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## The Post-Truth First Amendment

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# THE POST-TRUTH FIRST AMENDMENT

SARAH C. HAAN\*

*Post-truthism is widely viewed as a political problem. This Article explores post-truthism as a constitutional law problem, and argues that, because post-truthism offers a normative framework for regulating information, we should take it seriously as a basis for law.*

*In its exploration of the influence of post-truth ideas on law, the Article focuses on the compelled speech doctrine. When the State mandates disclosure, it pits the interests of unwilling speakers against the interests of listeners. In the twenty-first century, speakers who are targeted by mandatory disclosure laws are often organizational actors with informational advantages, such as corporations. Listeners who stand to benefit from information-forcing laws are mainly information end users such as consumers, investors, and citizens. Often, compelled speech law sets the ground rules for the political conflict between these Information Haves and Information Have-Nots, where it becomes fertile ground for post-truth ideas.*

*The Article argues that post-truth ideas are particularly potent in courts' application of the Zauderer doctrine, which governs a subset of disclosure laws. In a common interpretation—one endorsed by the Supreme Court last term in *NIFLA v. Becerra*—Zauderer provides lax scrutiny to laws that mandate disclosure of “purely factual and uncontroversial” information. As a result, many courts deciding a challenge to a disclosure law evaluate the “controversiality” of the information subject to disclosure. In this approach, “controversial” information—a broad category including information related to a public controversy or debate—enjoys greater protection from information-forcing law than uncontroversial information does. The Article argues that a legal framework that calibrates disclosure law to the controversiality of the underlying information is paradigmatically post-truth. It contends that, ultimately, by increasing protection of “controversial” information from disclosure, the Zauderer doctrine contributes to a post-truth information economy, in which the citizenry’s ability to engage in truth-seeking, self-fulfillment, and self-government is constrained by its lack of legal authority to reduce information asymmetries or to wrest information from Information Haves.*

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#### INTRODUCTION

In February 2018, a teenager killed seventeen people with an AR-15 rifle at a Parkland, Florida high school, prompting calls for gun reform.<sup>1</sup> Soon afterward, an aide to a Florida legislator publicly claimed, falsely, that two teen survivors who appeared on CNN were not survivors of a real shooting but actors making it up.<sup>2</sup> The son of the President of the United States “liked” tweets making similar allegations, and conspiracy theorists spread claims across the internet that the shooting was a “false flag” operation intended to undermine gun rights.<sup>3</sup> A video detailing the made-up conspiracy reached number one on YouTube’s trending page before the company pulled it down; “political propaganda bots and Russia-linked Twitter accounts” swarmed social media to foment discord about the shooting and the Second

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1. Arian Campo-Flores & Nicole Hong, *How the Florida School Shooting Turned Into a Gun-Control Movement*, WALL ST. J. (Feb. 23, 2018, 3:15 PM), <https://www.wsj.com/articles/how-the-florida-school-shooting-turned-into-a-gun-control-movement-1519416915> [<https://perma.cc/E5TA-RAHX>].

2. Christal Hayes, *Florida Lawmaker’s Aide Fired After Falsely Claiming Parkland Students Are Crisis ‘Actors’*, USA TODAY (Feb. 20, 2018, 7:01 PM), <https://www.usatoday.com/story/news/2018/02/20/aide-florida-lawmaker-outspoken-survivors-florida-shooting-crisis-actors/356960002/> [<https://perma.cc/Q6DH-RZP3>].

3. Michael M. Grynbaum, *Right-Wing Media Uses Parkland Shooting as Conspiracy Fodder*, N.Y. TIMES (Feb. 20, 2018), <https://www.nytimes.com/2018/02/20/business/media/parkland-shooting-media-conspiracy.html> [<https://perma.cc/U2HN-HMU9>].

Amendment.<sup>4</sup> The refrain for this story is a familiar one: welcome to Post-Truth America.

In the popular imagination, “post-truthism” is a political problem—it connotes lying and deception for political gain.<sup>5</sup> Climate change denialism is post-truth because it contravenes the consensus views of climate scientists and advances the Big Oil agenda. “Fake news” is post-truth because it seeds public debate with false news stories to stoke fear and anger. In post-truth politics, politicians tell us things that “‘feel true’ but have no basis in fact” to score political points.<sup>6</sup> The dangers of post-truthism are political dangers—growing partisanship, a resurgence of extremist ideologies, and the shadow of fascism.<sup>7</sup>

What if post-truthism also poses dangers for constitutional law?

This Article argues that post-truthism offers a normative framework for regulating information: a system of information values that ascribes low value to facts and fact-based reasoning. It shows that this normative version of post-truthism is already influencing First Amendment law. Post-truth threads, it argues, are brightly visible in compelled speech law.<sup>8</sup>

4. Erin Griffith, *Pro-Gun Russian Bots Flood Twitter After Parkland Shooting*, WIRED (Feb. 15, 2018, 2:00 PM), <https://www.wired.com/story/pro-gun-russian-bots-flood-twitter-after-parkland-shooting/> [<https://perma.cc/2L62-MJD6>]; John Herrman, *The Making of a No. 1 YouTube Conspiracy Video After the Parkland Tragedy*, N.Y. TIMES (Feb. 21, 2018), <https://www.nytimes.com/2018/02/21/business/media/youtube-conspiracy-video-parkland.html> [<https://perma.cc/8JC6-6BGF>].

5. See, e.g., Rebecca Newberger Goldstein, *Truth Isn't the Problem—We Are*, WALL ST. J. (Mar. 15, 2018, 10:36 AM), <https://www.wsj.com/articles/truth-isnt-the-problem-we-are-1521124562> [<https://perma.cc/6JPP-DVEX>] (defining post-truthism as the idea “that there is something radically screwy going on in one specific domain, namely politics”).

6. *Post-Truth Politics: Art of the Lie*, ECONOMIST (Sept. 10, 2016), <https://www.economist.com/leaders/2016/09/10/art-of-the-lie> [<https://perma.cc/9LFE-A7QL>].

7. A number of commentators have pointed out that post-truthism subverts “our capacity to reach any sort of middle ground or consensus”—a key function of political discourse and one that is necessary for the project of self-government. Goldstein, *supra* note 5.

8. Aside from a spate of scholarship on the regulation of false statements and *United States v. Alvarez*, 567 U.S. 709 (2012), the legal academic literature on post-truthism is thin. On falsity and the First Amendment, see, for example, Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445 (2012) and Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010). For more recent scholarship that connects post-truthism to law, see Joseph Blocher, *Free Speech and Justified True Belief* 7 (Duke Law Sch. Pub. Law & Legal Theory, Series No. 2019-6, Jan. 15, 2019), <https://ssrn.com/abstract=3315835> [<https://perma.cc/UH4N-338T>] (advocating a “knowledge-based approach to free speech”); Robert Chesney & Danielle Citron, *Deepfakes and the New Disinformation War: The Coming Age of Post-Truth Geopolitics*, FOREIGN AFF., Jan.–Feb. 2019, at 147, 147–48 (exploring the use of “highly realistic and difficult-to-detect digital manipulations of audio or video” as disinformation); Justin O’Brien, *A Question of Trust: Post-Truth Paradigms and the Challenge to Financial Regulation*, 11 L. & FIN. MKTS. REV. 20 (2017) (exploring how the erosion of trust in institutions influences financial regulation policies); Jennifer Raso, *Accessible Information and Democratic Dissent: Who Counts?*, 12 J.L. & EQUALITY 13 (2016) (considering the post-truth consequences of Canadian census reforms); and S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the*

Why do we find such evidence in compelled speech law? Because of the political stakes. Compelled speech presents to courts a unique political problem. When government restricts speech, the interests of speakers and listeners are roughly aligned; both speakers and listeners seek the production of speech. When government mandates disclosure, however, it is because listeners seek information that speakers do not want to produce.<sup>9</sup>

In compelled speech disputes in the United States, listener and speaker interest groups increasingly are defined by their roles in market exchanges. On the listener side, we mostly find individual information end users, such as consumers, retail investors, citizens, and workers. On the speaker side, we mostly find large organizations, often commercial actors. Thus, many compelled speech challenges involve a political contest between weak information end users and moneyed—and informationally advantaged—companies.<sup>10</sup> In this setting, it is no great surprise to find that post-truth disclosure cases both convey normative ideas about the sorts of information that listeners should and should not use to make decisions *and* decide, as a constitutional matter, what sorts of information listeners can have access to.

Compelled speech law exhibits post-truthism in at least two senses. First, some compelled speech subdoctrines are regulating information flows with a keen eye to the effects of a disclosure on its recipients' reasoning. To do this, they sew analytical connections between speaker interests and post-truth concerns about how people are likely to—and should—use information. This Article focuses on the widespread use by federal courts of “controversiality” tests to evaluate disclosure mandates under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*<sup>11</sup>—an approach recently endorsed by a 5-4 majority of the Supreme Court in *National Institute of Family and Life Advocates (NIFLA) v. Becerra*.<sup>12</sup> By unpacking the *Zauderer* doctrine, the Article shows how post-truth values are shaping the margins of First Amendment law.

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*Challenge*, 165 U. PA. L. REV. ONLINE 137, 137 (2017) (“[Post-truth] creates a critical conundrum for lawyers, judges, legislators, and anyone interested in deliberative democracy.”). See also Robert Post, *Truth and Disagreement*, in TRUTH AND DEMOCRACY 76, 85 (Jeremy Elkins & Andrew Norris eds., 2012) (“Truth in law is decisive and singular rather than plural and evolving. Truth in law is thus the opposite of truth in politics.”); Brian C. Murchison, *Speech and the Truth-Seeking Value*, 39 COLUM. J.L. & ARTS 55, 65 (2015) (arguing that courts should make the truth-seeking value a “more explicit and careful part” of their analysis).

9. See Helen Norton, *Secrets, Lies, and Disclosure*, 27 J.L. & POL. 641, 648 (2012) (urging attention in First Amendment cases to “whether the speakers’ reason for resisting” mandatory disclosure “undermines listener autonomy”).

10. Accord Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1120 (2015) (approving and expanding upon the view that the contemporary First Amendment “shelters power’s ability to make and propagate its own truth”). For a discussion of the tensions that exist between speakers’ rights and listeners’ rights in speech disputes, see Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767 (2017).

11. 471 U.S. 626, 651 (1985).

12. 138 S. Ct. 2361, 2372 (2018).

Compelled speech law also works, in conjunction with market forces, to create a post-truth information economy. In a post-truth information economy, it is difficult and costly, and sometimes impossible, for information end users to learn information that sheds light on matters of private or public concern. In the absence of such information, end users must still make decisions—perhaps involving a contested medical service, consumer product, or investment—but they are forced to do so under conditions of ignorance that result when market forces and constitutional law provide overlapping speaker prerogatives. In such circumstances, over time, citizens become conditioned to modes of decision-making that favor easy, emotional heuristics, groupthink, and deference to authority.

This Article seeks to broaden the discussion around compelled speech law to include a critical perspective on post-truthism. It is not meant to suggest that post-truthism has somehow “taken over” the First Amendment. In fact, the case law applying the *Zauderer* doctrine reveals lower federal courts often resisting post-truth arguments and value judgments because they so plainly contradict free speech and rational-actor principles.<sup>13</sup> The Article seeks to persuade the reader that a more nuanced understanding of post-truthism and a little political context shed important light on what is happening in this dynamic area of First Amendment law.

Although my post-truth frame is new, this Article is part of a small but growing literature that describes how law has evolved in ways that undermine evidence-based decision-making. Jane Bambauer, for example, has argued that laws like the Computer Fraud and Abuse Act (CFAA) make it more difficult for journalists and academics to gather and analyze private-actor data.<sup>14</sup> Her proposed solution is a “modest commitment to Empirical Liberty” under the First Amendment, which could serve as a basis for an affirmative right to *access* information.<sup>15</sup> Sonia Katyal has

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13. In one recent example, the Ninth Circuit Court of Appeals reheard en banc an appeal concerning warning labels for sugar-sweetened beverages. *Am. Beverage Ass’n v. City & Cty. of S.F.* (ABA 2019), 916 F.3d 749 (9th Cir. 2019). In its opinion, the Ninth Circuit clarified that a court can reach the “purely factual and uncontroversial” standard last in its analysis under *Zauderer*, an approach that eases the doctrinal pressure on controversy determinations in that circuit. *Id.* at 757, 759–60 (declining to decide “whether the warning here is factually accurate and noncontroversial”); see *infra* Section III.B.

14. “For example,” Bambauer writes,

the CFAA has been interpreted by several federal courts to apply serious civil and criminal penalties to anybody who accesses a website for a purpose that violates the website’s terms of service, even when the website is available to the public . . . . The criminal provisions are not limited to instances of unauthorized access that cause risk of harm. And both the criminal and civil provisions of the CFAA expose violators to much more liability than an ordinary contract claim would.

Jane R. Bambauer, *The Empirical First Amendment*, 78 OHIO ST. L.J. 947, 957–58 (2017). Because many websites have terms of service that prohibit “scraping information and the use of fake identities to make online accounts,” she explains, the CFAA presents a risk of serious legal consequences to researchers “who would like to test online services for evidence of racial bias or who would like to scrape publicly displayed information in order to put it in a more usable form for sociological research.” *Id.* at 958.

15. *Id.* at 959. Bambauer argues that empirical liberty should function to limit laws that

critically examined how courts “deny defendants access to the source code for software that produces the evidence used to convict them,” and has proposed solutions that increase opportunities for whistleblowing and information-forcing.<sup>16</sup> This growing literature focuses attention on the decision-making effects of law, particularly where information asymmetries serve the powerful at the expense of the powerless.

Part I unpacks post-truthism as a basis for regulating information. Because post-truthism assigns value to some kinds of information but not to others, it argues, information regulation can easily promote post-truth ideals. A defining feature of post-truthism is its rejection of fact-based reasoning as a means to advance the interests of powerful actors. This leaves the powerful actors in a position to exploit their existing informational advantages for political or economic gain.

Part II argues that a growing proportion of compelled speech cases are political, and that this explains why post-truth ideas have begun cropping up in compelled speech case law. It explores the political stakes in compelled speech disputes, which are framed by a growing conflict between Information Haves and Information Have-Nots.

Part III is a deep dive into legal doctrine. It describes a main mechanism through which compelled speech doctrine is evolving to produce post-truth information regulation: tests that lower the bar for disclosure of “uncontroversial” facts and raise it for disclosure of “controversial” facts. In essence, some courts have interpreted *Zauderer* to mean that mandates of “purely factual and uncontroversial” commercial disclosures can receive less searching First Amendment scrutiny than disclosures that do not satisfy this standard.<sup>17</sup> Lower courts, citing *Zauderer*, have fashioned de facto controversiality tests that calibrate First Amendment scrutiny based on whether the underlying information relates to a public controversy.<sup>18</sup>

Part IV criticizes this approach to *Zauderer* and argues that post-truth doctrines subvert core First Amendment values. For example, it shows how sliding scale protection for “controversial” and “uncontroversial” disclosures is at odds with the “marketplace of ideas” metaphor, and with time-honored American ideals about decision-making at the individual level. It also explains that while there *are* valid reasons to worry about government-mandated disclosure of “controversial” information, the *Zauderer* framework discounts those reasons.

Part V shows that *Zauderer*’s focus on regulating the flow of “controversial” information has migrated outside the commercial speech category. Other courts,

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constrain the ability of “outsiders” to access the information of “insiders,” often commercial actors. *Id.* at 957. As examples, she cites “trade secrets laws, privacy laws, . . . and anti-hacking laws.” *Id.* Her “insider” and “outsider” labels roughly correspond to the Information “Haves” and “Have-Nots” that I introduce in Part III; Bambauer’s “insiders” are “inside” large organizational actors that gather and produce information, and her “outsiders” are information end users like researchers and academics.

16. Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 60, 140–41 (2019) (proposing changes to trade secrets law and whistleblower protections as possible transparency-enhancing strategies).

17. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (quoting *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).

18. See *infra* Section III.A.

reviewing other sorts of disclosure mandates, such as crisis pregnancy clinic disclosures, have considered controversiality *qua* controversiality important to their First Amendment analysis. Although these cases are outliers, they reveal the potential for post-truth ideas to spread beyond commercial speech and to influence information-forcing law broadly.

Before the Article concludes, Part VI provides a snapshot of where the post-truth path may take us next. At the “less restrictive means” step of First Amendment analysis, some courts have interpreted narrow tailoring to require the *government*—rather than an organizational speaker, like a private company—to communicate controversial disclosures to the public. That is, these courts take the view that a disclosure law may fail “less restrictive means” analysis unless the law makes the State the channel of controversial information to the citizenry. This final doctrinal move is startling and wrongheaded; government filtering of information is *itself* a problem cognizable by the First Amendment. The government-filtering preference underscores why a post-truth lens sheds important light on even small doctrinal maneuvers that, increasingly, determine whether and how citizens will have access to information.

### I. WHAT IS POST-TRUTHISM?

Because post-truthism is mainly understood as a political problem, it is not obvious how post-truth ideas are relevant to First Amendment law. Essentially, post-truthism teaches that people should not use evidence-based reasoning to make decisions, but should rely instead on emotion, intuition, and belief.<sup>19</sup> This preference for feelings over facts provides a basis for regulating information, one that weighs speech burdens and interests according to post-truth values.

#### *A. Defining the Problem of Post-Truthism*

Between 2016 and 2018, “post-truth” became a critical entry in our political lexicon.<sup>20</sup> Oxford Dictionaries named it the word of the year for 2016, underscoring its new popularity and, in an accompanying essay, going far to define its meaning.<sup>21</sup> According to Oxford Dictionaries, post-truth describes “circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion

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19. William Davies, *The Age of Post-Truth Politics*, N.Y. TIMES (Aug. 24, 2016), <https://www.nytimes.com/2016/08/24/opinion/campaign-stops/the-age-of-post-truth-politics.html> [<https://perma.cc/L5GS-GZN6>] (the “promise of facts” is to establish a “shared stable reality,” while the “promise of data” is to “sense shifts in public sentiment”).

20. The label “post-factual” may be more accurate than “post-truth.” Often, the two terms are used interchangeably. *See, e.g.*, Farhad Manjoo, TRUE ENOUGH: LEARNING TO LIVE IN A POST-FACT SOCIETY (2006); Elizabeth S. Goodstein, *Money, Relativism, and the Post-Truth Political Imaginary*, 50 PHIL & RHETORIC 483, 485 (2017). For rhetorical purposes, I have retained the more common term, “post-truth.”

21. *Word of the Year 2016 Is...*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> [<https://perma.cc/6U8J-XUUK>].



and personal belief.”<sup>22</sup> This definition, which treats post-truthism as exclusively *descriptive* and as chiefly concerned with public opinion (i.e., *politics*) is incomplete.

In popular culture, commentators use “post-truth” to describe situations in which lies are intentionally spread for political gain, suggesting that post-truthism is a political strategy.<sup>23</sup> Often, the “post-truth” label is applied to politicians: U.S. President Donald Trump comes to mind, but the term was used in 2004 to describe then-President George W. Bush’s efforts to build support for the Iraq War.<sup>24</sup> “Truthfulness has never been counted among the political virtues,” Hannah Arendt wrote in 1967.<sup>25</sup>

Corporations can also employ post-truth politics. Oil companies engage in post-truth tactics when they underwrite dubious research and spread false claims that deny climate change; the label fits because the companies are politically motivated to forestall regulation.<sup>26</sup> Pundits and bloggers who promote conspiracy theories about school shootings, such as the 2012 Sandy Hook massacre and the more recent Parkland, Florida shooting, also are often described as fomenting post-truth politics.<sup>27</sup> While these pundits may not personally profit from spreading false claims

22. *Id.*

23. In a recent example, commentators used the term “post-truth” to describe communications by members of the Trump administration about a November 7, 2018, White House press conference. *See, e.g.,* Catie Keck, *Kellyanne Conway Says Doctored Video of Jim Acosta Was ‘Not Altered,’ Just ‘Sped Up,’* GIZMODO (Nov. 11, 2018, 1:15 PM), <https://gizmodo.com/kellyanne-conway-says-doctored-video-of-jim-acosta-was-1830368974> [<https://perma.cc/KT7X-F966>]. For more details, see Manuela Tobias, *Fact-Checking Distorted Video Sarah Sanders Used to Bar a CNN White House Reporter*, POLITIFACT (Nov. 8, 2018, 6:10 PM), <https://www.politifact.com/truth-o-meter/article/2018/nov/08/fact-checking-misleading-video-sarah-sanders-used-/> [<https://perma.cc/W5QW-AF7H>].

24. ERIC ALTERMAN, *WHEN PRESIDENTS LIE: A HISTORY OF OFFICIAL DECEPTION AND ITS CONSEQUENCES* 294 (2004).

25. Hannah Arendt, *Truth and Politics*, NEW YORKER, Feb. 25, 1967, at 70. Arendt, the premiere philosopher of totalitarianism, observed that lies “are often used as substitutes for more violent means,” and thus “are apt to be considered relatively harmless tools in the arsenal of political action.” *Id.* at 49. More recently, John Corner explained that “[p]ost-truth’ is a self-consciously grand term of epochal shift (trading heavily on assumptions about an ‘era of truth’ we apparently once enjoyed).” John Corner, *Fake News, Post-Truth and Media-Political Change*, 39 MEDIA, CULTURE & SOC’Y 1100, 1100 (2017).

26. *See, e.g.,* NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING* 169–215 (2010); Dana Nuccitelli, *Fake News Is a Threat to Humanity, but Scientists May Have a Solution*, GUARDIAN (Dec. 27, 2017, 3:00 AM), <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2017/dec/27/fake-news-is-a-threat-to-humanity-but-scientists-may-have-a-solution> [<https://perma.cc/LLX5-AX2P>] (there is “no better example” of the “‘post-truth’ era” than climate change).

27. *See, e.g.,* Dennis Behrendt, *Propaganda: Fight for the Minds of Children*, NEW AM. (May 25, 2018), <https://www.thenewamerican.com/print-magazine/item/29132-propaganda-fight-for-the-minds-of-children> [<https://perma.cc/U2FF-947Z>] (the “best example” of the “‘post-truth’ era” emerged in the wake of the Parkland shooting, when “kids themselves became not just the symbolic content of the propaganda, but simultaneously were offered up as their very own propagandists, in a sort of ‘propaganda selfie’”).

(although some certainly *do* profit), they are politically motivated—they seek to undermine gun control efforts with which they disagree.

Importantly, however, many writers claim that “post-truth” signifies something more than garden-variety political lies. “Politicians have lied for centuries,” one commentator observed before the 2016 election.<sup>28</sup> “What’s new is the rapid-fire, constant nature of the lies, paired with the fact that they’re so easily debunked. Traditionally, politicians have at least tried to hide their dishonesty, due to the assumption that voters would care.”<sup>29</sup> What is different, these commentators claim, is that truth *matters less than it used to*. Somehow, the truth has become “of secondary importance.”<sup>30</sup>

In 2016, in an oft-cited CNN interview, Newt Gingrich, a politician, and Alisyn Camerota, a journalist, went back and forth about Gingrich’s false claim that violent crime was rising in America.<sup>31</sup> Camerota observed that Federal Bureau of Investigations (FBI) crime statistics showed violent crime was at a historic low. In response, Gingrich asserted: “what I said is equally true. People feel it.”<sup>32</sup> Camerota replied, “They feel it, yes, but the facts don’t support it.”<sup>33</sup> “As a political candidate,”

28. Heather Wilhelm, *Commentary: Donald Trump and the Post-Truth Election*, CHI. TRIB. (Mar. 18, 2016, 8:28 AM), <https://www.chicagotribune.com/news/opinion/commentary/ct-donald-trump-lies-riots-wall-mexico-perspec-0318-jm-20160318-story.html> [<https://perma.cc/R9QD-LX6P>].

29. *Id.*; see also Goldstein, *supra* note 5 (noting that the “prevalence” of post-truth acts “does seem like a genuinely new phenomenon”).

30. *Post-Truth Politics: Art of the Lie*, ECONOMIST (Sept. 10, 2016), <https://www.economist.com/leaders/2016/09/10/art-of-the-lie> [<https://perma.cc/D3D6-EZH2>]; see also D.W. Pine, *Is Truth Dead? Behind the TIME Cover*, TIME (Mar. 23, 2017), <http://time.com/4709920/donald-trump-truth-time-cover/> [<https://perma.cc/78KA-NCHF>] (discussing magazine cover that asks “Is Truth Dead?”); Goldstein, *supra* note 5 (describing post-truthism as “the downgrading of truth”). Oxford Dictionaries agrees: “Rather than simply referring to the time after a specified situation or event—as in *post-war* or *post-match*—the prefix in *post-truth* has a meaning more like ‘belonging to a time in which the specified concept has become unimportant or irrelevant.’” *Word of the Year*, *supra* note 21. The Wikipedia entry for “post-truth politics” likewise asserts that “[p]ost-truth differs from traditional contesting and falsifying of facts by relegating facts . . . to be of secondary importance relative to appeal to emotion.” *Post-truth Politics*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Post-truth\\_politics](https://en.wikipedia.org/wiki/Post-truth_politics) [<https://perma.cc/5Q6B-K42Z>]; cf. Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won’t Go Away*, 41 LOY. L.A. L. REV. 181, 188 (2007) (questioning “whether the public has much of an appetite for truth”).

31. *Was Donald Trump’s Speech Too Dark?; Newt Gingrich Clarifies Comments on Sharia Law; Clinton to Announce Running Mate Soon; Democratic National Convention Begins on Monday; Late-Night Comics Take Jabs at RNC. Aired 8:30-9a ET*, CNN (July 22, 2016, 8:30 AM), <http://transcripts.cnn.com/TRANSCRIPTS/1607/22/nday.06.html> [<https://perma.cc/J3M5-5YDT>].

32. *Id.*

33. *Id.*

Gingrich said, “I’ll go with how people feel and I’ll let you go with the theoreticians [sic].”<sup>34</sup>

The exchange revealed something critical: most people view truth as essential, today as in the past.<sup>35</sup> However, some people “find” truth through the use of post-truth reasoning: they discount empirical data and rely instead upon emotional inputs, personal belief, deference to authority, and trust—even to determine truths that are empirically testable, like whether violent crime is going up or down. When these individuals are told by a trusted political leader that violent crime is rising, and this idea connects with the individuals’ gut feelings and fears, they may conclude that violent crime is rising across the United States, even though it is not.

In one theory, post-truthism is the natural consequence of cognitive biases that we are only now beginning to understand.<sup>36</sup> According to this behavioral approach, changes in technology and the information economy have made it particularly easy for cognitive biases to influence belief formation and decision-making.<sup>37</sup> Cognitive theories of post-truthism are descriptive and treat individuals as victims of post-truthism rather than agents of it. A common argument is that post-truthism reflects confirmation bias, in which “truth is . . . accepted based on whether the opinion presented aligns with what the [audience] already believes.”<sup>38</sup> Another, demonstrated by the work of psychologist Colleen Seifert and others, posits that post-truthism

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34. *Id.* Ironically, Gingrich was not a candidate for public office when he made this statement.

35. For additional insight on the exchange between Camerota and Gingrich, see LEE MCINTYRE, *POST-TRUTH* 2–4 (2018).

36. For example, in 2016, the Nobel laureate Daniel Kahneman attributed the Brexit movement to “emotional” arguments based on “irritation and anger.” Ambrose Evans-Pritchard, *AEP: ‘Irritation and Anger’ May Lead to Brexit, Says Influential Psychologist*, TELEGRAPH (June 6, 2016, 8:31 AM), <https://www.telegraph.co.uk/business/2016/06/05/british-voters-succumbing-to-impulse-irritation-and-anger---and/> [<https://perma.cc/6Y2B-FYNU>].

37. There is significant and growing literature on the connection between psychological biases and political outlook. Law professor Dan Kahan has written extensively on this connection; his work shows that individuals selectively interpret data to conform interpretations to their political outlook. See, e.g., Dan M. Kahan, Ellen Peters, Erica Cantrell Dawson & Paul Slovic, *Motivated Numeracy and Enlightened Self-Government*, 1 BEHAV. PUB. POL’Y 54 (2017). Kahan maintains a blog on the subject at <http://www.culturalcognition.net/blog/>. See also Julie Beck, *This Article Won’t Change Your Mind*, ATLANTIC (Mar. 13, 2017), <https://www.theatlantic.com/science/archive/2017/03/this-article-wont-change-your-mind/519093/> [<https://perma.cc/FLF7-S8MS>]; Dan Jones, *Seeing Reason: How to Change Minds in a ‘Post-Fact’ World*, NEW SCIENTIST (Nov. 30, 2016), <https://www.newscientist.com/article/mg23631520-800-grand-delusions-why-we-all-believe-the-weirdest-things/> [<https://perma.cc/8587-MYFC>] (summarizing research).

38. Weston Williams, *Post-Truth: What Oxford’s Word of the Year Says About Modern Discourse*, CHRISTIAN SCI. MONITOR (Nov. 16, 2016), <https://www.csmonitor.com/The-Culture/2016/1116/Post-truth-what-Oxford-s-word-of-the-year-says-about-modern-discourse> [<https://perma.cc/C7GH-SAZF>].

exploits repetition bias, in which people come to believe information simply because they have heard it repeated several times.<sup>39</sup>

Importantly, by treating post-truthism as an accident of faulty cognition, the behavioral approach fails to consider it as a value system. If the behavioralists are right, post-truthism probably cannot be addressed through law; we cannot, for example, criminalize false political speech. Instead, the cognitive approach suggests, the individual decision maker must self-police; and, indeed, a group of psychologists has proposed cognitive “interventions” in the form of a pledge that one must adopt on an individual basis.<sup>40</sup> Because the behavioral approach views individuals as organically vulnerable to certain types of manipulation, it presents post-truthism as more or less inevitable—an inescapable consequence of technological innovations, such as the internet and social media, that are making possible new methods of manipulation.<sup>41</sup>

In a different theory, post-truthism describes a “tribal epistemology” in which one’s use of information to make decisions is heavily shaped by subjective factors that connect one to a “tribe.”<sup>42</sup> Journalist David Roberts describes this as a system in which “[i]nformation is evaluated based not on conformity to common standards of evidence or correspondence to a common understanding of the world, but on whether it supports the tribe’s values and goals and is vouchsafed by tribal leaders.”<sup>43</sup> This sort of tribalism actually encourages members to embrace false claims, because “a pledge of political allegiance achieves greater authenticity if it flies in the face of

39. See, e.g., Stephan Lewandowsky, Ullrich K.H. Ecker, Colleen M. Seifert, Norbert Schwarz & John Cook, *Misinformation and Its Correction: Continued Influence and Successful Debiasing*, 13 PSYCHOL. SCI. PUB. INT. 106, 113 (2012).

40. Gleb Tsipursky, Fabio Votta & Kathryn M. Roose, *Fighting Fake News and Post-Truth Politics with Behavioral Science: The Pro-Truth Pledge*, 27 BEHAV. & SOC. ISSUES 47, 50 (2018) [hereinafter Tsipursky, *Fighting Fake News*] (proposing a solution in which people pledge to engage in twelve behaviors “that research in psychology shows correlates with an orientation toward truthfulness”); see also Gleb Tsipursky, *Towards a Post-Lies Future: Fighting “Alternative Facts” and “Post-Truth” Politics*, HUMANIST, Mar.–Apr. 2017, at 14 [hereinafter Tsipursky, *Post-Lies Future*] (“[P]eople can train themselves to evaluate reality accurately and thus make wise decisions.”).

41. Some commentators have suggested that poor information literacy compounds post-truthism. According to Daniel J. Levitin, “[i]n the old days, factual books and news articles simply looked authentic, compared to a screed that some nut might have printed in their basement on a home printing press. The Internet has changed that, of course. A crank website can look as authentic as an authoritative, fact-checked one.” DANIEL J. LEVITIN, *WEAPONIZED LIES: HOW TO THINK CRITICALLY IN THE POST-TRUTH ERA*, at xix (2016).

42. David Roberts, *Donald Trump and the Rise of Tribal Epistemology*, VOX (May 19, 2017, 9:58 AM), <https://www.vox.com/policy-and-politics/2017/3/22/14762030/Donald-trump-tribal-epistemology> [<https://perma.cc/2V2Y-D3M9>]; see also EVAN DAVIS, *POST-TRUTH: WHY WE HAVE REACHED PEAK BULLSHIT AND WHAT WE CAN DO ABOUT IT*, at xx (2017) (“A certain number of people seem to hold views not because they think the evidence supports them, but because they feel that professing a belief in them can serve as an expression of group allegiance and loyalty.”); Goldstein, *supra* note 5 (ascribing post-truthism to political “tribalism”).

43. Roberts, *supra* note 42.

counter-evidence.”<sup>44</sup> The greater the lie, the greater the loyalty you demonstrate by adopting the lie. In the “tribal” view, political polarization is both a cause and an effect of post-truthism, and the result is a sort of downward spiral away from empirically testable truth. In the tribalism approach, as in the behavioral approach, it is difficult to see much of a role for law in either promoting or challenging post-truthism.

What the tribal theory gets right is its depiction of post-truthism as a system that ascribes different grades of value to different kinds of information. Such a system gives little weight to the tribal member’s subjective experience of information, and emphasizes the community’s process of assigning information value. High value is assigned to modes of reasoning that reinforce tribal ties—not just emotion and belief but also deference to authority and groupthink—and tribal elites are incentivized to make decisions that elevate loyalty above objectivity.

The tribal theory also underscores post-truthism’s threat to democracy. One of the main concerns raised by commentators about post-truth politics is that it creates an opening for fascism or autocracy. For one thing, “[d]emocracy is under threat when the truth is no longer a check on power.”<sup>45</sup> That is, if citizens do not understand the truth of what is happening in their communities, they cannot exercise sovereignty over their own lives. Post-truthism may also create an opening for fascism because it undermines trust in political institutions.<sup>46</sup> The loss of trust could set into motion steps—such as widespread disengagement—that lead to democratic failure. In addition, some commentators suggest that, by destroying common factual ground between groups, tribal post-truth politics discourage compromise, which is an essential part of democratic self-government.<sup>47</sup> Others have pointed out how post-truthism conflicts with ideas of freedom and consent, which are integral to democratic decision-making.<sup>48</sup>

Hannah Arendt argued that an “extreme contempt for facts” was essential to the rise of totalitarianism.<sup>49</sup> Her explorations of truth, falsity, and political power remain

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44. Goldstein, *supra* note 5.

45. Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 869 (2018).

46. See Tsipursky, *Post-Lies Future*, *supra* note 40, at 14 (“[T]ruth in politics is a common good just like clean air and water, and the pollution of truth will devastate our political system . . .”).

47. See, e.g., Bradley Onishi, *Dehumanizing Huckabee Tweet Another Echo of Dangerous Tribalism*, REWIRE.NEWS (June 23, 2018, 9:18 PM), <https://rewire.news/religion-dispatches/2018/06/23/dehumanizing-huckabee-tweet-another-echo-dangerous-tribalism/> [<https://perma.cc/NJP3-CJ4H>] (“It’s either ‘us’ or ‘them’; there can be no middle ground, no third category, no space for discussion, debate, or dialogue.”); David Roberts, *America Is Facing an Epistemic Crisis*, VOX (Nov. 2, 2017, 8:40 AM), <https://www.vox.com/policy-and-politics/2017/11/2/16588964/america-epistemic-crisis> [<https://perma.cc/6V52-KK4Q>] (“We no longer learn or know things together, as a country, so we can no longer act together, as a country.”).

48. Will Fish, “Post-Truth” Politics and Illusory Democracy, 14 PSYCHOTHERAPY & POL. INT’L 211, 212 (2016).

49. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 461 (2004).

among the most influential in political philosophy. Arendt perceived critical differences in the ways in which political lies functioned for the masses versus the movement elite. For the masses, the totalitarian movement would “conjure up a lying world of consistency which is more adequate to the needs of the human mind than reality itself.”<sup>50</sup> In contrast, Arendt observed, the movement elite was characterized by “cynicism” imbued with tribal loyalty; they did not believe the totalitarian lies, but truth was beside the point.<sup>51</sup> Arendt, like current commentators, identified both behavioralism (irrationality) and tribalism (cynical and self-conscious lying) at work.<sup>52</sup>

Arendt’s insights keenly apply to our current moment. “[T]he gullibility of sympathizers makes lies credible to the outside world,” she explained, “while at the same time the graduated cynicism of membership and elite formations [of the movement] eliminates the danger that the Leader will ever be forced by the weight of his own propaganda to make good his own statements.”<sup>53</sup> The “outside world,” Arendt wrote, misunderstands this system, and wrongly believes that either the “very enormity of totalitarian lies would be their undoing,” or that “it would be possible to take the Leader at his word and force him, regardless of his original intentions, to make it good.”<sup>54</sup> In fact, she explains, the Leader will never have to make good on the lies.<sup>55</sup>

Adam Kirsch, writing in 2017, likewise suggested that “a large share of the population . . . thrill[s] precisely to the falsehood of a statement, because it shows that the speaker has the power to reshape reality in line with their own fantasies of self-righteous beleaguerment.”<sup>56</sup> In this sense, lying is more than a pledge of tribal allegiance, even a cynical one—it is about power. The philosopher Lee McIntyre, author of a book-length treatment of post-truthism, also perceives post-truthism to be about raw power. He writes that post-truthism “amounts to a form of ideological supremacy, whereby its practitioners are trying to compel someone to believe in something, whether there is good evidence for it or not.”<sup>57</sup> It is, he writes, a “recipe for political domination.”<sup>58</sup>

50. *Id.* at 464.

51. *Id.* at 500–01.

52. *Id.* at 464–65, 500–01.

53. *Id.* at 501.

54. *Id.* at 501–02.

55. *Id.*

56. Adam Kirsch, *Lie to Me: Fiction in the Post-Truth Era*, N.Y. TIMES (Jan. 15, 2017), <https://www.nytimes.com/2017/01/15/books/lie-to-me-fiction-in-the-post-truth-era.html> [<https://perma.cc/4JMZ-MSAS>]; see also Goodstein, *supra* note 20, at 491 (“[T]he rise of the political power of revealed religion in late antiquity, which so powerfully demonstrated the capacity of emotionally grounded belief to connect, mobilize, and motivate human beings, went . . . hand in hand with the decline of democratic practices and the rise of authoritarian powers.”).

57. MCINTYRE, *supra* note 35, at 13.

58. *Id.* Ominously, Arendt demonstrated that political lies create tensions that can reshape a movement’s objectives. Eventually, she wrote, totalitarianism becomes bound up with its lies so completely that it must, to survive, eliminate “every competing nontotalitarian reality.”

Some have suggested that post-truthism is part of a “historic shift away from the principles and values of the project of Enlightenment,” “upending long-held practices of treating human beings as rational agents.”<sup>59</sup> In the rational-actor model, each decision maker weighs whatever information she wants according to her own individual preferences to maximize her own personal utility. Post-truthism does not leave questions of weight and value to the individual; it favors groupthink, submission, and obedience. In a post-truth world, citizens do not actively participate in the formation of public opinion so much as they affirm or reject ideas presented to them, on the basis of emotional appeal.<sup>60</sup>

Post-truth values can also be observed outside the political domain, in the marketplace. Should one buy a widget after an exhaustive cost-benefit analysis, or based on brand loyalty? Post-truthism, and powerful brand-name companies, counsel in favor of the latter. As a decision-making heuristic that leans heavily on emotion and trust, brand loyalty is a form of post-truth reasoning. Loyalty to the Trump brand—which was a consumer brand before it became a political one—is often associated with current post-truth politics.

### *B. Post-Truthism as a Theory of Information Use*

Whatever post-truthism is descriptively, it presents as a set of decision-making values. Insofar as post-truthism matters in law, it is because post-truthism offers a normative account of information use.<sup>61</sup> In this account, some types of information—such as emotion, intuition, and belief—have greater value than other types of information, like facts, evidence, and data. What is more, certain *sources* of information have superior value, and certain *channels* of information are more trustworthy.<sup>62</sup> Thus, when Donald J. Trump opines that CNN is “fake news,” he is expressing post-truthism as a normative value: he is telling his audience not to trust information obtained from CNN, and not to factor news from CNN into their

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ARENDR, *supra* note 49, at 510 (“The struggle for total domination of the total population of the earth, the elimination of every competing nontotalitarian reality, is inherent in the totalitarian regimes themselves; if they do not pursue global rule as their ultimate goal, they are only too likely to lose whatever power they have already seized.”). Thus, a movement that relies on post-truth reasoning may eventually become driven by the need to silence other truths, and to do so through expansion.

59. Goodstein, *supra* note 20, at 490.

60. Cf. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 483 (2011) (noting that “participating in the formation of public opinion” is “a form of communicative action”).

61. “[T]he underlying concern about a post-truth society,” writes Evan Davis, “is why there is so much bullshit.” DAVIS, *supra* note 42, at xv. Davis’s view—that we mainly should be concerned about post-truthism’s causes—is widely expressed in popular commentary but, in my view, misses the point. The underlying concern about post-truthism, I argue, is that post-truthism can easily provide a basis for regulating information. Our attention to post-truthism should be forward looking, not merely retrospective.

62. As Rebecca Tushnet has pointed out, “[s]cientific evidence indicates that emotion and rationality are not opposed . . . but rather inextricably linked.” Rebecca Tushnet, *More Than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2392 (2014).

decision-making.<sup>63</sup> Instead, he suggests, citizens should make decisions and form beliefs in reliance on information provided by him and his approved sources.

This Article argues that because post-truthism is fully realized only through information's *use*, what post-truthism offers is a regulatory system in which the flow of information to decision makers is regulated with particular attention to the information's value and influence. In First Amendment law, this translates into careful parsing of listener interests.<sup>64</sup> When a doctrine turns, in whole or in part, on the value of information for its end user, that doctrine requires legal institutions, such as courts, to analyze and pass judgment on the value of the information. Determinations that information is "factual," or "material," or, in the domain of compelled speech, "controversial," are value judgments about whether and how end users should treat the information as decision-making inputs.

Rhetorically, the link between information value and use are commonly presented in two separate but related post-truth arguments.

### 1. The Fact-Opinion Ploy

The first is the notion that facts are illusory; we should not trust facts. According to this idea, information labeled as "fact" is usually just biased information presented to advance the speaker's ideological agenda.

Post-truth reasoners often express this point by arguing that fact cannot be distinguished from opinion. Because opinions can be presented as facts, they contend, all facts are suspect, and we should not trust facts as a basis for decision-making. This Article refers to this argument as the Fact-Opinion Ploy.<sup>65</sup> It is a "ploy" or gambit in the sense that it typically is used to undercut an opponent who has offered facts to support a contention.

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63. In my view, the "fake news" label (as distinguished from factually incorrect news) is used to advance the normative post-truth agenda by discrediting certain types and sources of information. As I explain, post-truthism is served when the quantity of information and the channels of information available to end users are reduced.

64. See, e.g., Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 S.C. L. REV. 913, 915 (2007) (noting that the push for expanded commercial speech protections "bizarrely shifts attention away from speakers toward listeners and information"). Cases like *Int'l Dairy Foods Ass'n v. Amestoy*, in which the Second Circuit held that "strong consumer interest" was "inadequate" to justify a product labeling disclosure, underscore the willingness of courts to discriminate among listener uses for information, thereby imposing a judge-made hierarchy of information values. 92 F.3d 67, 73-74 (2d Cir. 1996).

65. In her essay "Truth and Politics," Hannah Arendt described "[t]he blurring of the dividing line between factual truth and opinion" as a form of intentional lying that is common to politics. Arendt, *supra* note 25, at 68. However, Arendt was describing something different from the "ploy" I describe in the text. She described the situation in which a liar, "lacking the power to make his falsehood stick, does not insist on the gospel truth of his statement but pretends that this is his 'opinion,' to which he claims his constitutional right." *Id.* Arendt's insight suggests that the blurring of the dividing line between fact and opinion can be used to bolster one's own lies as much as to undercut the facts of one's opponent. That is, to characterize a true or false fact as opinion affects its value as a decisional input.



The Supreme Court has come across versions of the Fact-Opinion Ploy in various speech-related contexts, including the law of defamation<sup>66</sup> and securities fraud.<sup>67</sup> The Court has consistently resisted holding *either* that constitutional doctrine should turn on the distinction between fact and opinion, *or* that fact and opinion are the same thing. Importantly for purposes of this Article, it has also resisted holding that a distinction between fact and opinion etches a line between permissible and impermissible forms of compelled speech.<sup>68</sup>

## 2. The “Alternative Facts” Thesis

A second strain of post-truth thought, which this Article calls the Alternative Facts Thesis, is the idea that *contested* information is inherently untrustworthy. It posits that, in a controversy, each side will present information in its favor (“alternative facts”).<sup>69</sup> The more contested an idea is, the more information will be found on both

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66. Thus, for example, the law of defamation recognizes a limited fact/opinion distinction, while cautioning against enforcing an “artificial dichotomy.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990); *see also* *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1997) (“A statement couched as an opinion that presents or implies the existence of facts which are capable of being proven true or false can be actionable” as defamation.); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (“However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”).

67. In its interpretation of federal securities law, the Supreme Court has held that opinions can present or imply the existence of facts and can give rise to liability for securities fraud on that basis. *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1083, 1093 (1991) (holding that a statement of opinion can constitute a “misstatement[] of material fact” in violation of federal securities law because board opinions expressed in Securities and Exchange Commission (SEC) filings are “reasonably understood to rest on a factual basis . . . the absence of which renders them misleading”).

68. In 1988, in *National Federation of the Blind of North Carolina*, charities subject to the North Carolina Charitable Solicitations Act asked the Court to do just that. 487 U.S. 781 (1988). The Court went on to invalidate the disclosure because it required information to be disclosed during a particular, message-based expression by the speaker—thereby changing the content of a voluntary expression. *Id.* at 795; *see also* *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 573–74 (1995) (noting that the “general rule[] that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject, perhaps, to the permissive law of defamation” (citations omitted)).

69. The term “alternative facts” comes from a now-famous television news interview given by Kellyanne Conway on NBC’s Meet the Press on January 22, 2017. *See* Rebecca Sinderbrand, *How Kellyanne Conway Ushered in the Era of ‘Alternative Facts,’* WASH. POST (Jan. 22, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/how-kellyanne-conway-ushered-in-the-era-of-alternative-facts/?utm\\_term=.b4486c1a073f](https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/how-kellyanne-conway-ushered-in-the-era-of-alternative-facts/?utm_term=.b4486c1a073f) [<https://perma.cc/5TKV-YSAE>]. In a heated discussion between Conway and host Chuck Todd, Todd pressed Conway about White House Press Secretary Sean Spicer’s assertion that the crowd at Donald Trump’s inauguration was “the largest audience to ever witness an inauguration – period . . .” Rachel Chason, *Sean Spicer Says He ‘Absolutely’ Regrets Crowd-Size Briefing*, WASH. POST (Sept. 19, 2017), <https://www.washingtonpost.com/news/the>

sides of the issue. On this view, facts are not that helpful for resolving a dispute, because the greater the controversy, the greater the cacophony of facts bombarding us from both sides.<sup>70</sup> This line of argument, which is related to “whataboutism,”<sup>71</sup> teaches that more facts make a dispute murkier, not clearer, and that contestation itself signals a lack of trustworthiness.

The Alternative Facts Thesis shares much in common with the rise of “balanced reporting” in American journalism. Lee McIntyre, writing about the coverage of climate change on television news programs in the 1990s, described how “[o]vernight, the public was treated to split-screen TV ‘debates’ with scientists on one side and ‘skeptics’ on the other. The host would let them both talk for roughly the same amount of time, then pronounce the issue ‘controversial.’”<sup>72</sup> Here, both the false equivalency and the “controversial” label are important. False equivalency gave the impression that the contentions of one side were equally matched by the contentions of the other—thus demonstrating that reliance on facts and debate only results in a draw. The *spectacle* of the controversy—in which two sides duked it out, and it was neither possible nor really important to determine who was objectively correct—became entertainment, and a way to attract eyeballs.<sup>73</sup> The “controversial”

-fix/wp/2017/09/18/sean-spicer-says-he-absolutely-regrets-crowd-size-briefing/?noredirect=on&utm\_term=.416a9411679d [https://perma.cc/T8EM-XHE2]. Todd asked Conway why President Trump had asked Spicer to “utter a falsehood” to the press, and added that this “undermine[d] the credibility of the entire White House press office . . . on day one.” Sinderbrand, *supra*. Conway danced around the question at first, but eventually offered a candid post-truth rejoinder:

KELLYANNE CONWAY: Sean Spicer, our press secretary, gave alternative facts to that.

CHUCK TODD: . . . [A]lternative facts are not facts. They’re falsehoods.

*Id.*

70. Susan B. Glasser, the founding editor of *Politico Magazine*, offered a different insight. In an essay describing the epochal changes she witnessed in the news industry from the 1980s to Trump’s 2016 election, Glasser pointed out that, by 2016, the number of news sources had exploded. Voters believed Trump’s falsehoods, she wrote, “not just because they disagree with the facts as reporters have presented them but because there’s so damn many reporters, and from such a wide array of outlets, that it’s often impossible to evaluate their standards and practices, biases and preconceptions.” Susan B. Glasser, *Covering Politics in a “Post-Truth” America*, BROOKINGS (Dec. 2, 2016), <https://www.brookings.edu/essay/covering-politics-in-a-post-truth-america/> [https://perma.cc/A2WJ-ADU5]. The public’s inability to assess information quality likely contributes to the Alternative Facts Thesis (i.e., once information is contested, it cannot be trusted, because the public lacks the tools to evaluate conflicting claims).

71. “Whataboutism” is a rhetorical technique in which a person responds to an argument or set of points not by addressing or answering those points, but by expanding the scope of the discussion, often starting with the words, “What about...” The technique is associated with Soviet propagandists and has its own Wikipedia entry. *Whataboutism*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Whataboutism> [https://perma.cc/7LX4-JLNV].

72. MCINTYRE, *supra* note 35, at 80–81.

73. In *The Art of the Deal*, Donald Trump suggested that causing controversy is a valuable media strategy, one that he used in his businesses. “[I]f you are a little different, or a little outrageous, or if you do things that are bold or controversial, the press is going to write about

label functioned as a heuristic or signal: information that is contested and therefore controversial should be trusted less.

In their important book, *Merchants of Doubt*, Naomi Oreskes and Erik M. Conway identify a concerted “tobacco strategy” as early as December 1953, when the heads of major tobacco companies combined efforts with the public relations giant, Hill and Knowlton, to create and fund the Tobacco Industry Research Committee.<sup>74</sup> Oreskes and Conway describe how these actors transformed “emerging scientific consensus” about the health risks of smoking into a “raging scientific ‘debate.’”<sup>75</sup> They did this by funding scientific research to undermine the growing body of science connecting tobacco use to cancer, and by aggressively promoting a “balance campaign” to journalists.<sup>76</sup> Oreskes and Conway write:

The appeal to journalistic balance (as well as perhaps the industry’s large advertising budget) evidently resonated with writers and editors, perhaps because of the influence of the Fairness Doctrine. Under this doctrine, established in 1949 (in conjunction with the rise of television), broadcast journalists were required to dedicate airtime to controversial issues of public concern in a balanced manner . . . . While the doctrine did not formally apply to print journalism, many writers and editors seem to have applied it to the tobacco question, because throughout the 1950s and well into the 1960s, newspapers and magazines presented the smoking issue as a great debate rather than as a scientific problem in which evidence was rapidly accumulating . . . .<sup>77</sup>

More recently, social media companies have experimented with techniques to fight the spread of false information on their platforms. From December 2016 to December 2017, Facebook experimented with the use of “Disputed Flags,” red icons that flagged content which had been disputed by fact-checkers.<sup>78</sup> When it ended the

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you . . . . I don’t mind controversy . . . .” DONALD J. TRUMP WITH TONY SCHWARTZ, *TRUMP: THE ART OF THE DEAL* 39 (1987).

74. ORESKES & CONWAY, *supra* note 26, at 10–35; *see also* ARI RABIN-HAVT & MEDIA MATTERS FOR AMERICA, *LIES, INCORPORATED: THE WORLD OF POST-TRUTH POLITICS* 23–33 (2016).

75. ORESKES & CONWAY, *supra* note 26, at 18–19; *see also* Tim Harford, *The Problem with Facts*, *FIN. TIMES* (Mar. 9, 2017), <https://www.ft.com/content/eef2e2f8-0383-11e7-ace0-1ce02ef0def9> [<https://perma.cc/CUU7-U9ED>] (exploring at length the connection between tobacco companies’ efforts to distort evidence about health risks of smoking and post-truthism); RABIN-HAVT, *supra* note 74, at 23–33. A lesser-known example is offered by Lewandowsky et al., *supra* note 39, at 107. The authors describe “decades-long deceptive advertising for Listerine mouthwash,” in which Listerine “falsely claimed for more than 50 years that the product helped prevent or reduce the severity of colds and sore throats.” *Id.* A television ad campaign, required by the U.S. Federal Trade Commission, ran from 1978 to 1980 but did not successfully dispel the company’s misinformation. *Id.*

76. ORESKES & CONWAY, *supra* note 26, at 16.

77. *Id.* at 19.

78. *See* Tessa Lyons, *Replacing Disputed Flags with Related Articles*, *FACEBOOK* (Dec. 20, 2017), <https://newsroom.fb.com/news/2017/12/news-feed-fyi-updates-in-our-fight-against-misinformation/> [<https://perma.cc/PD6T-NRGK>].

experiment, Facebook executives published an article in *Medium* to explain what they had learned.<sup>79</sup> The article revealed that Facebook had ended its use of Disputed Flags in part because the flags “could sometimes backfire” and because other techniques “led to fewer shares of the hoax article than the disputed flag treatment.”<sup>80</sup> In other words, marking false content as contested by third-party fact-checkers did not do much to stop people from sharing it. Instead, the Disputed Flag may have signaled contestation, influencing the value of false information to particular users and causing them to want to share it.<sup>81</sup>

Both the Fact-Opinion Ploy and the Alternative Facts Thesis embody normative values about what sorts of information citizens *should* trust and use. The Fact-Opinion Ploy encourages citizens to view facts as inherently biased, and the Alternative Facts Thesis encourages citizens to distrust *contested* facts. Both suggest that, in a public dispute, emotion, personal belief, and deference to authority are superior to biased or unhelpful fact-based reasoning.

### 3. The Post-Truth Information Economy

Finally, we might speak of a *post-truth information economy*—a system of information exchange that discourages evidence-based reasoning, while facilitating decision-making based on simple heuristics such as emotional reasoning, brand loyalty, and groupthink. A post-truth information economy possesses two main characteristics: channel compression and information gaps. It not only makes evidence-based decision-making a challenge but, over time, habituates citizens to passivity and dependence on a few “trusted” authorities. In fact, in a paradigmatic post-truth world, there is only *one* channel of information, the State, and it transmits information selectively for the purpose of retaining power.

Laws and economic policies could easily be used to shape the information economy to serve post-truth aims. Censorship is characteristic of a post-truth information economy, because it tends to reduce the availability of information, and thus the range of inputs that a decision maker can consider. In post-truthism, of course, whole categories of information are not valued and therefore can be regulated away. In First Amendment cases, we might find judicial opinions holding that the State’s interest in creating conditions of informed citizenship is not “compelling” or “substantial.”<sup>82</sup>

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79. Jeff Smith, Grace Jackson & Seetha Raj, *Designing Against Misinformation*, MEDIUM (Dec. 20, 2017), <https://medium.com/facebook-design/designing-against-misinformation-c5846b3aa1e2> [<https://perma.cc/X47P-MD3V>].

80. *Id.*

81. For more detail on Facebook’s use of Disputed Flags and its follow-on feature, “Related Articles,” see Sarah C. Haan, *Facebook’s Alternative Facts*, 105 VA. L. REV. ONLINE 18 (2019).

82. For example, in *NIFLA v. Becerra*, a 5-4 majority of the Supreme Court expressly refused to affirm that “providing low-income women with information about state-sponsored services” was a “substantial state interest” under intermediate scrutiny. 138 S. Ct. 2361, 2375 (2018).

In a post-truth information environment, citizens may be encouraged to distrust certain channels of information. For example, they could be taught that information from the internet cannot be trusted—perhaps by disinformation campaigns that spread false claims indiscriminately on the internet to discredit it. Information from disfavored sources could be strictly regulated or policed.<sup>83</sup> Or, courts might treat disclosure laws designed to prevent citizens from being intentionally misled as lacking merit.<sup>84</sup> The net result of the narrowing of the field of information sources is that citizens would have access to less information, and to fewer perspectives on the information they did obtain.

Concentration in ownership of channels of information, such as news organizations or social media, could reduce information flows and access. Since civic organizations, including labor unions, serve important informational functions for their members, a reduction in their number and clout would contribute to information gaps. Information might be exclusively possessed by private actors who lack incentives to share it, with no legal mechanisms of information forcing. In contrast, the use of nonrational heuristics like brand loyalty would be encouraged and protected by legal doctrine.

In thinking about the relationship of post-truthism to law, then, it is worth asking how law shapes the information economy, and whether evolving legal doctrines advance post-truth outcomes.

## II. THE POLITICS OF COMPELLED SPEECH

A main premise of this Article is that we cannot understand the constitutional problem presented by compelled speech without acknowledging the political problem it presents to courts. When government restricts speech, the interests of speakers and listeners are roughly aligned. Speakers want to produce speech, and listeners want to receive it. Courts can resolve such cases in a way that vindicates the interests of both speakers and listeners, promoting a diverse range of First Amendment interests. They can do so by enforcing our constitutional preference for limited government, which, when the subject is government *restriction* of speech, means a preference for the unregulated flow of information and ideas.

Compelled speech is different. When government mandates disclosure, it is because listeners seek information that speakers do not want to produce. Listeners' and speakers' interests are opposed.

This presents a political problem because, increasingly, speakers and listeners are sorting into groups that are easily defined by their roles and power in the political economy.

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83. This is why, for example, it is common for proponents of post-truthism to argue in favor of broad laws protecting public officials from defamation, and to threaten lawsuits.

84. Here again see *NIFLA v. Becerra*, in which the Supreme Court seemingly endorsed practices that involved trickery and manipulation. 138 S. Ct. 2361; Julie Rikelman, *Symposium: The First Amendment Cannot Justify Lying to Women*, SCOTUSblog (Dec. 13, 2017, 3:07 PM), <https://www.scotusblog.com/2017/12/symposium-first-amendment-cannot-justify-lying-women/> [<https://perma.cc/9VTC-8SHR>] (describing the deceptive practices of crisis pregnancy centers that California's FACT Act, which the Supreme Court partly enjoined in *NIFLA v. Becerra*, was designed to counter).

*A. Demand-Side vs. Supply-Side Market Participants*

In the United States, listener and speaker interest groups increasingly are defined by their roles in market exchange. On the listener side, we mostly find individual information end users, such as consumers, retail investors, citizens, and workers. On the speaker side, we mostly find large organizations, often commercial actors. In this dynamic, legislatures may intend for an information-forcing law to level the informational playing field between powerful organizations that possess information and less powerful individuals who lack it. What medical services does this clinic offer? How many times has this company been sued for labor law violations? What percentage of graduates from this college get jobs? Information that would answer all of these questions has been the subject of disclosure laws challenged in recent compelled speech cases.

From the perspective of end users, disclosure of information serves critical functions: it furthers individual self-actualization, facilitates efficient capital allocation, aids consumer decision-making, helps people make medical decisions, promotes democratic self-government, and mitigates systemic risk. However, these purposes matter little to speakers. From the perspective of speakers, disclosure presents risks that the information will attract negative attention or permit merit-based assessments that harm the organization's interests. For example, in an industry in which six competing companies manufacture a product or provide a service, only one company stands to win from evidence-based empirics that show which company's product or service is the "best" (or the safest, or the most durable, etc.). The other five companies would be better off competing on other grounds. In an increasingly data-rich world, disclosure also means that the organization loses control of a valuable resource, its data, which could be utilized by enterprising competitors. Stark differences between the interests of speakers and listeners mean that judicial resolution of a First Amendment challenge to a disclosure mandate often will have political consequences: it will promote the entrenched interests of powerful organizations at the expense of less powerful individuals, or vice versa.<sup>85</sup> These political choices have long been concealed in the grooves of precedent and analytical convention.

It is difficult to summarize the technological and economic changes that, over the past half century, have opened an information chasm between the average American and the organizational actors that populate the economy. The simple bar code offers a powerful example. Originally introduced in supermarkets in the mid-1970s to speed up the checkout process and save labor costs, the bar code was universally adopted by the late 1990s and repurposed as a data tool used to gather and analyze both aggregate- and individual-level data on shoppers.<sup>86</sup> Even before the rise of the

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85. *Accord* Cohen, *supra* note 10 (developments in free speech law "reflect an economic reality in which information has increasingly become untethered from industrial production to become a source of value in its own right, and in which powerful interests that profit from information-related activities have systematically resisted regulatory oversight").

86. See Emek Basker, *Change at the Checkout: Tracing the Impact of a Process Innovation*, 63 J. Indus. Econ. 339 (2015); Gavin Weightman, *The History of the Bar Code*, SMITHSONIAN (Sept. 23, 2015), <https://www.smithsonianmag.com/innovation/history-bar>

internet as a retail platform, merchants were likely to have better data about individual shoppers' habits than the shoppers themselves, who lacked access to the data and the means to make use of it. By mining patterns in the data across populations—an effort that individuals could not replicate even if each person had access to his or her own data—retailers successfully generated new descriptive and predictive information about individuals. That is, the merchants' access to aggregate bar code data made it possible for them to produce new forms of *individualized* data.<sup>87</sup>

In turn, the rise of bar code technology as a means of inventory management facilitated the globalization of the supply chain, which has widened the geographic separation between individual Americans and the production of basic consumer products. This, too, has made it challenging for Americans to stay informed about the products and services we use every day, and the labor and regulatory issues at play in their production, while such information remains available, at a granular level, to the organizations that operate in this global stream of commerce.

In recent years, First Amendment scholars have become increasingly attentive to power differences between speakers and listeners in various contexts.<sup>88</sup> Helen Norton has advocated a listener-centered approach in which the law privileges listeners' First Amendment interests over speakers' interests in certain communicative relationships where “speakers enjoy advantages of information or power.”<sup>89</sup> This listener-centered approach would justify rational basis scrutiny for certain disclosure laws and inform the application of other levels of scrutiny.<sup>90</sup> Norton writes that “greater attention to the power asymmetries between speakers and listeners can inform our understanding of when and how” the First Amendment should permit government to prevent certain speakers from coercing comparatively vulnerable listeners.<sup>91</sup> So far, courts have not adopted the commonsense view that power asymmetries between speakers and listeners are relevant to compelled speech law.

-code-180956704/ [https://perma.cc/3Q26-ULLN]; Ellen Jean Hirst, *40 Years Ago Today: Wrigley Gum the First Product to Have Its Bar Code Scanned*, CHI. TRIB. (June 26, 2014), <https://www.chicagotribune.com/business/chi-bar-code40-years-old-wrigley-gum-20140626-story.html> [https://perma.cc/V3ZW-YYL6].

87. Famously, Target developed data analytics to determine when a female customer was likely to be pregnant. Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG. (Feb. 16, 2012), <https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html> [https://perma.cc/X7TX-VM74] (describing how Target learned about a Minneapolis teenager's pregnancy before her own father did because of Target's “pregnancy prediction” data analytics program).

88. These contexts include professional speech and employer speech. On the former, see Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016). On the latter, see Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016).

89. Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 445 (2019); see also Norton, *supra* note 9; Norton, *supra* note 88.

90. Norton, *supra* note 89 (manuscript at 9).

91. Norton, *supra* note 88, at 77.

### B. Information Capitalism

Information capitalism, in which data is monetized through exchange (rather than merely collected by private actors for their own use) contributes to asymmetries between commercial actors and individuals. Shoshana Zuboff coined the term “surveillance capitalism,” to describe a “technologically advanced” system of economic transactions that capitalize on “asymmetries in knowledge.”<sup>92</sup> In Zuboff’s conception, surveillance capitalism expresses an economic logic that produces “instrumentarian power,” which “produces endlessly accruing knowledge for surveillance capitalists and endlessly diminishing freedom for us.”<sup>93</sup> Julie Cohen has also written about “the emergence of vast and lucrative new markets organized around data collection and predictive profiling.”<sup>94</sup> Cohen has labeled this the “personal data economy.”<sup>95</sup>

Information capitalism, the personal data economy, and surveillance capitalism are relevant to a discussion of post-truth information regulation in two key respects. First, of course, they describe the accumulation of vast stores of information by private actors—information that sheds light on aspects of human flourishing, truth seeking, and democratic self-government. The one-sided accumulation of empirical data by a subset of actors—call them Information Haves—means that evidence-based reasoning is richly possible for Information Haves in ways that it is not possible for the rest—the Information Have-Nots. The Information Haves possess reams of data and inputs that can be measured and analyzed quantitatively, as well as the financial and technological resources to accomplish this analysis. The Have-Nots lack the information, as well as the means to make use of it.

Thus, in any sort of market (or other) exchange between Information Haves and Have-Nots, the Haves enjoy significant informational advantages that are, by definition, evidence based. Surveillance capitalism thus provides the basis for a major decision-making asymmetry, in which Information Haves enjoy enhanced evidence-based decision-making, while Information Have-Nots experience an informational disadvantage that limits the extent to which they can benefit from evidence-based reasoning. The Have-Nots are consigned to modes of decision-making that we recognize as post-truth.

Secondly, both Cohen and Zuboff emphasize that the information economy monetizes probabilistic information about our decisions. Its purpose is not merely to observe decision-making, but to *influence* it.<sup>96</sup> This, too, connects directly to post-

92. Shoshana Zuboff, *THE AGE OF SURVEILLANCE CAPITALISM* 11 (2019) (“Surveillance capitalists know everything *about us*, whereas their operations are designed to be unknowable *to us*. They accumulate vast domains of new knowledge *from us*, but not *for us*.”).

93. *Id.* at 379.

94. Julie E. Cohen, *Property and the Construction of the Information Economy: A Neo-Polanyian Ontology*, in *HANDBOOK OF DIGITAL MEDIA AND COMMUNICATION* (Leah Lievrouw & Brian Loader eds.) (forthcoming) (manuscript at 9) (on file with *Indiana Law Journal*).

95. *Id.*

96. Cohen, *supra* note 94; Zuboff, *supra* note 92, at 8 (Surveillance capitalism “claims human experience as free raw material for translation into behavioral data” which is “fabricated into prediction products that anticipate what you will do now, soon, and later”;



truthism's normative goals. Post-truthism's aim is not merely to enforce a system of information values, but to construct an information ecosystem that serves existing powerful actors through its influence on decision makers. Surveillance capitalism likewise seeks to construct an information ecosystem that serves the interests of those with the financial resources to buy predictive analytics and to use them to influence individuals' decision-making. Insofar as it focuses on communicating information to influence individuals' behavior, information capitalism shares something in common with post-truthism.

One reason that the political dimensions of compelled speech law matter is that they help explain why post-truth ideas have gained purchase in some courts. Post-truth analysis is not just a convenient shortcut to outcomes in which companies save disclosure costs, although disclosers often seek to frame the issue in those terms.<sup>97</sup> Even beyond cost-benefit analysis, post-truthism weakens First Amendment principles that have shored up democracy for two hundred years, but which tend to threaten the informational hegemony of powerful economic actors. Post-truthism suggests that the First Amendment can favor one type of decision-making over another, that rational decision-making lacks value, and that, in a marketplace of ideas, people do not really need exposure to a full range of information and claims.<sup>98</sup> What these powerful economic actors understand is that information asymmetry rigs the system in their favor.

### III. POST-TRUTH DOCTRINE

Since 1985, when the Supreme Court decided *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, lower federal courts have interpreted the case to justify laxer scrutiny for disclosures of "purely factual and uncontroversial" commercial information.<sup>99</sup> To do this, courts have improvised legal tests that focus on a disclosure's informational value to its recipients. The effect has been to raise the bar for disclosure of "controversial" information—information that a court imagines would shed light on a public controversy.<sup>100</sup>

This Part starts by describing the mechanisms of *Zauderer* review. Many lower federal courts deciding a First Amendment challenge to a commercial disclosure mandate interpret *Zauderer* to require a controversial/uncontroversial test at the front

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"automated machine processes not only know our behavior but also shape our behavior at scale.").

97. Indeed, some disclosure mandates, such as the Conflict Minerals Rule, enacted by Congress as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, are subject to formal regulatory agency procedures that evaluate the costs and benefits of the disclosures. See Jeff Schwartz & Alexandra Nelson, *Cost-Benefit Analysis and the Conflict Minerals Rule*, 68 ADMIN. L. REV. 287 (2016).

98. For an enlightening discussion of how First Amendment law might constructively address such issues in light of cognitive science, see Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 421–25 (2014).

99. 471 U.S. 626, 651 (1985).

100. See *infra* Section III.B.

end of the First Amendment analysis.<sup>101</sup> The Supreme Court's most recent compelled speech case, *NIFLA v. Becerra*, did nothing to disapprove that approach and could easily be read to endorse it.<sup>102</sup>

What does "controversial" mean? A second subsection looks closely at how these courts have defined "controversial" and "uncontroversial" disclosures. It shows that courts use different definitions: most interpret "controversial" to mean "related to a controversy," but others interpret it to mean "contested," "not verifiable," or "not true." It argues that, particularly in cases finding a First Amendment violation or a likelihood of a First Amendment violation, courts treat controversiality as a measure of disclosure function, with attention to whether the disclosure is likely to influence its audience. In other words, in the *Zauderer* context, "controversial" often means *subversive*.

#### A. Commercial Compelled Speech & Zauderer

When a plaintiff challenges a commercial disclosure mandate, intermediate review is the default. Like restrictions on commercial speech, compelled commercial speech is subject to review using the test established in *Central Hudson Gas & Electric Corporation v. Public Service Commission* in 1980.<sup>103</sup> Under *Central Hudson*, a law that compels a commercial disclosure must "directly advance[]" a "substantial" governmental interest and not be "more extensive than is necessary to serve that interest."<sup>104</sup>

In 1985, the Supreme Court departed from the *Central Hudson* standard and applied less exacting scrutiny to a disclosure mandate in *Zauderer*.<sup>105</sup> *Zauderer* involved disclaimers triggered by statements in print advertisements. The concern was that attorney advertisements that promoted contingent fee arrangements were deceptive unless they also contained specific information about how costs would be charged. Rather than apply intermediate scrutiny to the ad disclosure, the *Zauderer* Court devised a "reasonable relation" test, explaining that:

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101. The Ninth Circuit recently clarified that the controversiality test can come after an evaluation of the disclosure's justification and burden on speech. *See* *Am. Bev. Ass'n v. City & Cty. of S.F.*, 916 F.3d 749, 756 (9th Cir. 2019). The Eighth Circuit offers an exception; it does not routinely employ controversiality tests to determine the proper standard of review. *See* *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045 (8th Cir. 2014); *see also* *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (suggesting that the Supreme Court likely did not mean to make "purely factual and noncontroversial" a legal standard).

102. 138 S. Ct. 2361, 2372 (2018) (the licensed notice is not limited to "purely factual and uncontroversial information about the terms under which . . . services will be available").

103. 447 U.S. 557, 566 (1980); *see also* *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500 n.9 (1996).

104. *Cent. Hudson*, 447 U.S. at 566. The *Central Hudson* test applies only to commercial speech that is lawful and not misleading. *Id.*

105. 471 U.S. at 626, 651.

[t]he 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.<sup>106</sup>

Since 1985, and particularly in the last ten years, lower courts have applied *Zauderer's* "reasonable relation" review to an increasing scope of information-forcing regulation.<sup>107</sup> Courts often cite the case in connection with disclosure mandates that require businesses to reveal data about their products and services, for example.<sup>108</sup>

What is most noteworthy about *Zauderer* is the great significance courts have given the phrase "purely factual and uncontroversial" in the passage quoted above.<sup>109</sup> Today, nearly every application of the *Zauderer* test to a commercial disclosure involves judicial inquiry into whether the disclosure is "factual" and "uncontroversial."<sup>110</sup>

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106. *Id.* (citations omitted).

107. Under *Zauderer's* "reasonable relation" test, "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." *Id.* Robert Post has described *Zauderer* review as "an extraordinarily lenient test." 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, 560 (2006).

108. *See, e.g.,* N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (chain restaurants must disclose calorie information about their food products); Mass. Ass'n of Private Career Sch. v. Healey, 159 F. Supp. 3d 173 (D. Mass. 2016) (for-profit colleges must disclose graduation rate and employment rate data).

109. *See* Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 32 (2015) (describing *Zauderer's* "purely factual and uncontroversial" standard as "an independent prerequisite for constitutionality" in *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014)).

110. *See, e.g.,* Am. Beverage Ass'n v. City & Cty. of S.F. (*ABA 2019*), 916 F.3d 749, 756 (9th Cir. 2019) (The "*Zauderer* test . . . contains three inquiries: whether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome."); *Poughkeepsie Supermarket Corp. v. Dutchess Cty.*, 648 F. App'x 156, 158 (2d Cir. 2016) ("Because Local Law No. 9 requires only the disclosure of purely factual and uncontroversial information—namely, item pricing," it qualified for *Zauderer* review.); *Cigar Ass'n of Am. v. U.S. FDA*, 315 F. Supp. 3d 143, 165 (D.D.C. 2018) ("*Zauderer* applies only to disclosures of 'purely factual and uncontroversial information about the good or service being offered.' The court therefore must first determine whether the disclosures are 'purely factual' and 'uncontroversial.'"); *Nat'l Ass'n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842, 852 (E.D. Cal. 2018) ("The dispute in the present case is over whether the compelled disclosure is of purely factual and uncontroversial information."); *Core-Mark Int'l, Inc. v. Mont. Bd. of Livestock*, No. CV 15-05-H-SEH, 2018 U.S. Dist. LEXIS 187359, at \*10 (D. Mont. Nov. 1,

*Zauderer* leaves open a number of vexing and important questions.<sup>111</sup> The most vigorous disagreement over *Zauderer* so far has concerned what *kinds* of commercial disclosure mandates are subject to its laxer review.<sup>112</sup> In the narrow view, the *Zauderer* test applies only where a commercial disclosure is “purely factual and uncontroversial” and functions to prevent consumer deception.<sup>113</sup> In a somewhat broader view, *Zauderer* applies to any commercial disclosure mandate—but cannot

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2018) (compelled disclosure of product sell-by date “does not constitute an opinion, and cannot reasonably be considered controversial”); *Mass. Ass’n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 197 (D. Mass. 2016) (“*Zauderer* reasonable-basis review is applicable . . . if two conditions are met: (1) the speech is potentially misleading and (2) the regulations require the schools to disclose factual and uncontroversial information.”). *But see* 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045 (8th Cir. 2014); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012).

111. *See, e.g., Amarei v. City of Chicago*, No. 13 C 2805, 2015 WL 7251940, at \*3 (N.D. Ill. Nov. 17, 2015) (arguing that “*Zauderer* is not a form of rational basis review”); *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 633–34 (D. Vt. 2015) (expressing uncertainty about whether *Zauderer* requires a “substantial” governmental interest); Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 973 (2017) (“[C]ircuits have split on both *Zauderer*’s reach . . . and its form . . .”). The Supreme Court has addressed mandatory disclosure in only a few cases since it decided *Zauderer* in 1985. *See Milavetz, Gallop & Milavetz, P. A. v. United States*, 559 U.S. 229, 253 (2010) (upholding disclosure mandate that forced law firm to identify itself as a debt-relief agency as “reasonably related to the [Government’s] interest in preventing deception of consumers”) (quoting *Zauderer*, 471 U.S. at 651); *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (“Although the State may at times ‘prescribe what shall be orthodox in commercial advertising’ by requiring the dissemination of ‘purely factual and uncontroversial information,’ outside that context it may not compel affirmance of a belief with which the speaker disagrees . . . . [T]his general rule . . . applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . .”) (internal citations omitted); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 15–16 n.12 (1986); *see also* Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 518 (2014) (noting that commercial disclosure law “is not well developed”).

112. A few judges would draw the line between commercial speech restrictions and commercial disclosure. In a 2011 case involving both types of regulation, the Fifth Circuit applied *Central Hudson* to the speech restrictions and *Zauderer* to the disclosure mandates. *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 219, 227 (5th Cir. 2011); *see also* *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 534 (D.C. Cir. 2015) (Srinivasan, J., dissenting) (arguing that regulations restricting commercial speech should get *Central Hudson* review, but that regulations compelling “truthful commercial information” should receive *Zauderer* review).

113. *See, e.g., Bulldog Inv’rs Gen. P’ship v. Sec’y of the Commonwealth*, 953 N.E.2d 691, 705 (Mass. 2011), *cert. denied*, 566 U.S. 987 (2012). Even for courts that have adopted this interpretation of *Zauderer*, there is disagreement about whether *Zauderer* review applies only to commercial speech that is “inherently” misleading, or also to speech that is “potentially” misleading. *See, e.g., Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 641 (6th Cir. 2010); *Healey*, 159 F. Supp. 3d at 196.

be *satisfied* unless the disclosure is factual and uncontroversial.<sup>114</sup> The D.C. Circuit initially refused to apply the *Zauderer* test outside the consumer deception context,<sup>115</sup> but changed its mind in 2014 when reviewing a country-of-origin labeling law for meat products.<sup>116</sup> It later changed its view of *Zauderer*'s scope again, holding that *Zauderer* review applies only to "purely factual and uncontroversial" compelled speech in "voluntary advertising."<sup>117</sup> The Supreme Court's 2018 decision in *NIFLA v. Becerra* calls this interpretation into question by describing *Zauderer*'s scope as extending to "purely factual and uncontroversial disclosures about commercial products."<sup>118</sup>

The Ninth Circuit has taken a different tack. In 2012, in a case reviewing a law that required cell phone sellers to disclose radiofrequency energy emissions information to purchasers of cell phones, the Ninth Circuit applied lax *Zauderer* review.<sup>119</sup> However, it held that plaintiffs were likely to succeed on the merits of their claim that the disclosure law violated the First Amendment because, the Ninth Circuit asserted, *Zauderer* requires that "any governmentally compelled disclosures to consumers must be 'purely factual and uncontroversial,'" and the radiofrequency energy emissions disclosures failed this test.<sup>120</sup> In other words, instead of reading the phrase "purely factual and uncontroversial" as helping to define the scope of commercial speech to which *Zauderer* review will apply, the Ninth Circuit treated "purely factual and uncontroversial" as a standard that must be met to satisfy *Zauderer* review.<sup>121</sup>

Other federal courts routinely interpret *Zauderer* to require a controversiality test. For example, in 2016, the Second Circuit applied *Zauderer* review to a law requiring

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114. *CTIA-Wireless Ass'n v. City & Cty. of S.F.*, 494 F. App'x 752 (9th Cir. 2012).

115. *See, e.g., Nat'l Ass'n of Mfrs. v. SEC (NAM 2014)*, 748 F.3d 359, 371 (D.C. Cir. 2014).

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

117. *Nat'l Ass'n of Mfrs.*, 800 F.3d at 524 n.14 (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001)).

118. *Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2376 (2018). The statement could be characterized as dicta because *NIFLA* concerned the provision of services and not "commercial products." However, the phrase "disclosures about commercial products" would seem to extend beyond "voluntary advertising." Elsewhere in the same opinion, Justice Thomas described *Zauderer* as applying "more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* at 2372. Although this, too, could be read to extend *Zauderer*'s scope beyond "voluntary advertising," it also might be understood to require that the speaker be a "professional." Since professionals typically produce services, not "commercial products," however, it is difficult to understand the majority's view of *Zauderer*'s scope of application.

119. *CTIA-Wireless Ass'n v. City & Cty. of S.F.*, 494 F. App'x 752 (9th Cir. 2012).

120. *Id.* at 753.

121. The Ninth Circuit again endorsed this approach in 2017 in *American Beverage Association v. City and County of San Francisco (ABA 2017)*, 871 F.3d 884 (9th Cir. 2017), and upon rehearing en banc in 2019. *Am. Beverage Ass'n v. City & Cty. of S.F. (ABA 2019)*, 916 F.3d 749, 756 (9th Cir. 2019).

price stickers on items sold at retail.<sup>122</sup> But it did so only after concluding that price stickers involve “only the disclosure of purely factual and uncontroversial information—namely, item pricing—about the retailer’s own goods.”<sup>123</sup> In 2015, a federal court in Illinois applied *Zauderer* review to a Chicago ordinance requiring tax preparers to make disclosures to customers.<sup>124</sup> After deciding that *Zauderer*’s “reasonable relation” test governed, the court held that *Zauderer* was satisfied because “the required disclosures contain only the sort of uncontroversial factual information that *Zauderer* contemplated.”<sup>125</sup>

In 2018, in *NIFLA v. Becerra*, a case concerning mandatory disclosures for crisis pregnancy centers, the Supreme Court briefly discussed controversiality as a basis for determining the correct standard of review of disclosure laws targeting licensed clinics and unlicensed centers.<sup>126</sup> Writing for a 5–4 majority, Justice Thomas declined to apply *Zauderer* review to the licensed clinic disclosure on the ground that the disclosure was “not limited to ‘purely factual and uncontroversial information about the terms under which . . . services will be available.’”<sup>127</sup> The disclosure was not so limited, Justice Thomas explained, because it concerned “state-sponsored services” rather than “services that licensed clinics provide,” and because it required the disclosure of information about “abortion, anything but an ‘uncontroversial’ topic.”<sup>128</sup> In other words, the majority treated controversiality as at least partially determinative of the level of scrutiny it would apply to a compelled speech law. Lower federal courts already have begun to interpret *NIFLA v. Becerra* as an endorsement of controversiality tests to determine whether a disclosure mandate is entitled to lax *Zauderer* review.<sup>129</sup>

As this suggests, in the *Zauderer* framework, the question of whether a commercial disclosure mandate is “purely factual and uncontroversial” is consequential, and sometimes outcome determinative.<sup>130</sup> It is a test with teeth.

122. *Poughkeepsie Supermarket Corp. v. Dutchess Cty.*, 648 F. App’x 156, 157 (2d Cir. 2016) (summary order).

123. *Id.* at 158.

124. *Amarei v. City of Chicago*, No. 13 C 2805, 2015 WL 7251940, at \*1 (N.D. Ill. Nov. 17, 2015).

125. *Id.* at \*3. In applying *Zauderer*’s “reasonable relation” test, the court also considered whether the disclosures “further[ed] the City’s goal of preventing tax preparers from taking advantage of customers” and concluded that they did. *Id.*

126. 138 S. Ct. 2361, 2372 (2018).

127. *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).

128. *Id.*

129. *See, e.g., Am. Beverage Ass’n v. City & Cty. of S.F. (ABA 2019)*, 916 F.3d 749, 756 (9th Cir. 2019) (“The *Zauderer* test, as applied in *NIFLA*, contains three inquiries: whether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome. A compelled disclosure accompanying a related product or service must meet all three criteria to be constitutional.”) (citing *NIFLA v. Becerra*, 138 S. Ct. 2361, 2372 (2018)).

130. *See, e.g., Mass. Ass’n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 197 (D. Mass. 2016) (stating that a “condition” for *Zauderer* review to apply is that the information be “factual and uncontroversial”); *Amarei v. City of Chicago*, No. 13 C 2805, 2015 WL 7251940, at \*3 (N.D. Ill. Nov. 17, 2015) (applying *Zauderer* review to commercial disclosures of

*B. Disclosure Controversial*

What makes a disclosure controversial? The circuits disagree.<sup>131</sup> Lower courts applying *Zauderer* most commonly use “controversial” to mean that the disclosure information *relates* to a public controversy. For example, in *National Association of Manufacturers (“NAM”) v. SEC*, the D.C. Circuit suggested that a controversial disclosure is anything related to a “controversy” or a “dispute, especially a public one.”<sup>132</sup> The Second Circuit reached essentially the same conclusion in *Evergreen Association v. City of New York*, treating a disclosure about whether a clinic provides particular health services as “controversial” because it required clinics to “mention” a “controversial” subject.<sup>133</sup>

Until its decision in *NIFLA v. Becerra* in 2018, the Supreme Court had never used controversiality as a basis to reject *Zauderer* review for a disclosure law.<sup>134</sup> In *NIFLA*, one challenged disclosure was a statement that “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [telephone number].”<sup>135</sup> This information was nonideological and presumably accurate, but the Court refused to apply *Zauderer* review because, it said, the disclosure contained “information about” services “including abortion, anything but an ‘uncontroversial’ topic.”<sup>136</sup> This phrasing expressed a very broad view of controversiality, essentially construing it to mean that a disclosure cannot be “uncontroversial” if it relates to a controversial topic.

Importantly, these courts’ use of “controversial” is broader than the dictionary definition of the word; “controversial” is generally defined to mean “[g]iving rise or

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“uncontroversial factual information,” including a list of services provided by a tax preparer and the prices of the services, the “estimated time a customer can expect to receive a [tax] refund, and a short certification statement”).

131. See, e.g., *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 34 (Kavanaugh, J., concurring) (“[I]t is unclear how we should assess and what we should examine to determine whether a mandatory disclosure is controversial.”); *id.* at 54 (Brown, J., dissenting) (“[W]hat is or is not controversial will lie in the eye of the beholder.”).

132. *Nat’l Ass’n of Mfrs. v. SEC (NAM 2015)*, 800 F.3d 518, 529 (D.C. Cir. 2015). Although *National Association of Manufacturers* concluded that *Zauderer* review did not apply, it provided a detailed analysis of the disclosure under *Zauderer* as an alternative holding. *Id.* at 532–33.

133. 740 F.3d 233, 245 n.6 (2d Cir. 2014). *Evergreen Association* is discussed at greater length in Part V. In that opinion, the Second Circuit held that the challenged disclosures were not commercial speech, but it offered an analysis “[a]ssuming *arguendo*” that they were commercial speech. *Id.* It concluded that *Zauderer* would not apply on the sole basis that the disclosures were not “purely factual and uncontroversial.” *Id.*

134. 138 S. Ct. at 2372. See *supra* notes 126–28 and accompanying text, explaining that controversiality was one of two reasons the Court refused to apply *Zauderer* review to the licensed clinic disclosure.

135. *NIFLA*, 138 S. Ct. at 2369.

136. *Id.* at 2372.

likely to give rise to controversy or public disagreement.”<sup>137</sup> That is, a “controversial disclosure” in the dictionary sense is a disclosure that *causes* controversy. A “controversial disclosure” in the *Zauderer* sense is a disclosure *related* to a controversy.

These courts’ expansive definition of “controversial” suggests that any information that tends to shed light on a matter of public debate is ineligible for *Zauderer* review. Other courts have suggested that a disclosure is controversial if it is contested,<sup>138</sup> not verifiable,<sup>139</sup> or likely to be “misinterpreted by consumers.”<sup>140</sup> Plaintiffs seeking to extend the definition have argued that a commercial disclosure is controversial if it is “inflammatory”<sup>141</sup> or “sensitive.”<sup>142</sup>

Some courts have concluded that “factual” and “uncontroversial” mean the same thing. For example, in 2015, a federal district court applied the *Zauderer* test to a Vermont state law mandating labels for products created with the use of genetic engineering, but only after concluding that the information disclosed was not “controversial.”<sup>143</sup> Somewhat cryptically, the court explained that “before compelled commercial information is deemed ‘controversial,’ the compelled information must, itself, be ‘controversial.’”<sup>144</sup> The court’s opinion included a seven-paragraph subsection analyzing whether the challenged law required the disclosure of “controversial” information.<sup>145</sup> Ultimately the court concluded that because the Vermont law’s “disclosure requirement mandates the disclosure of only factual information—whether a food product contains [genetically engineered]

137. *Controversial*, ENG. OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/controversial> [<https://perma.cc/LP3E-U33M>].

138. See *infra* notes 148–71 and accompanying text.

139. See also *Core-Mark Int’l, Inc. v. Mont. Bd. of Livestock*, No. CV 15-05-H-SEH, 2018 U.S. Dist. LEXIS 187359, at \*10 (D. Mont. Nov. 1, 2018) (product sell-by date was “definite and determinable” and therefore uncontroversial).

140. *Cigar Ass’n of Am. v. U.S. FDA*, 315 F. Supp. 3d 143, 165–66 (D.D.C. 2018) (“A disclosure is ‘controversial,’ the court gathers, when it is ‘subject to misinterpretation by consumers,’ or ‘inflammatory.’”); see also *Nat’l Ass’n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842, 851 (E.D. Cal. 2018) (disclosure was controversial because it was “misleading to the ordinary consumer”).

141. *Cigar Ass’n of Am.*, 315 F. Supp. 3d at 165–66.

142. In two cases decided in 2012 and 2017, respectively, the Ninth Circuit arrived at different outcomes regarding similar disclosure mandates by changing its interpretation of the word “controversial.” *Compare* *CTIA–Wireless Ass’n v. City & Cty. of S.F.*, 494 F. App’x 752, 753–54 (9th Cir. 2012) (holding that radiofrequency energy disclosures were “misleading and controversial”), *with* *CTIA–Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017) (“‘[U]ncontroversial’ in [the *Zauderer*] context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience.”).

143. *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 628–30 (D. Vt. 2015).

144. *Id.* at 628.

145. *Id.* at 628–30.



ingredients— . . . it does not require the disclosure of ‘controversial’ information.”<sup>146</sup> In the court’s view, information that is *factual* cannot also be *controversial*.<sup>147</sup>

The D.C. Circuit disagreed in *NAM v. SEC*. Since the Supreme Court linked the two terms conjunctively in *Zauderer*, that court reasoned, “‘uncontroversial,’ as a legal test, must mean something different than ‘purely factual.’”<sup>148</sup> In *NAM v. SEC*, a trade association of manufacturers challenged a mandatory disclosure of corporate social responsibility information, the Conflict Minerals Rule.<sup>149</sup> The Rule, enacted by Congress as a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act, required a subset of companies regulated by the SEC to make disclosures related to their use of certain minerals in their manufacture of goods.<sup>150</sup> Manufacturers that sourced these minerals from the Democratic Republic of the Congo and the surrounding area, or that could not identify the origin of the minerals they used, were required to disclose in reports filed with the SEC, and separately on their company websites, that the products were not “DRC conflict free.”<sup>151</sup>

The D.C. Circuit twice refused to analyze the Rule as a securities disclosure (which would have subjected the Rule, at most, to rational basis review<sup>152</sup>), declined to apply *Zauderer*’s “reasonable relation” test, and ultimately held that either the

146. *Id.* at 630. Earlier in the opinion, the district court had also stated:

A manufacturer who is required to disclose whether its products contain certain ingredients is not compelled to make a political statement even if such a statement “links a product to a current public debate” because “many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety.”

*Id.* at 622 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562–63 n.5 (1980)). An appeal of the case to the Second Circuit was dropped.

147. *R.J. Reynolds Tobacco Co. v. FDA* provides another example. In the case, the D.C. Circuit concluded that compelled images “primarily intended to evoke an emotional response” were not “purely factual.” 696 F.3d 1205, 1216 (D.C. Cir. 2012), *overruled in part* by *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc). However, the court’s explanation revealed that it really meant that the graphic images were not “uncontroversial” (i.e., the images were sensational and designed, in the court’s word, to “shock”). *Id.* at 1213–17.

148. *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 528 (D.C. Cir. 2015).

149. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. §§ 78m(p) (2012); Conflict Minerals, 17 C.F.R. §§ 240.13p-1, 249b.400 (2018).

150. Conflict Minerals, 77 Fed. Reg. 56724, 56275-6 (Sept. 12, 2012). These “conflict minerals,” gold, tantalum, tin, and tungsten, are primarily used in the manufacture of electronics. *See* Conflict Minerals, 77 Fed. Reg. at 56283–84 (describing common uses of the four minerals); Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd-Frank Act’s Corporate Governance Disclosure Won’t Solve a Human Rights Crisis*, 25 REGENT U. L. REV. 351, 359 (2013).

151. *Nat’l Ass’n of Mfrs. v. SEC (NAM 2014)*, 748 F.3d 359, 370 (D.C. Cir. 2014).

152. *See id.* at 371–72 (discussing whether securities disclosure would receive rational basis review). The D.C. Circuit agreed to rehear the case to determine whether its decision in *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014), required a different result. *See Nat’l Ass’n of Mfrs. v. SEC (NAM 2015)*, 800 F.3d 518 (D.C. Cir. 2015).

*Central Hudson* test or strict scrutiny applied.<sup>153</sup> In an opinion concluding that part of the Rule violated the First Amendment, the D.C. Circuit suggested that the disclosure was not “factual” because “[p]roducts and minerals do not fight conflicts.”<sup>154</sup> The court interpreted *Zauderer*’s “purely factual” language as a basis for fine-grained semantic quibbling.

Upon rehearing, the D.C. Circuit devoted several paragraphs to *Zauderer*’s “purely factual and uncontroversial” standard, offering its analysis as an alternative ground for its holding invalidating part of the disclosure mandate.<sup>155</sup> It rejected the idea that *Zauderer*’s “uncontroversial” test should be interpreted to draw a line between fact and opinion because, it said, the fact-opinion distinction is “often blurred.”<sup>156</sup> The court mused:

Is Einstein’s General Theory of Relativity fact or opinion, and should it be regarded as controversial? If the government required labels on all internal combustion engines stating that “USE OF THIS PRODUCT CONTRIBUTES TO GLOBAL WARMING” would that be fact or opinion? It is easy to convert many statements of opinion into assertions of fact simply by removing the words “in my opinion” or removing “in the opinion of many scientists” or removing “in the opinion of many experts.” It is also the case that propositions once regarded as factual and uncontroversial may turn out to be something quite different.<sup>157</sup>

This, of course, is the Fact-Opinion Ploy, discussed in Part II above.<sup>158</sup> It is the post-truth idea that facts and opinions are essentially the same thing, an argument typically used to suggest that facts are equally as trustworthy as opinions, and therefore should not be valued more highly than opinions in decision-making.<sup>159</sup>

The court *could have* said that a fact-opinion distinction is not useful in this context—an approach the Supreme Court has taken in the law of defamation, securities fraud, and other compelled speech cases<sup>160</sup>—but it chose instead to

153. *NAM 2015*, 800 F.3d at 524. The district court had applied *Central Hudson*. *Nat’l Ass’n of Mfrs. v. SEC*, 956 F. Supp. 2d 43, 73 (D.D.C. 2013).

154. *NAM 2015*, 800 F.3d at 530 (quoting *NAM 2014*, 748 F.3d at 371). The court concluded that part of the Rule failed the *Central Hudson* test, and thus violated the First Amendment. Upon rehearing, the court expressly adopted the reasoning from its first opinion on that subject. *Id.* at 524.

155. *Id.* at 524–30.

156. *Id.* at 528.

157. *Id.* (citations omitted).

158. The D.C. Circuit’s use of post-truth tropes in this opinion was overt. In a footnote, for example, the majority expressly referenced a passage from George Orwell’s book, *Nineteen Eighty-Four*. *See id.* at 530 n.29.

159. In 2018, in *Janus v. AFSCME*, the Supreme Court labeled “climate change” a “controversial subject[],” thereby laying the ground work for any future challenge to a disclosure mandate related to “climate change” or, as the D.C. Circuit put it in the quoted passage, “global warming.” 138 S. Ct. 2448, 2476 (2018).

160. *See supra* notes 61–63 and accompanying text; *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 797–98 (1988) (“These cases cannot be distinguished simply because they involved

challenge the value of the supply chain information that the rule required to be disclosed. In an earlier opinion, the D.C. Circuit had expressed skepticism that investors factor information about the origin of conflict minerals into their decision-making at all, reflecting the judges' own subjective view about the kinds of information that investors should use in their investment and shareholding decisions.<sup>161</sup> The D.C. Circuit's articulation of the Fact-Opinion Ploy in *NAM v. SEC* is a striking judicial expression of a post-truth idiom commonly used to undermine fact-based reasoning.<sup>162</sup>

The other main thread of post-truth rhetoric discussed in Part II, the Alternative Facts Thesis, influences another commonly used definition of "controversial." Courts applying *Zauderer* often imply that "uncontroversial" means *uncontested*, or sometimes *true*.<sup>163</sup> An important example is the Ninth Circuit's treatment of a mandatory warning for sugar-sweetened beverages in *American Beverage Association v. City and County of San Francisco*.<sup>164</sup> The case challenged on First Amendment grounds a San Francisco ordinance that required advertisements for sugar-sweetened beverages within the city to bear this warning: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco."<sup>165</sup> In 2017, a three-judge panel of the Ninth Circuit, applying *Zauderer* review, began its review of the disclosure by addressing the "controversy" question. It characterized this

compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech.").

161. See *Nat'l Ass'n of Mfrs. v. SEC (NAM 2014)*, 748 F.3d 359, 370–372 (D.C. Cir. 2014) ("[T]he 'conflict free' label is not employed to sell securities.").

162. In *American Meat Institute (AMI) v. U.S. Department of Agriculture*, a trade association of meat producers challenged a federal country-of-origin labeling law. 760 F.3d 18, 21 (D.C. Cir. 2014). The Secretary of Agriculture had required disclosure of the location of each step in the production of meat products, including the location of an animal's "slaughter." The AMI argued that the disclosure was "controversial" because the word "slaughter" was objectionable. See *id.* at 27. Rather than dismiss this idea out of hand, the D.C. Circuit conceded that the word "'slaughter' . . . might convey a certain innuendo," but declined to throw out the disclosure on that basis, since the rule allowed retailers to substitute the word "harvested," which the trade association had not objected to. *Id.* A year later, however, the D.C. Circuit expressed a change of heart about the case:

A controversy, the dictionaries tell us, is a dispute, especially a public one. Was there a dispute about the country-of-origin [meat packaging] disclosures in *AMI* or as *AMI* put it, was there a controversy "for some reason other than [a] dispute about simple factual accuracy"? One would think the answer surely was yes.

*NAM 2015*, 800 F.3d at 529 (citations omitted).

163. See, e.g., *Centro Tepeyac v. Montgomery Cty.*, 779 F. Supp. 2d 456, 471 (D. Md. 2011) (upholding a disclosure mandate that "in neutral language states the truth"), *rev'd in part*, 683 F.3d 591 (4th Cir. 2012), *aff'd en banc*, 722 F.3d 184 (4th Cir. 2013) (affirming the district court).

164. 871 F.3d 884, 888 (9th Cir. 2017).

165. *Id.* (quoting S.F., CAL., HEALTH CODE § 4203(a) (2015)).

question as “whether the ‘inherent character’ of the compelled disclosure is ‘purely factual and uncontroversial’ under *Zauderer*.”<sup>166</sup> It found it was not, explaining that:

[T]he factual accuracy of the warning is, at a minimum, controversial as that term is used in the *Zauderer* framework. The warning provides the unqualified statement that “[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay,” and therefore conveys the message that sugar-sweetened beverages contribute to these health conditions regardless of the quantity consumed or other lifestyle choices. This is contrary to statements by the [Food and Drug Administration (FDA)] that added sugars are “generally recognized as safe,” and “can be a part of a healthy dietary pattern when not consumed in excess amounts.”<sup>167</sup>

The court’s logic was faulty: the notion that added sugars contribute to obesity, diabetes, and tooth decay is *not* contradicted by a statement that added sugars are “generally recognized as safe,”<sup>168</sup> unless obesity, diabetes, and tooth decay make a person unsafe. More to the point, a warning that drinking beverages with added sugars contributes to obesity, diabetes, and tooth decay would not be understood by a reasonable consumer to mean that every person who consumes sugar-sweetened beverages will develop those ailments. A food can both be “safe,” in the sense that it will not immediately sicken a person who consumes it, and contribute to long-term health problems.

In the case, the Ninth Circuit presented the FDA’s statements, and similar statements from the American Dental Association, as creating a dispute or controversy about the health effects of sugar-sweetened beverages.<sup>169</sup> It then asserted that the existence of the dispute (i.e., conflicting statements presented to the court in litigation) made “the factual accuracy of the warning . . . controversial.”<sup>170</sup> This approach neatly marries a common post-truth argument with *Zauderer* review. It suggests that contestation *itself* renders information unreliable, and that this is disqualifying under *Zauderer*. In other words, when parties present conflicting information about a disclosure in litigation, the disclosure becomes controversial.<sup>171</sup> Under the Ninth Circuit’s approach, this meant the disclosure failed *Zauderer* review.

In January 2019, the Ninth Circuit reheard *American Beverage Association v. City and County of San Francisco* en banc and again concluded that the American Beverage Association was likely to succeed on its claim that the sugar-sweetened

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166. *Am. Beverage Ass’n v. City and County of San Francisco (ABA 2017)*, 871 F.3d at 895 (citation omitted).

167. *Id.* (citations omitted).

168. *Id.*

169. *Id.* at 896. Unlike the FDA, which is a governmental agency, the American Dental Association is a private, nonprofit association of dentists. *About the ADA*, ADA <https://www.ada.org/en/about-the-ada> [<https://perma.cc/R53N-5UTV>].

170. *ABA 2017*, 871 F.3d at 895.

171. As discussed in Part II, the view that contestation itself renders information untrustworthy or unreliable is the Alternative Facts Thesis. *See supra* Section I.B.

beverage warning violated the First Amendment.<sup>172</sup> This time, however, the court not only treated *Zauderer's* “purely factual and uncontroversial” language as two parts of a three-part “*Zauderer* test,”<sup>173</sup> but expressly declined to reach the question of whether the sugar-sweetened beverage warning was “purely factual” or “noncontroversial.”<sup>174</sup> Instead, the court started its application of the *Zauderer* test by asking whether the disclosure was “not unjustified or unduly burdensome” and concluded that, because the disclosure failed this third prong of the test, it could stop there in its analysis.<sup>175</sup> A dissent, joined by the Chief Judge, argued that the analysis should have *started* with the factual/uncontroversial inquiry: “where, as here, the parties disagree about the veracity of compelled speech, the court should begin by asking whether the government’s message is objectively true.”<sup>176</sup> The dissenters concluded that the sugar-sweetened beverage warning was not “objectively true” because it used the word “diabetes,” and though sugar consumption has been linked to the development of type 2 diabetes, the causes of type 1 diabetes are unknown.<sup>177</sup>

In *Evergreen Association*, the Second Circuit *also* suggested that contested information is controversial.<sup>178</sup> In a decision enjoining the disclosure that “the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider,” the Second Circuit wrote: “It may be the case that most, if not all, pregnancy services centers would agree that pregnant women should see a doctor. That decision, however, as this litigation demonstrates, is a public issue subject to dispute.”<sup>179</sup> Because a litigant challenged the idea that pregnant women should consult a doctor, the court labeled the idea disputed—and described it, a few sentences later, as a “contested public issue.”<sup>180</sup> The challenger’s decision to dispute the disclosure was the factor driving its First Amendment treatment.<sup>181</sup>

On this reasoning, litigation itself becomes a process to transform a disclosure into a contested public issue.<sup>182</sup> The maneuver imports into the doctrine the idea that

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172. *Am. Beverage Ass’n v. City & Cty. of S.F. (ABA 2019)*, 916 F.3d 749 (9th Cir. 2019).

173. *Id.* at 756 (“The *Zauderer* test, as applied in NIFLA, contains three inquiries: whether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome.”).

174. *Id.* at 757.

175. *Id.* (“We need not, and therefore do not, decide whether the warning here is factually accurate and noncontroversial.”).

176. *Id.* at 765 (Christen, J., concurring).

177. *Id.* at 765–67.

178. *Evergreen Ass’n v. City of New York*, 740 F.3d 233 (2d Cir. 2014).

179. *Id.* at 250.

180. *Id.* at 250–51.

181. The Second Circuit held that this disclosure mandate, and two others, were not commercial speech. Even so, in the course of applying intermediate and strict scrutiny to the disclosure mandates, it analyzed their controversiality. Separately, the court concluded that if the disclosure mandates *were* commercial speech, they were not “uncontroversial,” and thus *Zauderer* would not apply. *Id.* at 245 n.6.

182. *But see Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 622 (D. Vt. 2015) (“[O]bjection and opposition, no matter however vehement, do not, without more, convert a disclosure requirement about a food product into a political statement.”).

contestation is as powerful a signal of information value as the underlying merits. As a federal court put it in a 2016 product warning case:

A “controversy” cannot be created any time there is a disagreement between the parties because *Zauderer* would never apply, especially where there are health and safety risks, which invariably are dependent in some degree on the current state of science and research. A “controversy” cannot automatically be deemed created any time there is a disagreement about the science behind a warning because science is almost always debatable at some level (*e.g.*, even if there is agreement that there is a safety issue, there is likely disagreement about at what point a safety concern is fairly implicated).<sup>183</sup>

Notably, in *Janus v. AFSCME* in 2018, Justice Alito’s majority opinion made a point of listing “controversial subjects” such as “climate change[,] . . . sexual orientation and gender identity, [and] evolution,” all topics of extensive scientific research and consensus.<sup>184</sup> Whatever *Zauderer* means, it cannot be that compelled speech is fatally “controversial” because an unwilling speaker targeted by a disclosure law says the speech is controversial.

It is particularly interesting that the message enjoined in *Evergreen Association* merely advised pregnant women to “consult with” additional, credible sources of information (licensed physicians).<sup>185</sup> The purpose of the city ordinance was to encourage information seeking by pregnant women, without regard to political ideology. Yet the court suggested that the City could not constitutionally require a health clinic to post a sign encouraging information seeking because the whole subject of women’s reproductive health is a public issue and thus controversial.<sup>186</sup> In the similar disclosure mandate at issue in *NIFLA v. Becerra*, the disclosure message also merely encouraged information seeking.<sup>187</sup> There was no inquiry into speech chilling, the deterrence of other protected interests, or the expression of ideology or viewpoint; the disclosure’s relation to a hotly contested public issue sufficed to defeat it.

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183. *CTIA—Wireless Ass’n v. City of Berkeley*, 158 F. Supp. 3d 897, 904 (N.D. Cal. 2016).

184. 138 S. Ct. 2448, 2476 (2018).

185. *Evergreen Ass’n*, 740 F.3d at 250.

186. In *Massachusetts Association of Private Career Schools v. Healey*, a federal district court engaged in fine-grained analysis of four separate disclosure mandates to determine whether each was uncontroversial. 159 F. Supp. 3d 173, 197 (D. Mass 2016). For example, the plaintiff challenged the application of *Zauderer* to a disclosure that “[f]ailure to repay student loans is likely to have a serious negative effect on your . . . future earnings.” *Id.* The court found the disclosure was appropriate for *Zauderer* review, observing that it “does not appear to be a controversial proposition.” *Id.* It went on to apply *Zauderer* review to two of the other three disclosure mandates, but rejected *Zauderer* review for a disclosure it found to be partially false, which the court contended made it “not a factual disclosure.” *Id.* at 200.

187. *Nat’l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018).

## IV. POST-TRUTH VALUES

Why is this post-truth, or even problematic? In short, by treating controversiality as a problem per se, the *Zauderer* approach calibrates the flow of disclosure information based purely on how that information will affect its audience, and in reverse—*constricting* the flow of useful information on matters of the highest public interest. If the *Zauderer* framework did this incidentally while protecting other constitutional interests—privacy rights, expressive interests, the right against self-incrimination, etc.—it might be justified. However, courts applying controversiality tests are not primarily concerned with rights-deterrence; they are concerned about the impact of the information. Implicit in this concern is the idea that some information is uniquely dangerous or subversive in its effects. Where information might upset the status quo, “controversiality” tests work to keep people in the dark.

*A. The Problem of Speech Chilling*

There *are* valid reasons to raise concerns about government-mandated disclosure of controversial information. One is that forcing speakers to reveal facts about themselves on controversial subjects might chill protected First Amendment activity.<sup>188</sup> Speakers may speak less, or speak differently, if they understand that certain voluntary speech acts will cause them to have to reveal controversial information about themselves that could subject them to public censure or embarrassment. Two important First Amendment cases reveal the relationship between controversiality, speech chilling, and free expression. They are *NAACP v. Alabama ex rel. Patterson*<sup>189</sup> and *McIntyre v. Ohio Elections Commission*.<sup>190</sup>

*NAACP v. Alabama* was a civil-rights-era case in which Alabama sought to compel the NAACP, a nonprofit corporation, to disclose the identities of its members. The Supreme Court threw out Alabama’s compelled disclosure on First Amendment grounds.<sup>191</sup> The Court’s primary concern was the substantial burden it said the disclosure mandate placed on the NAACP’s members’ exercise of rights: the likelihood that it would “induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs . . . and of the consequences of this exposure.”<sup>192</sup> Those consequences included “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of

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188. In *Healey*, a federal court found that a mandated disclosure was false for some speakers and observed that “if a disclosure . . . compels false speech, it can act as a speech restriction. Specifically, if a speaker is faced with a choice between including a false disclosure in an advertisement and not advertising at all, he may choose not to speak.” 159 F. Supp. 3d at 206.

189. 357 U.S. 449 (1958).

190. 514 U.S. 334 (1995).

191. *Patterson*, 357 U.S. at 462.

192. *Id.* at 463. After concluding that the burden on the NAACP’s members’ rights was substantial, the Court found that “Alabama has fallen short of showing a controlling justification for the deterrent effect” of the disclosure mandate on those rights. *Id.* at 466.

public hostility.”<sup>193</sup> Alabama’s interest in obtaining the disclosure did not justify the “deterrent effect” the disclosure would have on the NAACP’s members’ exercise of their right of association.<sup>194</sup> The Court used the word “controversial” only once, in a statement that verified the importance of that associational right.<sup>195</sup>

*McIntyre v. Ohio Elections Commission* addressed a disclosure law targeting an individual rather than an organization.<sup>196</sup> Margaret McIntyre had distributed leaflets at a local town meeting, expressing her opposition to a proposed school tax levy. She was charged with violating a provision of Ohio state law that required such leaflets to identify the person who created them<sup>197</sup> and fined \$100.<sup>198</sup> In discussing why the law violated Mrs. McIntyre’s First Amendment rights, the Supreme Court described the disclosure mandate as particularly “intrusive” because it “reveals unmistakably the content of her thoughts on a controversial issue.”<sup>199</sup> The Court discussed how the political leaflet was more “personal” and “provocative” than a political contribution of money, noting that “when money supports an unpopular viewpoint it is less likely to precipitate retaliation.”<sup>200</sup> In its conclusion, the Court underscored this point using strong language, observing that anonymous pamphleteering “exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.”<sup>201</sup>

In the Supreme Court’s analysis, the fact that her leaflet addressed a “controversial” issue—a political matter that would be decided by an election—was relevant because the Court worried that Mrs. McIntyre’s speech required protection from a real threat of reprisal. In the Court’s use, “controversial” meant something closer to the dictionary definition: not *related to* a public controversy, but *causing* controversy, or *provoking*.

However, what was provocative about the pamphlet was Mrs. McIntyre’s views about the tax levy, not the disclosure mandated by Ohio law. The Court was not concerned about the controversiality of the disclosure; it was worried that the disclosure would identify her as the author of a controversial pamphlet. The disclosure of her identity would have made her a target for retaliation, thus increasing the likelihood that she would choose, *ex ante*, not to speak at all.

These two important cases show that serious concerns exist when a disclosure mandate threatens to chill an individual’s protected First Amendment activity. In *NAACP v. Alabama*, the individuals were NAACP members who were exercising their First Amendment rights to association; in *McIntyre*, it was Mrs. McIntyre

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193. *Id.* at 462.

194. *Id.* at 466.

195. *Id.* at 460 (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”).

196. 514 U.S. 334 (1995).

197. OHIO REV. CODE ANN. § 3599.09(A) (West 1988).

198. *McIntyre*, 514 U.S. at 338.

199. *Id.* at 355.

200. *Id.*

201. *Id.* at 357.



herself who was engaged in protected First Amendment expression about an upcoming election.

In *Zauderer*'s progeny, courts' concern with controversiality, but not rights-deterrence, reveals a potential shift in doctrine. It is significant that the effects that concern courts are not chilling effects on speakers, but influence effects on information recipients. Perhaps this is because the Supreme Court has characterized the chilling effect on an organizational speaker as relatively weak. Unlike individuals, corporations and health clinics do not feel emotions like embarrassment or shame; they can be economically intimidated, but not physically intimidated. Consequently, they are less likely than individuals to have their First Amendment activity chilled by certain types of mandatory disclosure.<sup>202</sup> In these cases, courts' analyses reflect a subtle post-truth concern about information's potentially subversive effects.

### *B. The Problem of Ideology*

There is a second reason to question state-mandated disclosure of controversial information: the State might mandate disclosure to advance a contested ideological agenda.<sup>203</sup> However, improper state motives cannot be effectively policed by treating all information related to public debate as exempt (or nearly exempt) from compelled disclosure. For example, a law that required anti-vaxxers to publicly disclose the name of their health insurance companies should be constitutionally suspect, but not because vaccines and health insurance are "controversial" subjects.<sup>204</sup> Instead, a court could conclude that the State was singling anti-vaxxers out for different treatment to embarrass them.<sup>205</sup>

It is possible, too, that the State could use disclosure to "impose its own message in the place of individual speech, thought, and expression,"<sup>206</sup> or to "prescribe what

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202. *Cf.* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 n.6 (1980) ("[C]ommercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'"). Business managers do feel emotions like embarrassment and anxiety. In rare circumstances, a company's manager might worry that a disclosure would reflect negatively on him or her *personally*, causing the manager psychological distress. However, organizations can structure their decision-making processes to reduce the ability of managers to pursue self-interested strategies. Because organizations can and should do this, the danger that a manager's *individual* anxiety would chill the *organization's* speech is low.

203. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.").

204. If controversiality was the determining factor, the State could not mandate *any* contested disclosures related to vaccines without satisfying a higher level of scrutiny.

205. *See, e.g., Leslie Kendrick, Disclosure and Its Discontents*, 27 J.L. & POL. 575, 585 (2012) ("[T]he government may not use disclosure to target particular speakers for unfavorable treatment for engaging in protected expression.").

206. *Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

shall be orthodox in politics, nationalism, religion, or other matters of opinion.”<sup>207</sup> This is the problem addressed in cases like *West Virginia State Board of Education v. Barnette*, which held that schools may not force school children to recite the Pledge of Allegiance.<sup>208</sup>

By creating a lax standard of scrutiny for disclosures that it labeled “purely factual and uncontroversial,” the Supreme Court may have really intended to preserve strict scrutiny for disclosures that cause the speaker to affirm an ideological message. However, “purely factual and uncontroversial” does not mean “nonideological,” and the proliferation of post-*Zauderer* controversiality tests demonstrates the danger of substituting the former for the latter. A subject becomes “controversial” when someone controverts it, but a statement does not become “ideological” because someone says it is. In his concurrence in *NIFLA v. Becerra*, Justice Kennedy wrote that forcing crisis pregnancy centers to inform patients that state-funded abortions are available to eligible women “compels individuals to contradict their most deeply held beliefs.”<sup>209</sup> This is seriously wrong. A person can speak “about” something without endorsing it. Kennedy’s logic is not just strained; it requires enforced silence on a range of subjects—imposing consequences only on those who, by the misfortune of their role in our political economy, are Information Have-Nots.

Compelled ideological speech is objectionable because it gives the State an authoritarian upper hand in political discourse and because, as Caroline Mala Corbin puts it, it “intrude[s] upon the speaker’s autonomy and dignity.”<sup>210</sup> Yet the autonomy and dignity interests of organizational speakers, particularly the commercial actors so successful at leveraging information asymmetries into profit, are—if they exist at all—less pronounced and vital than the autonomy and dignity interests of individual humans. Because this is true, in close cases, courts cannot justify privileging the right of a commercial actor to not mention a subject over the rights of human actors to experience autonomy and dignity through free and informed decision-making.

Thus, courts *should* care about controversiality—but only insofar as it tells them something about the capacity of a disclosure to chill speech or to deter the exercise of similarly important rights. The problem with the *Zauderer* doctrine is that it has been interpreted in a way that divorces valid constitutional concerns about rights-deterrence from doctrinal tests about a disclosure’s power to shape public opinion. State action that deters the exercise of constitutional rights is a problem of constitutional dimension; compelled disclosure of “controversial” information is not.

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

208. *Id.*

209. 138 S. Ct. at 2379 (Kennedy, J., concurring).

210. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1293 (2014); see also *id.* at 1298 (“A person cannot be said to be autonomous in body if forced to speak when she would rather stay silent. Nor is she autonomous in thought if forced to state a belief with which she disagrees. This insult to the speaker’s dignity is compounded if listeners misattribute the government’s opinion to the speaker.”).

*C. The Value of Controversial Information*

There is a strong argument that “controversial” information is not at the margins of compelled speech, but at its heart. After all, controversial information—information that sheds light on a subject people care about—has a high value to individuals and society.<sup>211</sup> Courts have applied the controversial label to disclosures related to trade in a war zone,<sup>212</sup> health risks of glyphosate, an herbicide,<sup>213</sup> reproductive health services,<sup>214</sup> radiofrequency energy exposure from cell phones,<sup>215</sup> allegations of labor law violations,<sup>216</sup> the health risks of cigarettes<sup>217</sup> and sugar-sweetened beverages.<sup>218</sup> It is precisely in debates on subjects like these that citizens need information—and where, if information is *not* available, they are likely to make choices that are self-defeating rather than self-actualizing. One could argue that controversial information should be the *easiest* to compel, not the most difficult—assuming that speaker interests and the risk of speech chilling are the same.<sup>219</sup>

Some courts, drawing on the Alternative Facts Thesis, have suggested that “controversial” information under *Zauderer* is information that might be false because someone has contested it.<sup>220</sup> Contestation should be a starting point, however, not an end point. Citizens need access to contested information and to the arguments about it to evaluate it. To conclude that contested information must be exempt from disclosure is to capitulate to one of post-truthism’s most potent normative arguments.

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211. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)) (“[E]xpression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’”).

212. *See* Nat’l Ass’n of Mfrs. (*NAM 2015*) v. SEC, 800 F.3d 518 (D.C. Cir. 2015).

213. *See* Nat’l Ass’n of Wheat Growers v. Zeise, 309 F. Supp. 3d 842, 852 (E.D. Cal. 2018) (“[T]he required warning for glyphosate does not appear to be factually accurate and uncontroversial because it conveys the message that glyphosate’s carcinogenicity is an undisputed fact when almost all other regulators have concluded that there is insufficient evidence that [it] causes cancer.”).

214. *See* Evergreen Ass’n v. City of New York, 740 F.3d 233 (2d Cir. 2014).

215. *See* CTIA—Wireless Ass’n v. City & Cty. of S.F., 494 F. App’x 752, 753–54 (9th Cir. 2012).

216. *See* Associated Builders & Contractors of Se. Tex. v. Rung, No. 1:16-CV-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016).

217. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1213–17 (D.C. Cir. 2012), *overruled in part by* Am. Meat Inst. v. U.S. Dep’t of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc).

218. *See* Am. Beverage Ass’n v. City & Cty. of S.F. (*ABA 2017*), 871 F.3d 884 (9th Cir. 2017).

219. *See, e.g.*, *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (“Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed.”). The Supreme Court “has frequently reaffirmed that speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

220. *See supra* notes 151–73 and accompanying text.

Robert C. Post has written persuasively that the “fundamental purpose” of the First Amendment is to “protect[] the processes of opinion formation that are necessary for democratic self-governance.”<sup>221</sup> In political contests between Information Haves and Have-Nots, compelled speech becomes one of the “communicative processes” that is necessary for opinion formation. Post-truthism offers something of a competing view—an idea of opinion formation in which whole types of decision-making are invalid. Information-forcing laws passed by democratically accountable legislatures should be understood as part of the communicative processes that produce self-government. So long as disclosure mandates do not infringe other, important constitutional interests, they reflect the valid informational demands of an active citizenry.

The First Amendment is commonly understood to promote a robust “marketplace of ideas” in which citizens can obtain the widest possible exposure to ideas and information.<sup>222</sup> In the marketplace of ideas, listeners benefit from exposure to *lots* of information and arguments—the more the better. Because individual listeners will weigh and compare conflicting claims, according to the marketplace theory, the best ideas will rise to the top.<sup>223</sup> Thus, in a marketplace of ideas, more facts are beneficial, and government filtering is incompatible with an “uninhibited marketplace of ideas in which truth will ultimately prevail.”<sup>224</sup>

The marketplace metaphor assumes that the “best” ideas will prevail because citizens will prefer them, and it leaves questions about how individual citizens will value and process information to the individual. That is, the metaphor—and the First Amendment itself—advances no particular normative views about how individuals *should* process or rely upon information. The marketplace of ideas metaphor trusts information end users to freely and competently make use of information. It is a challenge to the traditional marketplace metaphor to suggest, as post-truthism does, that only certain kinds of decision-making are valid.

The notion that contested information is not trustworthy—a post-truth idea that was described with the label the “Alternative Fact Thesis” in Part II—also conflicts with the marketplace of ideas metaphor. The marketplace metaphor places high value

221. Post, *supra* note 60, at 487.

222. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”). Robert Post disagrees that “fostering a marketplace of ideas” is a purpose or goal of the First Amendment, “because new knowledge cannot be created without the concomitant power to judge ideas as true or false, as better or worse.” Post, *supra* note 60, at 487. However, where a democratically accountable legislature expresses the informational interests of citizens by enacting a disclosure law, the State is not judging ideas or information; it is protecting the processes of opinion formation.

223. See, e.g., Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1 (1996).

224. *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984)); see also *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2237 (2015) (Kagan, J., concurring) (quoting this language and discussing preservation of an uninhibited marketplace of ideas as a main basis for applying strict scrutiny to content-based speech regulation).

on contestation, and the idea of citizens sifting and evaluating competing claims. In the marketplace of ideas, contestation is to be expected and is a good thing; only through robust contestation can the truth be known.<sup>225</sup> In contrast, post-truthism asserts that when a fact is contested, it loses value—there is no point in engaging in a labor-intensive process to investigate that fact because more information will only make the inquiry murkier. Thus, the marketplace metaphor treats contestation as a cognitive call to arms, while post-truthism views it as a reason to stand down and wait for orders. A post-truth marketplace of ideas would bear little resemblance to the marketplace of ideas we have been taught to revere.

Calibrating levels of scrutiny to disfavor “controversial” disclosures also invokes dangers of governmental bias and filtering.<sup>226</sup> And here too post-truthism offers some insights. First Amendment law treats content-based speech restrictions with suspicion because of the danger of government censorship or favoritism toward particular ideas.<sup>227</sup> As Justice Scalia once explained, content-based regulation of speech lends itself to use for “invidious, thought-control purposes.”<sup>228</sup> Justice Alito has written that content-based laws “present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its ‘topic’ or ‘subject’ favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth.”<sup>229</sup>

The same concerns are raised when speech is regulated on the basis of “controversiality.” If the State limits disclosure to only noncontroversial topics, this has the effect of favoring the status quo. In such a scenario, one of the political branches has created an information-forcing rule precisely because the introduction of new information is expected to do important work—to shake up the status quo, to remedy an information asymmetry, to shed light on a problem. (Whether the disclosure actually accomplishes these things in the end depends on the decisions of numerous information end users, all acting autonomously, and involves no government compulsion.) Heightened review makes it harder for the disclosure to reach the public, and unless the heightened review is justified by other significant constitutional interests, controversiality tests invoke the concerns expressed by Justices Scalia and Alito.

The Supreme Court has long interpreted the First Amendment to promote the free exchange of information, with attention to the value of information to its recipients. The Court’s attention to informational value is premised on the view that listener

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225. Although he views “participating in the formation of public opinion” as self-governance rather than truth-seeking, Robert Post recognizes it as “a form of communicative action.” Post, *supra* note 60, at 483.

226. See *Reed*, 135 S. Ct. at 2231 (“[A] speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed.”).

227. See *id.* at 2226 (quoting *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)) (stating that the government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content”).

228. *Hill v. Colorado*, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting) (quoting *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 794 (1994)).

229. *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring).

interests matter: the more valuable information potentially is to its recipients, the more significant its role in individual self-fulfillment, truth-seeking, and democratic decision-making, and thus the higher the bar for the State to restrict the information's flow.<sup>230</sup> This was the rationale for providing intermediate protection to commercial speech, for example. Thus, when the government restricts speech, the value of the information to its audience is part of the constitutional analysis—and not just the fact of its value, but the *degree* of its value.

The *Zauderer* framework turns this logic on its head. By reverse calibrating the constitutionality of a disclosure mandate to the likelihood that recipients will be influenced or moved to action in a public dispute, it powerfully shapes the constitutional law of information-forcing.<sup>231</sup> Fundamentally, this is information regulation in service to political and economic power: it is protective of the status quo and of existing power structures that create Informational Haves and Have-Nots. What is lurking in the background of these cases is a fear that a disclosure itself will be destabilizing or will upset the status quo against a speaker's interests.

#### V. BEYOND COMMERCIAL SPEECH

Part III described how *Zauderer* works in cases involving commercial speech. Through the development of legal tests that make levels of scrutiny contingent on the “controversial” quality of information, commercial compelled speech has become a potential vector for post-truth information regulation. Yet judicial inquiry into the controversiality of compelled speech has not been limited to commercial speech. In a more ad hoc development of First Amendment law, some courts have also increased scrutiny for mandatory disclosure of “controversial” information outside the commercial speech category.<sup>232</sup> *Zauderer*'s concern for controversiality has begun to migrate to other compelled speech cases, where it remains true to form: uncontroversial disclosures get more lax review, and controversial disclosures receive a heightened form of scrutiny.

In the paragraphs that follow, I detail two such cases. In *Associated Builders & Contractors of Southeast Texas v. Rung*, in 2016, a federal district court enjoined a requirement that contractors soliciting federal government contracts publicly disclose information about court cases, settlements, arbitrations, and administrative

230. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 5 (4th ed. 2010) (noting that the First Amendment's protection of speech has “been thought to serve three principal values: advancing knowledge and ‘truth’ in the ‘marketplace of ideas,’ facilitating representative democracy and self-government, and promoting individual autonomy, self-expression and self-fulfillment”).

231. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (“Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed.”).

232. See *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, No. MJG-10-760, 2016 WL 10893970, at \*10, \*15 (D. Md. Oct. 4, 2016) (applying strict scrutiny to a waiting room sign because it would “introduce” a “topic” the court identified as “sensitive and morally-laden”); see also *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 525–26 (6th Cir. 2012).

merits determinations in which they were charged with violating a labor law.<sup>233</sup> The court applied strict scrutiny.<sup>234</sup> In *Evergreen Association v. City of New York*, in 2014, the Second Circuit held that mandatory disclosures required of crisis pregnancy clinics violated the First Amendment, applying either intermediate or strict scrutiny.<sup>235</sup>

In each case, although the court did not apply *Zauderer*, it discussed the controversiality of the disclosure and its subversive informational effects on recipients. In neither case did the court look for evidence that the disclosure would have a deterrent effect on someone's exercise of a constitutionally protected right. The Texas federal court did not suggest that government contractors might cease soliciting contracts if they were forced to disclose charges of labor law violations, nor is that particularly likely. The Second Circuit did not suggest that crisis pregnancy clinics would shut their doors if they had to post signs listing the medical services they offer—nor would we expect them to. Both courts, however, discussed the uses to which recipients would put the disclosure information, parsing listener interests that, as a result of the courts' holdings, will go unsatisfied.

#### A. Associated Builders & Contractors of Southeast Texas v. Rung

In late 2016, a federal court in Texas enjoined the Contractor Fair Pay Rule, a public disclosure mandate that required contractors soliciting federal government contracts valued at more than \$500,000 to publicly disclose information about court cases, settlements, arbitrations, and administrative merits determinations in which they were charged with violating a labor law.<sup>236</sup> Two things are noteworthy about the case.

First, although the court did not apply *Zauderer*, its analysis focused meaningfully on the “controversial” nature of the information to be disclosed. Citing *NAM v. SEC*, the court stated that the Contractor Fair Pay Rule compelled contractors to “‘publicly condemn’ themselves” by disclosing “controversial” information about alleged labor law violations.<sup>237</sup> It deemed allegations in administrative merits determinations “certainly controversial in nature,” apparently because administrative proceedings are adversary proceedings.<sup>238</sup>

Second, the court expressed particular concern about the potential influence of the disclosures on recipients. The court worried that contractors subject to the disclosure

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233. *Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at \*11 (E.D. Tex. Oct. 24, 2016).

234. *Id.* (determining that the disclosure requirement “must be preliminarily enjoined to prevent irreparable harm to Plaintiffs’ members from compelled speech that is not narrowly tailored to achieve any compelling government interest”).

235. *Evergreen Ass’n v. City of New York*, 740 F.3d 233 (2d Cir. 2014).

236. *Associated Builders*, 2016 WL 8188655, at \*9.

237. *Id.* at \*10 (citing *Nat’l Ass’n of Mfrs. v. SEC (NAM 2015)*, 800 F.3d 518, 529 (D.C. Cir. 2015)).

238. *Id.*

mandate would be prejudiced because recipients would act on the information.<sup>239</sup> The court fretted that companies’

public reports of alleged violations may be used by their competitors and adversaries to gain competitive advantage over [them] . . . [and t]hey will likely suffer increased costs, loss of customers, and loss of goodwill, regardless of whether they are actually disqualified from government contracts, by being labeled labor law violators.<sup>240</sup>

Of course these are likely to occur—it is reasonable to assume that a range of audiences will be influenced by information that a company has repeatedly been accused of violating labor laws. Some of the information—disclosures about court cases and administrative actions, for example—is a matter of public record anyway, though this information is not routinely communicated directly by companies to customers or employees.

The court objected that the disclosures “may prove not to be factual at all” if subsequent judicial or administrative procedures resolved the matter in the contractor’s favor,<sup>241</sup> but the court’s strained interpretation of the word “factual”—one’s status as a party in a legal or administrative proceeding is a matter of simple fact—highlighted the court’s choice to treat the disclosures as sensitive because of the interest they might generate. If the court’s concern were genuine, it could have enjoined only the parts of the rule that required disclosure of violations that were not yet finally resolved, but instead it enjoined the whole disclosure mandate. The whole rule, it concluded, was not “factual,” and was problematically “controversial.”<sup>242</sup>

#### B. *Evergreen Association v. City of New York*

In *Evergreen Association v. City of New York*, the Second Circuit addressed mandatory disclosures by health clinics to patients.<sup>243</sup> A New York City law compelled certain health clinics to disclose two kinds of information about themselves: (1) whether they had “a licensed medical provider on staff,” and (2) whether they provided certain medical services.<sup>244</sup> In addition, the law required

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239. *Id.* at \*14.

240. *Id.*

241. *Id.* at \*10.

242. *Id.* at \*11.

243. 740 F.3d 233 (2d Cir. 2014). The disclosure mandates applied to certain clinics defined under the law as “pregnancy services centers,” and required disclosures to be posted “at [the clinics’] entrances and waiting rooms, on advertisements, and during telephone conversations.” *Id.* at 238. In this appeal, the Second Circuit reviewed the district court’s grant of a preliminary injunction of the law. Ultimately, the Second Circuit affirmed the injunction as to two of three disclosure provisions, but held that the plaintiffs had not demonstrated a likelihood of success for one of the three disclosure provisions and vacated the injunction as to that disclosure. *Id.*

244. *Id.* at 238. Specifically, the law required the clinics to disclose “whether or not they ‘provide or provide referrals for abortion,’ ‘emergency contraception,’ or ‘prenatal care.’” The Second Circuit labeled this the “Services Disclosure.” *Id.*



disclosers to post a message: “that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider.”<sup>245</sup>

The City argued that the disclosure mandates were commercial disclosures and thus subject to, at most, intermediate review under *Central Hudson*.<sup>246</sup> The clinics argued that strict scrutiny applied.<sup>247</sup> The Second Circuit declined to decide the issue and evaluated each type of disclosure under both strict and intermediate scrutiny.<sup>248</sup> It held that plaintiffs were unlikely to succeed on their First Amendment claim challenging the disclosure about licensed medical personnel on staff, but that the other two disclosure requirements likely violated the First Amendment.<sup>249</sup>

The court did not apply *Zauderer*, and it started its analysis with the conclusion that the City’s interest in mandating the disclosures was compelling, satisfying even strict scrutiny.<sup>250</sup> This focused the analysis on whether the disclosures were sufficiently tailored to the City’s interest. In its discussion of tailoring, the court repeatedly expressed the view that the two problematic disclosures were “controversial.” The “Services Disclosure” overburdened the clinics’ speech, the court wrote, *because it* “mandates discussion of controversial political topics.”<sup>251</sup> The disclosure would be made in the context of “a public debate over the morality and efficacy of contraception and abortion,” the court continued, explaining that this—the existence of a public debate—transformed the waiting room communication into “political” disclosure.<sup>252</sup> The “Government Message” likewise communicated information that was controversial, the court explained, because whether “pregnant women should see a doctor” is “a public issue subject to dispute,” “a contested public issue,” and a “matter[] of public concern.”<sup>253</sup> Essentially, the Second Circuit held that these two disclosures failed narrow tailoring in significant part because they required the clinics to publish controversial information (i.e., information that related to a public controversy).<sup>254</sup>

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245. *Id.*

246. *Id.* at 245.

247. *Id.* at 244.

248. *Id.* at 245–51. Although the Second Circuit declined to decide whether intermediate or strict scrutiny applied, it consistently described the disclosures as directed at “consumers” and serving commercial purposes, which should have led it to treat them as commercial disclosures. *See, e.g., id.* at 248–49. The district court had applied strict scrutiny. *Id.* at 246.

249. *Id.* at 245 (“[U]nder either level of review, the Government Message and Services Disclosure fail review while the Status Disclosure survives.”).

250. *Id.* at 246. The court wrote that the City’s compelling interest was “to inform consumers about the services they will receive from pregnancy services centers in order to prevent delays in access to reproductive health services.” *Id.*

251. *Id.* at 250.

252. *Id.* at 249.

253. *Id.* at 250.

254. *Id.*

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What these two cases show is how easily the logic of “controversiality” testing can migrate outside the *Zauderer* context. In these cases, the “controversial” nature of the disclosures did not have the effect of chilling the disclosers’ expression, and it did not reveal efforts by the State to advance an ideological agenda. In neither case did the court spend much time worrying about those sorts of deprivations of speaker rights, either. Instead, controversiality was treated as a problem itself. Yet controversiality, standing alone, is hardly problematic. And insofar as it indicates that listeners might be particularly interested in the information or the topic it informs, that fact should cut in favor of disclosure, not against it.

#### VI. POSTSCRIPT: A GOVERNMENT-FILTERING PREFERENCE

After a court assigns a level of scrutiny to a challenged disclosure mandate, it assesses the governmental interest and finally turns to narrow tailoring. In a handful of cases, federal courts have suggested that to satisfy narrow-tailoring analysis, a mandate must or should be designed so that the State *itself* conveys controversial information to the public. These courts imply that speaker burdens can be reduced by substituting the State for a private actor as the channel of private-actor disclosure to the public—and that, at higher levels of scrutiny, the First Amendment may require such a shift.

Although the “government-filtering preference” is mildly protective of speakers’ interests, it is deeply damaging to listener interests and to the values that sustain democratic self-government. Thus, although few courts are currently enforcing the preference as a matter of First Amendment law, the expression of the preference by some courts is a major red flag about how compelled speech doctrinal mechanisms can be co-opted to produce post-truth regulatory outcomes and to subvert core First Amendment values.

##### *A. Speech Restrictions and Fit*

Courts commonly apply “less restrictive means analysis” to laws that *limit* speech. Here, the idea is that the State should restrict as little speech as possible while pursuing appropriate regulatory interests.<sup>255</sup> For strict scrutiny, narrow tailoring requires that a speech regulation use the least restrictive means necessary to achieve

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255. See, e.g., *Am. Meat Inst. v. United States Dep’t of Agric.*, 760 F.3d 18, 44–45 (D.C. Cir. 2014) (en banc) (requirement that a regulation “be no more extensive than is necessary to serve” the State’s substantial interest under intermediate scrutiny “applies not only to speech restrictions but also to compelled speech”); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422 (1996) (“A law is not narrowly tailored if there are less speech-restrictive means available that would serve the interest essentially as well as would the speech restriction.”).

a compelling governmental interest.<sup>256</sup> Intermediate scrutiny involves a similar but less rigorous tailoring analysis.<sup>257</sup>

In *Lorillard Tobacco Co. v. Reilly*, for example, the Supreme Court threw out tobacco advertising restrictions because they were not sufficiently tailored.<sup>258</sup> The Court specifically identified state-sponsored disclosure as a less restrictive means of achieving the State's interest—reducing tobacco use among children—observing that “if [the State's] concern is that tobacco advertising communicates a message with which it disagrees, it could seek to counteract that message with ‘more speech, not enforced silence.’”<sup>259</sup> Essentially, the Supreme Court held that the State could not pursue a compelling interest through the restriction of private-actor speech if the State could achieve the same interest through its own information campaign.

Since deciding *Lorillard Tobacco* in 2001, the Supreme Court has not again suggested that a law restricting a private actor's speech may violate the First Amendment if a state education campaign could achieve a similar informational outcome. However, in a variation on this logic, lower courts have sometimes invalidated a speech ban where the state interest justifying the restriction of speech could have been achieved with a disclosure *by the same speaker*.<sup>260</sup> Both *Lorillard Tobacco* and these follow-on cases suggest that, where possible, disclosure laws (including state-sponsored information campaigns) *must* be used instead of speech bans to pursue a compelling governmental interest.

When the challenged law compels speech, however, the logic of these trade-offs gets more complicated.

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256. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000); *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

257. *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980) (“[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.”); *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 265 (2d Cir. 2014) (quoting *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 104 (2d Cir. 2010)) (“‘The dictates of *Central Hudson* do not require [a government] to adopt the least restrictive means of advancing its asserted interests,’ nor ‘that there be no conceivable alternative, but only that the regulation not burden substantially more speech than is necessary to further the government’s legitimate interests.’”); Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Precision: Contrast Space and Narrow Tailoring in First Amendment Doctrine*, 6 COMM. L. & POL’Y 259, 264–65 (2001) (describing tailoring analysis in strict and intermediate scrutiny).

258. 533 U.S. 525, 586 (2001).

259. *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

260. *See, e.g., Alexander v. Cahill*, 598 F.3d 79, 96 (2d Cir. 2010) (holding that advertising ban failed narrow tailoring where the government’s interest could have been achieved by means of disclosure); *Rubenstein v. Florida Bar*, 72 F. Supp. 3d 1298, 1318 (S.D. Fla. 2014) (holding that restriction on the use of past results in attorney advertising was more extensive than necessary where “a disclaimer, or required language” could have been used).

*B. Compelled Speech and Fit*

If the First Amendment sometimes requires a State to achieve an interest through compelled speech rather than restriction of speech, does it follow that the First Amendment sometimes requires the State to become the discloser? And what if the disclosure information itself originated with—or must be obtained from—the private actor? Does less restrictive means analysis require the State to take on speech responsibilities, or to function as an information intermediary?

Some courts have essentially twisted the logic of *Lorillard Tobacco* to reach this end. They assert that disclosure of certain information by the State is preferable to mandatory disclosure of the same information by private actors, even if the time, place, and manner of the disclosure will be different. For example, some courts have suggested it is less restrictive for the State to operate a public awareness or educational campaign than to force private actors to communicate the information directly to the public.<sup>261</sup> In 2011, a federal district court in Maryland applying strict scrutiny threw out a crisis pregnancy clinic disclosure encouraging pregnant women to “consult with a licensed health care provider,” asserting that a county government must “post notices . . . in county facilities or launch a public awareness campaign” as a less restrictive alternative.<sup>262</sup> Yet it is not clear that a county public awareness campaign would reach the same women who enter a private health clinic. In addition, since the cost of a public awareness campaign might greatly exceed the cost to clinics of posting a sign, this approach likely increased the overall societal costs of the disclosure.

Most recently, a 5-4 majority of the Supreme Court held that the First Amendment requires a public information campaign instead of mandatory disclosure to satisfy even the less rigorous tailoring analysis of intermediate scrutiny.<sup>263</sup> In *NIFLA v. Becerra*, California’s Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act required licensed health clinics to disclose to patients that the State offered free and low-cost reproductive health services to eligible women and to provide a phone number to call to check for eligibility.<sup>264</sup> In an opinion striking down the disclosure law on First Amendment grounds, Justice Thomas asserted that California should have pursued its goals through a “public-information campaign” or by “post[ing] the information on public property near crisis pregnancy centers.”<sup>265</sup>

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261. See, e.g., *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006) (endorsing a “broad educational campaign directed at the public” as less speech restrictive than forcing video game manufacturers to put ratings on packages).

262. See, e.g., *Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456, 459, 469 n.9 (D. Md. 2011) (stating that the government could “post notices encouraging women to see a doctor in county facilities or launch a public awareness campaign” as a “less restrictive” alternative to requiring crisis pregnancy clinics to post a sign stating “the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider”).

263. *Nat’l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2377 (2018).

264. *Id.* at 2368.

265. *Id.* at 2376. It is worth noting that Justice Thomas refused to concede even that

As it happened, California had already tried this and had concluded that it did not work. However, the majority was unmoved. There was no evidence, Justice Thomas wrote, that women were failing to enroll in publicly funded healthcare because they lacked information; instead, women might not “want” the free services, or California might have “spent insufficient resources” on the information campaign.<sup>266</sup> The Court concluded that the disclosure law was not “sufficiently drawn” even under intermediate scrutiny.<sup>267</sup>

Other courts have gone significantly further, suggesting that narrow tailoring is not satisfied unless the State serves as an information intermediary that gathers data from disclosers, synthesizes and analyzes the information, and channels it to the public.<sup>268</sup> For example, in *NAM v. SEC*, the D.C. Circuit threw out part of the conflict minerals disclosure regime that required companies to disclose information, in SEC filings and on companies’ websites, directly to the public.<sup>269</sup> The D.C. Circuit suggested in dicta that Congress could have devised a “less restrictive” mandate by requiring the *government* to communicate the same information to the public about each company’s products.<sup>270</sup> That is, the court believed that routing disclosure information about individual companies’ products through a government filter satisfied the First Amendment, but that forcing each company to disclose information about their own products directly to the public did not.

The D.C. Circuit even went so far as to suggest that government-generated disclosure may be superior to discloser-generated disclosure from a listener-focused perspective. The court opined that “a centralized list compiled by the [SEC] in one place may even be more convenient or trustworthy to investors and consumers.”<sup>271</sup> This assertion—that government-filtered speech is “more convenient or trustworthy” to recipients than information from its original source—was as startling when it was written as it is today. In fact, government-filtering of speech and information has long been understood as a constitutional problem, not a solution to a constitutional problem.

Fundamentally, requiring the public to obtain information from the State reduces the value of the information to its recipients. It hardly advances First Amendment values to tell citizens they can obtain information from private companies, but only

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“providing low-income women with information about state-sponsored services” was a “substantial” state interest under intermediate scrutiny. *Id.* at 2367, 2375.

266. *Id.* at 2376.

267. *Id.* at 2375. The Court also faulted the disclosure law for being “wildly underinclusive” because it did not require disclosures by other types of clinics that served low-income women. *Id.* (citing *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 802 (2011)).

268. See *Nat’l Ass’n of Mfrs. v. SEC (NAM 2014)*, 748 F.3d 359 (D.C. Cir. 2014) *aff’d*, 800 F.3d 518 (2015); see also *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 800 (1988) (observing that the First Amendment problem might be solved by requiring the discloser to make disclosures to the State, which the State could communicate to the public).

269. *NAM 2014*, 748 F.3d 359.

270. *Id.* at 372.

271. *Id.* at 373; cf. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2233 (2015) (Alito, J., concurring) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–69 (2009)) (“In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech.”).

so long as the government is the channel of that information, controlling both its content and presentation. One reason is that a system in which citizens must obtain information from a single source raises post-truth concerns. Habituating citizens to obtain controversial information from only one source creates an informational dependency that subverts democratic self-government.<sup>272</sup> It encourages passivity and groupthink.

When the exclusive source of private-sector information is the government itself, however, additional concerns arise. The State is incentivized to shape the information environment in ways that advantage the State, its political actors, and the campaign finance donors who fund them; therefore, state-filtered information is likely to be viewed by citizens as untrustworthy. Many Americans have a basic mistrust of government, and our political culture associates propaganda strongly with state-sponsored speech. Today, with the regulatory state under control of a presidential administration regularly criticized for communicating false and misleading information to the public, a government-filtering rule may go far to compromise the value of the information. If citizens do not trust state-filtered information, the result may be no different than if a court had simply thrown the disclosure mandate out on First Amendment grounds. And just because citizens trust state-filtered information today does not mean they will (or should) trust it tomorrow.

Any information system that treats the State as a primary channel of *private actors'* information to *other private actors* gets the balance of First Amendment interests exactly backward: an ecology of dispersed disclosers, each communicating directly with the public, is the First Amendment ideal, even if the disclosers are under compulsion. If we take compelled speech seriously, there are a lot of reasons to prefer an ecology of dispersed speakers. From a speaker's point of view, the ability to contextualize disclosure information through additional speech is powerfully beneficial.<sup>273</sup> From a listener's point of view, it is always better to obtain information from multiple independent sources than from a single source. Importantly, a rule that produces disaggregated

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272. The impulse that affirms a government-filtering preference is significantly at odds with the view of many scholars that decentralized information production is critical to freedom and democracy. Scholars writing about the networked information economy provide strong arguments in favor of decentralization. *See, e.g.,* YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 212–72 (2006).

273. Many courts, including the Supreme Court, have written about the significant value of the disclosers' ability to contextualize or respond to mandatory disclosure with additional speech. *See, e.g.,* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *Meese v. Keene*, 481 U.S. 465, 480–81 (1987); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977) (stating that if consumers receive only incomplete information from attorney advertising “the preferred remedy is more disclosure, rather than less”); *Conn. Bar Ass’n v. United States*, 620 F.3d 81, 87, 95–96 (2d Cir. 2010); *Env’tl. Def. Ctr., Inc. v. U.S. EPA*, 344 F.3d 832, 850 (9th Cir. 2003) (a company subject to the challenged disclosure requirement on safe toxin disposal was not prohibited from “stating its own views” on the subject); *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 625 (D. Vt. 2015); The discloser’s power to respond is important because it potentially mitigates the effects of the information on the discloser’s interests, and can do so organically, right alongside the public disclosure. By providing additional on the spot speech, the discloser can go far toward offsetting dignitary or reputational harms.

disclosure from multiple speakers better respects individuals' freedom to utilize information as they see fit. As discussed in Part IV, a core premise of the marketplace of ideas is that each citizen possesses the freedom to use whatever decision-making process(es) he or she chooses. For all of these reasons, the significant informational value of disaggregated disclosure offsets the mild First Amendment infringements experienced by speakers in many situations.

In another recent case, two power companies challenged a Long Island town's ordinance requiring hazardous chemical warnings on telephone poles treated with pentachlorophenol, a pesticide that is classified as a probable carcinogen by the Environmental Protection Agency.<sup>274</sup> The District Court for the Eastern District of New York declined to treat the hazardous chemical warnings as commercial disclosures, and the court found they did not survive strict scrutiny.<sup>275</sup> The reason was that the ordinance was not the least restrictive means to educate the public about toxic chemicals in telephone poles.<sup>276</sup> "[T]he parties apparently agree," the court wrote, "that the Town is free to create, distribute, and display at its own expense the exact same warning signs contemplated [in the ordinance] on any and all Town property. . . ."<sup>277</sup> The court failed to note, however, that the warnings told readers to "avoid prolonged direct contact with this pole" and to "wash hands or other exposed areas thoroughly if contact is made"—a warning that was significantly diminished if it was removed from the poles.<sup>278</sup> In other words, the Town could pay to post its own warning signs, but these would likely be less effective at achieving the Town's interest: helping residents protect their health from exposure to carcinogens.

The court's decision to throw out the hazardous chemical warnings on First Amendment grounds illustrated how the government-filtering preference shifts information costs from a private actor to the State.<sup>279</sup> However, it also increases *overall* disclosure costs. For example, in the case of the conflict minerals disclosure in *NAM v. SEC*, the D.C. Circuit suggested that the SEC should collect, synthesize, and publish information from numerous companies, which presumably would require it to maintain and update one or more reports over time.<sup>280</sup> This barely saves the companies any money—after all, the companies must still go through a disclosure exercise—but it creates meaningful new and ongoing costs for the SEC. Moreover, by creating new costs

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274. *PSEG Long Island LLC v. Town of North Hempstead*, 158 F. Supp. 3d 149, 153–55, 157 (E.D.N.Y. 2016). The ordinance required the warning to be posted on every fourth pole.

275. *Id.* at 164, 167–68 (“[T]he warning signs bear no discernible relationship to the Plaintiffs’ products, services, or other commercial interests, and are therefore outside the purview of the commercial speech doctrine.”).

276. *Id.* at 167–69.

277. *Id.* at 168.

278. *Id.* at 157. The full warning message stated: “NOTICE—THIS POLE CONTAINS A HAZARDOUS CHEMICAL. AVOID PROLONGED DIRECT CONTACT WITH THIS POLE. WASH HANDS OR OTHER EXPOSED AREAS THOROUGHLY IF CONTACT IS MADE.” *Id.*

279. *See Beeman v. Anthem Prescription Mgmt., LLC*, 315 P.3d 71, 105 (Cal. 2013) (Corrigan, J., concurring and dissenting) (noting the cost-shifting effect of mandatory disclosure).

280. *Nat’l Ass’n of Mfrs. v. SEC (NAM 2014)*, 748 F.3d 359, 373 (D.C. Cir. 2014), *aff’d*, 800 F.3d 518 (2015).

for the State, the approach also increases the political costs of disclosure. In some cases, government-filtered disclosure may be cost prohibitive for the State, even though it probably would not be cost prohibitive for individual disclosers assuming the pro rata costs associated with their own activity. This means that useful disclosure information will never reach the public. More generally, as the costs of a disclosure mandate rise, the benefits necessary to justify the costs also rise. Particularly where a disclosure's benefits are intangible or difficult to quantify, such as disclosure of information that advances democratic decision-making rather than consumer choice, a government-filtering preference may discourage regulators from using disclosure as a regulatory tool at all.

This is not meant to suggest that a government-filtering preference has taken hold in courts across the United States. It has not. However, one thing is clear: at the less restrictive means step of First Amendment analysis, some courts are willing to trade away core First Amendment interests to reduce burdens on private speakers. We should recognize this as post-truth because its widespread adoption would compress the information economy, make the State the exclusive source of citizen information on a range of important subjects, discourage individual truth-seeking and democratic self-determination, and limit the availability of information that is important to people for a range of purposes. Courts should reject the government-filtering preference as fundamentally undemocratic.

## VII. CONCLUSION

James Madison once wrote that “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”<sup>281</sup> Madison's words, and his recognition that democracy requires citizens to wield information-forcing tools, have stood the test of time.

Pundits will almost certainly continue to argue about post-truthism. Is post-truthism a side product of the internet, a potent antidemocratic tribalism, or the end of our commitment to rationality? Whatever post-truthism is as a political phenomenon, it is most potent as a *constitutional* problem when First Amendment doctrine calibrates information flows in relation to the disruptive uses to which citizens may put information.

In other words, post-truthism matters in law insofar as constitutional value judgments about decision-making shape the flow of information to end users in ways that reinforce informational power structures. In earlier eras, censorship and speech bans raised serious concerns that we could recognize as implicating post-truth concerns. Such restrictions threatened to create information gaps and to silence particular channels of information, making evidence-based reasoning more difficult and costly. In the current information age, the evolving law of compelled speech poses a new set of post-truth problems for law.

This Article has shown that courts' use of controversiality tests tends to reverse calibrate information regulation to disclosure's informative function: the more recipients would value the information in the exercise of their citizenship (i.e., in resolving a matter

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281. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 1 THE FOUNDERS' CONSTITUTION 690 (Philip B. Kurland & Ralph Lerner eds., 1987).



subject to public debate), the more likely the First Amendment will prevent the information's disclosure. *Zauderer* sets the constitutional bar higher for information that recipients are likely to value highly and sets the constitutional bar lower for information that recipients are likely to care little about. It gets the First Amendment interests exactly backward.

There are real reasons why the First Amendment might care about whether information subject to mandatory disclosure is controversial. One reason is that forcing certain kinds of speakers to disclose certain kinds of information can lead to reprisal and retaliation against speakers, which might deter speakers' exercise of constitutional rights and interests. Another reason is that, in some cases, the State might use (and has used) compelled speech to force speakers to affirm an ideological viewpoint. Since it is true that ideological viewpoints tend to be controversial, courts might use (and have used) controversiality testing as an overbroad way to quash viewpoint discrimination.

The First Amendment's overarching concern is to encourage the free flow of information on matters of public debate. It is time to consider how information-forcing fits into this scheme and to define limiting principles that promote, and do not undermine, democracy.