necessarily mean, however, that commercial speech will be protected as often as noncommercial speech will. The explanation of this seeming inconsistency turns on the premise that First Amendment protection against governmental suppression is not absolute. Rather, it is widely accepted by both courts and scholars that

72 *See, e.g.*, Redish, *supra* note 19; Redish & Voils, *supra* note 21.

73 *See, e.g.*, Baker, *supra* note 67; Post, *supra* note 66; Frederick Schauer, *Commercial Speech and the Perils of Parity*, 25 Wm. & Mary Bill Rts. J. 965 (2017).

74 See discussion *supra* note 66 and accompanying text.

75 *See generally* Redish & Voils, *supra* note 21.

even fully protected expression may be regulated in the presence of a compelling competing interest. Protection of the public's health and safety against immediate threats, I have argued, constitutes such a compelling interest, and commercial speech is, as a categorical matter, more likely to give rise to such a compelling danger than noncommercial speech is.[76] The same is true, I reasoned, of an immediate threat of intentional economic fraud, which also must be recognized as a compelling interest.[77] Thus, commercial speech can be recognized as equivalent in value to noncommercial speech, yet at the same time be subject to a greater number of instances of constitutionally justified suppression.

In my prior scholarly work, I never considered the question whether the equivalency principle similarly applies to governmental *compulsion* of speech, as well as to suppression. While to this point in my analysis I have proposed a relatively intricate approach to determine the constitutionality of compelled commercial speech,[78] I have not raised the question of the equivalency principle's applicability to this regulatory context. Arguably, I need not do so here. After all, as the title of this Article suggests, my subject is confined to the constitutionality of compelled commercial speech. I could, I suppose, leave it at that, and focus on the extent to which my analysis is intended to apply as well to noncommercial speech in subsequent scholarship, if ever. But years of experience immersed in the scholarly commercial speech wars makes me anticipate the argument that unless I can demonstrate that my equivalency principle applies to *compelled* speech, my assertion that it applies to *suppressed* speech falls apart. Were such an argument to be made by those who oppose commercial speech parity in any form, I would categorically reject it. The contexts of suppression and compulsion are not necessarily fungible for this purpose. For example, one could argue that from the listener-centric perspective of free speech analysis,[79] suppression of the expression of information and opinion undermines the ability of the would-be recipients of that expression to govern their lives effectively and therefore undermines performance of the self-governing process. Yet compelled speech, in some cases,[80] may actually foster or facilitate performance of such inherently democratic functions.

True, in the context of individual speakers, compelled speech may demoralize and psychologically manipulate the compelled speaker, and it is debatable whether those same harms exist in the context of a corporate speaker.[81] Thus, there exists at least an arguable basis for rejecting the

76 *Id.* at 785.

77 *Id.* at 794–95.

78 *See supra* Section III.B.

79 See discussion *supra* notes 17–18 and accompanying text.

80 Note that in my proposed standard for determining the constitutionality of compelled commercial speech, I have sought to separate situations in which such compelled speech would facilitate performance of the self-governing function or undermine it. *See supra* Section III.B.

81 *See supra* Section III.B.

equivalency principle in the compelled speech context. But this arguable difference is irrelevant in the suppression context; deprivation of potentially valuable information to the populace is a sufficient constitutional pathology to justify a finding of unconstitutionality, regardless of the suppression's pathological impact on the speaker. Thus, even assuming—solely for purposes of argument—that one were to reach the conclusion that suppression of commercial speech causes more harm than compulsion of commercial speech, it surely does not logically follow that the equivalency principle is inapplicable in the regulatory suppression context. If the listener-centric model is deemed to be undermined by suppression of the speech of those *opposing* commercial sale of a product (as all anti–commercial speech scholars presumably would conclude), then logically it is undermined by suppression of the speech of those *advocating* commercial sale (once again, at least absent the showing of a compelling interest justifying such suppression). This is so even if we assume, for purposes of argument, that the same is not true in the context of compelled speech.

Thus, logically it matters not at all to the regulatory suppression context whether the equivalency principle applies as well to the regulatory compulsion context. But it is nevertheless appropriate to turn to that question: Should the standard proposed here for measuring the constitutionality of compelled commercial speech be deemed also the proper measure of the constitutionality of compelled noncommercial speech, thereby triggering the equivalency principle's applicability to the compulsion as well as to the suppression context? The answer, I believe, is yes.

The first point to note is that despite the Court's eloquent (if largely vacuous) defense of the First Amendment's prohibition of compelled noncommercial speech in cases like *Barnette* and *Wooley*,[82] in neither of those landmark decisions was there even an arguably compelling governmental interest justifying the compulsion. *Barnette*, it should be recalled, dealt with whether the state could require a Jehovah's Witness school girl to pledge allegiance to the flag. *Wooley* concerned whether a Jehovah's Witness couple could be required to display New Hampshire's slogan, "Live Free or Die," on their license plate. Both cases went to the heart of the regulatory-centric model of First Amendment analysis: governmental attempts to control the thought processes of its citizens. On the other hand, neither case involved even an arguably compelling governmental interest to justify such prima facie constitutional violations. Thus, as important as both decisions are in the history of First Amendment doctrine, neither tells us whether compelled noncommercial speech may ever be upheld.

Even in the more traditional context of regulatory suppression, First Amendment absolutism has never been accepted by the Court,[83] and only rarely by First Amendment scholars. If absolutism is categorically rejected in

82 *See* Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

83 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

the suppression context, there is no reason to assume it applies to the compulsion context. I am unaware of any Supreme Court decision invalidating compelled noncommercial speech in the face of even an arguably compelling governmental interest. Indeed, there are at least two instances where the Court has been very willing to uphold governmentally compelled speech on the part of noncommercial speakers. One is in the context of contributions to political campaigns, where the Court has upheld forced disclosures of names of both the contributors and the candidates to whom they contributed.[84] Such required disclosures serve two important public interests: to deter corruption, and to inform the electorate of who is supporting which candidates. The other situation concerns the Court's decision in *Red Lion Broadcasting Co. v. FCC*,[85] upholding the FCC's fairness doctrine for broadcast licensees. The Court reasoned that licensees could be required to air positions with which they disagreed because such a requirement actually furthered the Meiklejohnian First Amendment listener-centric interest in keeping the voters informed.[86] To be sure, the Court's reasoning, grounded largely in assumptions of technological scarcity, will generally be inapplicable (indeed, it is now inapplicable in the context of *Red Lion* itself), as the Court has recognized.[87] But the decision nevertheless recognizes that in certain instances, because of the public's interest in receiving a wide variety of information and opinion, a speaker may be compelled to provide a platform for expression of views with which the speaker disagrees.

In any event, anyone who takes the absolutist position that compelled noncommercial speech is always unconstitutional should take note of the judiciary's ability to compel witness testimony without anyone ever suggesting the existence of a First Amendment problem with such compelled speech. Thus, even in the noncommercial speech context, it is reasonable to assume that compelling interests exist that would justify compulsion. The only questions are when, where, and why. If one proceeds on the assumption that the showing of a compelling governmental interest is capable of justifying compelled noncommercial speech, one must of course determine what constitutes a sufficiently compelling interest in this context. In making this determination, it would seem reasonable to start with governmental efforts to protect against proximate threats to public health and safety. After all, it is difficult to imagine more compelling interests than these. Thus, if, absent inclusion of some sort of required disclaimer, noncommercial speech presents a serious and proximate threat to health or safety, such a justification could reasonably be deemed compelling. This does not necessarily mean, however, that commercial and noncommercial compelled speech will receive identical treatment. As a general matter, it is likely that noncommercial speech that threatens health or safety will give rise to a less proximate danger, since it may not be as widely distributed as commercial speech nor

84 *See* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

85 395 U.S. 367 (1969).

86 *Id.* at 392; *see also supra* Part I.

87 *See, e.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

contain as direct a promotion of sale as commercial speech generally does. But this will require a case-by-case inquiry, rather than a categorical classification, to make a final determination in individual cases.

Also seeming to satisfy this high bar would be governmental efforts to prevent an intentional fraud that causes significant economic harm to members of the public. It is difficult to imagine a theory of the First Amendment, possibly short of one characterized by the most extreme form of unbending absolutism, that would deem commission of the crime of intentional economic fraud on the public to be constitutionally protected. Indeed, such expression could, consistent with the First Amendment, be suppressed by government. *A fortiori*, it could be allowed to be expressed only on the condition that it include some sort of disclaimer. Of course, as is the case in commercial speech, to satisfy First Amendment protections, the compelled disclaimer would have to satisfy particular criteria—similar in many ways to my qualifiers and disqualifiers, used to determine the constitutionality of compelled commercial speech.[88]

Ultimately, this approach to compelled speech in the noncommercial speech context appears strikingly similar to the approach I proposed for compelled commercial speech. And on some level, it would make little sense to reach any other conclusion. Consider the situation of the honey maker I described earlier.[89] If the honey maker takes out an advertisement stating that scientific proof exists showing that consuming honey either prevents or cures particular diseases, at the very least under *Zauderer* he could be required to include a disclaimer stating that the Food and Drug Administration does not necessarily agree with his assertions.[90] Such compelled speech could be deemed to protect against threats to public health and the potential threat of economic harm due to fraud. But what if, instead of including the assertion about the beneficial qualities of honey in an advertisement, the honey maker writes a book, or a newspaper op-ed column, making the exact same claim? Are we to conclude that all of a sudden, because the speech is no longer classified as commercial speech, the disclaimer requirement violates the First Amendment? Such a rigid dichotomy would place form over substance, ignoring the fact that possibly the exact same dangers arise when the claims are made in a more traditional form of noncommercial communication. Thus, assuming a finding has been made that the reach of the communication and the demographic of those exposed to the communication is virtually identical in both instances, drawing a distinction for First Amendment purposes between the two situations makes no sense.

One could reasonably impose on the health-safety exceptions to First Amendment protection against compelled speech the requirements that the threat be shown to be serious, clear, and proximate. But I see no reason why those very same metaqualifiers should not apply with equal force to application of the health-safety exception to the constitutional ban on compelled

88 *See supra* Section III.C.

89 *See supra* Section III.B.

90 Zauderer v. Office of Disciplinary Council, 471 U.S. 626 (1985).

commercial speech. Similarly, in allowing government to require inclusion of some form of disclaimer, we need to keep in mind that the nature of advocacy allows some selectivity in choice of facts and arguments. An advocate need not make the opposition's case for it.[91] Thus, required inclusion of all counterarguments could have a devastating impact on the exercise of First Amendment rights. Therefore, it should only be where the danger has been shown to be both serious and proximate that government should be permitted to depart from this foundational precept of free expression.

It should once again be emphasized that, as in the case of First Amendment protection of false factual claims,[92] this does not necessarily mean that governmentally compelled commercial speech will be invalidated as often as compelled noncommercial speech will be. This is so even if one starts, as I would, with the premise that compelled commercial speech risks giving rise to many of the same fatal constitutional pathologies deemed to dictate the unconstitutionality of compelled noncommercial speech.[93] For example, situations will often arise where the commercial speech, because of its wide distribution, the directness of its promotion of sale, and the demographic qualities of the audience reached, will give rise to a more serious threat to public health or safety than would, say, the same claims made in a less widely distributed scholarly article, seen only by a more intellectually discerning audience. But recognition of this possibility does not in any way alter the basic fact that, much like my proposal for the treatment of compelled commercial speech, the long-standing First Amendment prohibition on compelled noncommercial speech is subject to an exception for compelling interests. Thus, I think it is fair to conclude that under the approach I propose for First Amendment treatment of compelled commercial speech, the equivalency principle between commercial and noncommercial speech for First Amendment purposes continues to apply.

Conclusion

The First Amendment law concerning compelled speech is not as clear-cut as many probably think it is. Many may assume that compelled speech is automatically unconstitutional in the context of noncommercial speech and automatically constitutional in the commercial speech context. But if so, they would be wrong. While the classic cases concerning compelled noncommercial speech, such as *Barnette* and *Wooley*, were easily resolvable in favor of a finding of unconstitutionality, neither involved even an arguably compelling governmental interest to justify the compulsion. To the contrary, both represented paradigmatic invasions of the regulatory-centric model's prohibition of governmental efforts to engage in citizen thought control.[94] On

91 This concern is consistent with my theory of the adversary First Amendment. *See* Redish, *supra* note 19, at 1–5.

92 *See* Redish & Voils, *supra* note 21.

93 *See supra* Section III.B.

94 *See supra* Section II.A.

the other hand, the Supreme Court has correctly recognized that compelled commercial speech may trigger many of the classic—and fatal—First Amendment pathologies to which compelled speech gives rise, even if it does not necessarily trigger all of them.

In this Article, I propose a method to determine the constitutionality of compelled commercial speech, including an inquiry into both qualifiers and disqualifiers central to making the determination of constitutionality.[95] Under this standard, it is only when government seeks to protect against a clearly defined, serious, and proximate threat to public health or safety or the imposition of an intentional economic fraud on the public that it may overcome the standing presumption against governmental interference in communications between private speaker and private listener. Moreover, in order to qualify for a finding of constitutionality, the compelled speech must not include facts or scientific statements with which the compelled speaker reasonably disagrees. Nor may the compelled speech, regardless of its content, effectively consume the expressive platform in question, thereby effectively disrupting the commercial speaker's ability to communicate its message to its potential customers.

Whether such a standard, even assuming it were to be accepted in the context of commercial speech, should be deemed equally applicable to test the constitutionality of compelled noncommercial speech at this point in time remains doctrinally unresolved. Even if one were to reject fungibility between compelled commercial and noncommercial speech, that would have no logical impact on the extent to which commercial and noncommercial speech should be deemed equivalent for purposes of judging the constitutionality of direct suppression. But it is my belief that, as a matter of both logic and policy, the standard I have developed to judge the constitutionality of compelled commercial speech applies with equal justification in the context of compelled noncommercial speech. As in other areas of First Amendment law, though many scholars of free expression seem to be unable to understand or accept the logic of this position, the equivalency principle between commercial and noncommercial speech is applicable to instances of compelled, as well as suppressed, expression.

95 *See supra* Part III.