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## Public Health Originalism and the First Amendment

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# Public Health Originalism and the First Amendment

Claudia E. Haupt\* & Wendy E. Parmet\*\*

## *Abstract*

*Current First Amendment doctrine has set public health regulation and protections for commercial speech on a collision course. This Article examines the permissibility of compelled public health and safety warnings after the Supreme Court's decision in National Institute of Family & Life Advocates v. Becerra (NIFLA) through the lens of a concurrence to the Ninth Circuit's en banc decision in American Beverage Ass'n v. City & County of San Francisco (American Beverage II) suggesting that only health and safety warnings dating back to 1791 are presumptively constitutional under the First Amendment.*

*Rejecting this form of "public health originalism," this Article first assesses the current doctrinal landscape of compelled public health and safety warnings in the context of commercial speech. It then turns to the history of such warnings, revealing that contrary to apparent assumptions underlying "public health originalism" in its deregulatory form, laws compelling speech including to protect public health existed in*

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*the framing era and were not thought to clash, in the modern sense, with individual liberties, including the freedom of expression. Finally, this Article offers a reading of NIFLA in light of the underlying normative interests of speakers and listeners that attempts to reconcile contemporary First Amendment doctrine and compelled public health and safety warnings.*

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### INTRODUCTION

The deregulatory impact of the Supreme Court’s approach to the First Amendment has attracted the attention of judges

and scholars for some time.<sup>1</sup> Public health and safety regulations previously considered permissible are facing new risks,<sup>2</sup> illustrating the stakes of this theoretically questionable approach. But while critics of the deregulatory First Amendment frequently invoke a throwback to the *Lochner* era,<sup>3</sup>

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1. See, e.g., *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting) (“[T]he majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy.”); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2383 (2018) (Breyer, J., dissenting) (“Using the First Amendment to strike down economic and social laws . . . will, for the American public, obscure, not clarify, the true value of protecting freedom of speech.”); Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1242 (2020) (“The ghost of *Lochner* . . . haunts contemporary free speech law.”); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1454 (2017) (“By conceptualizing corporate and listeners’ interests as aligned because both benefit from deregulation, the Court has developed a tradition in which corporate interests are always vindicated while listeners’ interests are not.”); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1157–58 (2015) (describing how the First Amendment has been used to advance economic interests); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015) (“[T]he First Amendment has become a powerful engine of constitutional deregulation.”); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 137 (“Courts’ growing protection of commercial speech threatens to revive a sort of *Lochnerian* constitutional economic deregulation . . . .”); C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 990–94 (2009) (arguing that commercial speech should be subject to regulation due to its relation to market transactions); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2588 (2008) (arguing against the expansive protection of commercial speech, especially as applied to for-profit corporations); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 10 (2000) (“Nothing could be more damaging to the First Amendment than to equate it with a specific economic perspective, and in this way to transform it into a mere ‘basis for reviewing economic regulations.’”).

2. See Andra Lim, Note, *Limiting NIFLA*, 72 STAN. L. REV. 127, 141–48 (2020) (discussing lawsuits raising First Amendment claims that have thrown into question the constitutional status of commercial warnings and disclosures).

3. See generally *Lochner v. New York*, 198 U.S. 45 (1905). See Shanor, *supra* note 1, at 135 (“[A] growing number of scholars, commentators, and judges have likened aspects of recent First Amendment jurisprudence to *Lochner v. New York's* anticanonical liberty of contract.”).

we may have to look back even further. Concurring in *American Beverage Ass'n v. City & County of San Francisco (American Beverage II)*<sup>4</sup>—a Ninth Circuit en banc decision ordering a preliminary injunction against a San Francisco ordinance requiring certain health warnings on ads for sugary beverages—Judge Ikuta notably remarked that while it is not evident “what sorts of health and safety warnings date back to 1791, . . . warnings about sugar-sweetened beverages are clearly not among them.”<sup>5</sup> If followed by other judges, this interpretive approach, which we call “public health originalism,” poses a fundamental challenge to modern public health and safety regulation.

Both the en banc decision<sup>6</sup> and Judge Ikuta’s concurrence<sup>7</sup> in *American Beverage II* explicitly relied on the Supreme Court’s decision in *National Institute of Family & Life Advocates v. Becerra (NIFLA)*,<sup>8</sup> which struck down a California law regulating speech at crisis pregnancy centers (CPCs).<sup>9</sup> Justice Thomas’ opinion for the Court in *NIFLA* has created deep doctrinal confusion.<sup>10</sup> Most critical, for present purposes, is

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4. 916 F.3d 749 (9th Cir. 2019) (en banc).

5. *Id.* at 762 (Ikuta, J., concurring).

6. *Id.* at 753 (majority opinion) (“Relying on the United States Supreme Court’s decision in [*NIFLA*], we conclude that Plaintiffs will likely succeed on the merits of their claim that the Ordinance is an ‘unjustified or unduly burdensome disclosure requirement that might offend the First Amendment by chilling protected commercial speech.’” (citation omitted)).

7. *Id.* at 758 (Ikuta, J., concurring) (“In [*NIFLA*], the Supreme Court provided a framework for analyzing First Amendment challenges to government-compelled speech.” (citation omitted)).

8. 138 S. Ct. 2361 (2018). For a discussion of *NIFLA*, see generally Lim, *supra* note 2; Thea Raymond-Sidel, Note, *I Saw the Sign: NIFLA v. Becerra and Informed Consent to Abortion*, 119 COLUM. L. REV. 2279 (2019).

9. *NIFLA*, 138 S. Ct. at 2368, 2378.

10. See Wendy E. Parmet et al., *The Supreme Court’s Crisis Pregnancy Center Case—Implications for Health Law*, 379 NEW ENG. J. MED. 1489, 1490–91 (2018) (discussing the constitutional jeopardy of health laws following *NIFLA* that were once assumed to be constitutional); Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J.F. 185, 187 (2018) (“[The] majority opinion devotes a substantial discussion to professional speech before ultimately deciding the case on other grounds . . . suggest[ing] that there remains considerable uncertainty about the definition of professional speech.”); Vikram David Amar & Alan Brownstein, *Toward a*

*NIFLA*'s impact on the "states' ability to protect public health by regulating commercial speech."<sup>11</sup> As one of the first federal appellate court decisions to apply *NIFLA*, *American Beverage II* vividly illustrates *NIFLA*'s potential danger to public health laws.<sup>12</sup> Further, although Judge Ikuta's opinion represents only the views of one judge from the Court of Appeals, her linkage of *NIFLA* to originalism, and her suggestion that the constitutionality of health and safety warning laws depends upon their legal status in 1791 demands examination, as they offer an interpretation that reflects several elements of the originalist critique of the regulatory state.<sup>13</sup> Her opinion thus may well foretell future decisions that rely on public health originalism.<sup>14</sup> For that reason, it is critical that the misunderstandings upon which her approach lie are exposed now, rather than once this approach is more widely adopted.

In this Article, we argue that public health originalism is based on a misreading of *NIFLA* and a misguided understanding of history, doctrine, theory, and policy. Exposing judicial misunderstandings of both doctrine and history, and clarifying what *NIFLA* permits in terms of health and safety are vital to ensure that both states and the federal government<sup>15</sup> can continue to protect public health effectively without running afoul of the First Amendment.

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*More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 27 n.132 ("The majority's arguments suggesting a narrow limiting of the government's ability to restrict or compel professional speech in *NIFLA* are the most disturbing aspects of a generally unpersuasive opinion.").

11. Parmet et al., *supra* note 10, at 1490.

12. See *NIFLA*, 138 S. Ct. at 2381 (Breyer, J., dissenting) ("[The majority's] test invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle.").

13. See *infra* Part II.

14. See *infra* Part III.

15. See, e.g., Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 180 (2018) ("There may be no edifice of public regulatory power more immediately threatened by this trend than the Food and Drug Administration (FDA).").

This Article proceeds in three Parts. Part I introduces the *American Beverage* litigation and situates it within commercial speech doctrine more broadly. In particular, we discuss the Supreme Court's earlier decision in *Zauderer v. Office of Disciplinary Counsel*<sup>16</sup> which previously controlled how compelled commercial disclosures were reviewed. We then examine several circuit court decisions prior to *American Beverage*, which sought to interpret *Zauderer*, as well as the Ninth Circuit's panel decision in *American Beverage I*. Finally, we introduce the Supreme Court's *NIFLA* decision and discuss how the Ninth Circuit viewed its reinterpretation of *Zauderer* in its own en banc decision in *American Beverage II*, which misread the Supreme Court's *NIFLA* decision in important respects.

Part II interrogates Judge Ikuta's "public health originalism." After discussing what she appears to mean, we explore some specific challenges and implications that arise from determining the constitutionality of compelled health and safety warnings by looking to whether they were accepted as constitutional in 1791.<sup>17</sup> These include the obvious point that

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16. 471 U.S. 626 (1985).

17. We do not revisit larger debates about the viability or legitimacy of originalism as a method of constitutional interpretation writ large. The literature on originalism is vast. Some recent contributions include Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018); Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671 (2018); William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213 (2017); D. A. Jeremy Telman, *Originalism: A Thing Worth Doing . . .*, 42 OHIO N. UNIV. L. REV. 529 (2016); Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935; Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907 (2008). We also do not consider the merits of the different schools of originalism. For a discussion of evolving approaches to originalism, see generally Andrew Coan, *Living Constitutional Theory*, 67 DUKE L.J. ONLINE 99 (2017); Matthew D. Bunker, *Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of Expression*, 17 COMM. L. & POL'Y 329 (2012). Nor do we join the question of whether the framing generation expected the Speech Clause to apply beyond the limited case of prior restraints or pre-publication licenses. There is also a rich body of literature that seeks to understand the original meaning of the Speech Clause. See Bunker, *supra*, at 333–42 (discussing challenges in applying new originalism to the Speech Clause); Jud Campbell, *Natural Rights and the First*

the First Amendment only applies to the states through the Fourteenth Amendment, and was not held to do so until 1925.<sup>18</sup> Therefore, it is quite unclear why an originalist would look, as Judge Ikuta did, to the 1790s, rather than the 1860s, to determine the constitutionality of compelled state health and safety warning laws.<sup>19</sup>

Second, and more fundamentally, Judge Ikuta's "public health originalism" seems to rely on a significant misapprehension of earlier notions of the police power and its relation to the regulation of speech. Although the specific warning labels at issue in *American Beverage* were certainly not extant in the eighteenth or nineteenth centuries, health and safety laws were more commonplace than we might suspect.<sup>20</sup> Moreover, mandated warning laws existed at the time, and there is no evidence that they were seen as clashing, in the modern sense, with individual liberties.<sup>21</sup> To the contrary, liberty, including the freedom of expression, was widely understood as inherently limited by the common good,<sup>22</sup> as exemplified by the common law maxims of *sic utere*<sup>23</sup> and *salus*

*Amendment*, 127 YALE L.J. 246, 249–51 (2017) (discussing the scholarly literature applicable to the original meaning of the Speech Clause).

18. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding the First Amendment right to free speech is applicable to the states via the Fourteenth Amendment).

19. See Bunker, *supra* note 17, at 336 (emphasizing the need for originalists to look not only at the original framing period in the late eighteenth century, but also to the framing era of the Fourteenth Amendment in 1868 when determining such matters).

20. See Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 285–302 (1993) (providing an overview of the status of public physical health law in the American colonies and during the confederation and early federalist eras).

21. See *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851) (explaining that individual rights are constrained by "all manner of wholesome and reasonable laws . . . for the good and welfare" of the state).

22. See Campbell, *supra* note 17, at 246 ("Speech and press freedoms referred, in part, to natural rights that were expansive in scope but weak in their legal effect, allowing for restrictions of expression to promote the public good.").

23. See *Alger*, 61 Mass. (7 Cush.) at 86 (conceptualizing the police power as a means of enforcing a common law maxim governing the law of



*populi*.<sup>24</sup> Indeed, in both the 1780s and 1860s the police power was viewed as enabling states to compel warnings without violating any individual right.<sup>25</sup> Or, to put it another way, the baseline assumption was that states could impose restraints on individuals, including with respect to speech, in the name of health and safety.<sup>26</sup>

We conclude Part II by examining the provenance and role of the type of warning laws that now face First Amendment jeopardy. Although mandated warning laws have a long pedigree, they have no doubt proliferated in recent decades.<sup>27</sup> Paradoxically, they have done so in part because of concerns for individual liberties, including those protected by the First Amendment. Before the Supreme Court applied the First Amendment to commercial speech,<sup>28</sup> jurisdictions had greater leeway to ban advertisements of products they deemed misleading or dangerous.<sup>29</sup> As the twentieth century progressed,

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nuisance—*sic utere tuo, ut alienum non lædas*—use your own property in such a way that you do not injure other people’s).

24. See WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 37–39 (2009) (recognizing the meaning of the common law maxim *salus populi suprema lex*—the health or well-being of the people is the supreme law).

25. Prior to the Civil War, a warning law imposed by the federal government would have raised alarms on federalism, rather than First Amendment, grounds. Until the Progressive Era, the protection of health and safety within a state was widely viewed as within the provenance of the states. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1872) (noting that a state’s power to regulate for the health and safety of its citizens “is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States”).

26. See Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1663–66 (2019) (discussing the origins of the police power before 1868).

27. See *infra* Part II.

28. See *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (deciding that the First Amendment applied to advertisements for abortion because the ads “contained factual material of clear ‘public interest’”).

29. See WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 191–234 (1996) (discussing expansive public limitations on private activity concerning public health, including medical police, quarantines, and noxious trades); Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST. 476, 481–501 (1996) (discussing the

such measures increasingly came to be seen as inappropriately paternalistic and incompatible with freedom of expression.<sup>30</sup> In their place, jurisdictions turned to warning labels that seemed to be a less paternalistic alternative.<sup>31</sup> What happens if health and safety laws are no longer considered the less restrictive alternative? We argue that policymakers may, to industry's chagrin, turn at times to more draconian alternatives. If so, public health originalism may paradoxically push us closer to an earlier, more paternalistic approach to protecting public

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evolution of public health's place in police power jurisprudence from 1868 to 1905).

30. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 (1996) (stating that the Court's commercial speech decisions reject "a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely"); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 768 (1976) (rebuffing the state's argument that consumers would make irresponsible choices if they were able to choose between higher priced but higher quality pharmaceuticals accompanied by high quality prescription monitoring services resulting from a "stable pharmacist-customer relationship"). For a discussion of the role of anti-paternalism in the Court's commercial speech jurisprudence, see Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 587–606 (2004) (reviewing First Amendment jurisprudence where the Court evinces, either explicitly or implicitly, some aversion to paternalism); Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 883 (2015). In the early days of the administrative state, command and control regulations were common and routine. But as we have learned more about the complexities of the marketplace, as we have acquired greater respect for the autonomy of marketplace actors, there has been a marked shift toward forms of regulation that force the disclosure of information believed necessary for educated participation in the marketplace.

31. See Lisa A. Robinson et al., *Efficient Warnings, Not "Wolf or Puppy" Warnings*, in THE FUTURE OF RISK MANAGEMENT 227–50 (Howard Kunreuther et al. eds., 2019) (discussing the history of warning laws and noting that they are "less intrusive than command and control regulations"); Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1826 (2013) ("While hard forms of paternalism cannot be ruled out of bounds, a general principle of behaviorally informed regulation—its first and only law—is that the appropriate responses to behavioral market failures usually consist of nudges, generally in the form of disclosures, warnings, and default rules."); M. Gregg Bloche, *Obesity and the Struggle with Ourselves*, 93 GEO. L.J. 1335, 1357 (2005) (arguing that with warnings the "paternalism here is a minor intrusion, since mere warnings, as opposed to outright bans (or liability for defective design) permit consumers to choose and make them responsible for their decisions").

health, for example, by banning activities rather than compelling that they come with warning labels.<sup>32</sup>

Part III returns to *NIFLA*, providing an interpretation that is consistent with First Amendment doctrine and theory as well as federal and state interests in protecting public health. The *NIFLA* majority itself seemed aware of the potentially far-reaching effects of the deregulatory approach.<sup>33</sup> Thus, it attempted to cabin its own reasoning at several points during the opinion, including with the assertion that “[l]ongstanding torts for professional malpractice” are not in jeopardy and “the requirement that a doctor obtain informed consent to perform an operation is ‘firmly entrenched in American tort law.’”<sup>34</sup> Moreover, in an attempt to defuse the dissent’s skepticism, the majority declared that it “do[es] not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”<sup>35</sup> But these raw assertions are unsupported by analysis.<sup>36</sup>

We suggest that, given the interests underlying public health warnings and the corresponding First Amendment interests of listeners, *NIFLA* must be read narrowly. Indeed, seen in conjunction with Supreme Court precedent in *Reed v. Town of Gilbert*<sup>37</sup> and *Sorrell v. IMS Health*,<sup>38</sup> the Court’s

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32. See Shanor, *supra* note 1, at 198–99 (“Greater protections for commercial speech may therefore reduce the role of many of the tools of behavioral law and economics based regulation—either producing deregulatory outcomes or, paradoxically, incentivizing mandates.”).

33. Nat’l Inst. of Fam. & Life Advoc. v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2376 (2018) (“Contrary to the suggestion in the dissent, we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”).

34. *Id.* at 2373.

35. *Id.* at 2376.

36. *Id.* at 2381 (Breyer, J., dissenting) (“But this generally phrased disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification.”); see Haupt, *supra* note 10, at 190 (“[T]he majority, without further explanation, assumes malpractice liability and informed consent to be constitutional under the First Amendment.”).

37. 135 S. Ct. 2218 (2015).

38. 564 U.S. 552 (2011).

expansive view of commercial speech doctrine is increasingly divorced from context.<sup>39</sup> When public health interests are at stake, this acontextual understanding of the First Amendment results in a stark mismatch between theory and doctrine for “the Constitution values different kinds of speech for different reasons.”<sup>40</sup> The doctrinal framework governing specific kinds of speech must reflect those reasons. Public health and safety warnings are a case in point.

## I. CONTEMPORARY COMMERCIAL SPEECH AND PUBLIC HEALTH WARNINGS

Commercial speech doctrine remains contested and in flux. Although some scholars argued earlier that commercial speech should be protected by the First Amendment,<sup>41</sup> the Supreme Court did not do so until 1976.<sup>42</sup> Since then, the Court’s doctrinal approach towards commercial speech has been inconsistent.<sup>43</sup> The following discussion reviews the broad doctrinal contours against which the *American Beverage* litigation was set.

Traditionally, the starting point for commercial speech analysis has been the intermediate scrutiny inquiry set out in *Central Hudson Gas & Electric Corp. v. Public Service*

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39. See *Reed*, 135 S. Ct. at 2222 (holding that content-based regulations must satisfy strict scrutiny); *Sorrell*, 564 U.S. at 563, 571 (suggesting that more scrutiny of laws regulating commercial speech might be warranted, at least when the laws in question were “content- and speaker-based”).

40. Post, *supra* note 30, at 871.

41. See Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 443–48 (1971) (arguing that commercial speech cannot be distinguished from any category of protected speech in its capacity to provide the public with information that is relevant both to people’s personal lives and to their political decisions or in any other constitutionally relevant dimension).

42. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (striking down a state law that barred pharmacists from advertising the price of drugs and holding that commercial speech is protected by the First Amendment).

43. See, e.g., Post, *supra* note 1, at 2 (describing commercial speech doctrine as “a notoriously unstable and contentious domain of First Amendment jurisprudence.”).

*Commission*.<sup>44</sup> But while that case, as well as the Supreme Court's earlier discussion of commercial speech in *Virginia State Board of Pharmacy*,<sup>45</sup> reviewed laws that limited commercial speech, *Zauderer v. Office of Disciplinary Counsel*<sup>46</sup> established the Court's approach for reviewing laws that require commercial speakers "to provide somewhat more information than they might otherwise be inclined to present."<sup>47</sup> At issue in *Zauderer* was a law compelling an attorney to "include in his advertising purely factual and uncontroversial information about the terms under which his services will be available."<sup>48</sup> Noting a distinction between "disclosure requirements and outright prohibitions on speech,"<sup>49</sup> the Court recognized a lower, rational basis standard for the former, holding "that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."<sup>50</sup>

In the years since the Court issued that admonition, lower courts have struggled to determine both when *Zauderer*'s lower level of scrutiny was applicable, and the degree of protection afforded to disclosure laws.<sup>51</sup> Indeed, the federal appellate courts fundamentally disagree about the types of disclosures to which *Zauderer* applies. While one set of circuit court decisions limits *Zauderer* to speech designed to redress consumer

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44. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (requiring that commercial speech regulations be subjected to intermediate scrutiny when determining constitutionality); see also Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 974–76 (2017) (detailing lower courts' application of *Zauderer* to analyze commercial warnings and disclosures). This Note also provides a brief overview of the doctrinal development from *Virginia Pharmacy* to *Zauderer*. *Id.*

45. 425 U.S. 748 (1976).

46. 471 U.S. 626 (1985).

47. *Id.* at 650.

48. *Id.* at 651.

49. *Id.* at 650.

50. *Id.* at 651.

51. See, e.g., *Repackaging Zauderer*, *supra* note 44, at 979 ("*Zauderer*'s treatment in various circuits most closely resembles a fractured, frequently contradictory mosaic."); Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 357 (2018) (noting that compelled speech doctrine "contains major uncertainties" due to the doctrine's internal tensions).

deception,<sup>52</sup> a group of sister circuits have applied *Zauderer*'s more deferential review to laws compelling the disclosure of consumer information in general.<sup>53</sup>

In this Part, we first provide a chronological overview of the most important doctrinal developments immediately preceding *American Beverage*, focusing on three particularly relevant cases: the D.C. Circuit's 2012 decision in *R.J. Reynolds Tobacco Co. v. FDA*,<sup>54</sup> the same court's 2014 decision in *American Meat Institute v. USDA (AMI)*,<sup>55</sup> and the Ninth Circuit's 2017 decision in *CTIA—The Wireless Ass'n v. City of Berkeley*.<sup>56</sup> We then focus on the Ninth Circuit's 2017 (pre-*NIFLA*) panel<sup>57</sup> and its 2019

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52. See, e.g., *Dwyer v. Cappell*, 762 F.3d 275, 284 (3d Cir. 2014) (suggesting that *Zauderer* applies only to disclosures aimed at preventing consumer deception); *Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006) (quoting *Zauderer* as authorizing disclaimers aimed at preventing deception but without providing any analysis); *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005) (same).

53. See, e.g., *Am. Meat Inst. v. U.S. Dep't of Agric. (AMI)*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc) (noting that *Zauderer* "seems inherently applicable beyond the problem of deception"); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 554 (6th Cir. 2012) ("If a commercial-speech disclosure requirement fits within the framework of *Zauderer* and its progeny, then we apply a rational-basis standard."); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (describing *Zauderer* as "akin to the general rational basis test governing all government regulations under the Due Process Clause"); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114–15 (2d Cir. 2001)

Mandating that commercial actors disclose commercial information ordinarily does not offend the important . . . interests that lie at the heart of the First Amendment. The Amendment is satisfied, therefore, by a rational connection between the purpose of commercial disclosure requirement and the means employed to realize that purpose.

54. 696 F.3d 1205 (D.C. Cir. 2012).

55. 760 F.3d 18 (D.C. Cir. 2014).

56. 854 F.3d 1105 (9th Cir. 2017), *vacated*, 138 S. Ct. 2708 (2018). After the *American Beverage II* en banc decision was handed down, a panel of the Ninth Circuit affirmed *CTIA* on remand, 928 F.3d 832 (9th Cir. 2019). We return to this latest decision in *CTIA* in Part III *infra*.

57. *Am. Beverage Ass'n v. City & Cnty. of San Francisco (American Beverage I)*, 871 F.3d 884 (9th Cir. 2017).

(post-*NIFLA*) en banc<sup>58</sup> decisions in *American Beverage*, and discuss how the Ninth Circuit responded to the Supreme Court's decision in *NIFLA*, which was decided between the time that the circuit court issued its panel and en banc decisions. The doctrinal shift that *NIFLA* suggested caused disagreement among the en banc opinions in *American Beverage II* and laid the groundwork for Judge Ikuta's turn to public health originalism.

### A. *Compelled Warnings and the Role of History*

In order to fully appreciate the doctrinal meanderings throughout the *American Beverage* litigation, three cases involving compelled warnings seem particularly salient. First, in 2012 in *R.J. Reynolds Tobacco Co. v. FDA*, the D.C. Circuit held that a set of new FDA-proposed warning labels, implementing a requirement of the 2009 Family Smoking Prevention and Tobacco Control Act, violated the First Amendment because the agency failed to present evidence that the warnings would lead to a reduction in smoking rates and thus failed to meet the scrutiny required by *Central Hudson*.<sup>59</sup> *R.J. Reynolds* illustrates the clash between the government's power to demand "that consumers be fully informed about the dangers of hazardous products"<sup>60</sup> and the protection commercial speech doctrine provides commercial entities against being forced to warn about their own product.<sup>61</sup> Importantly for our purposes, the court rejected application of the *Zauderer* framework<sup>62</sup> arguing that its less stringent approach to First Amendment review was applicable only when the disclosure

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58. *Am. Beverage Ass'n v. City & Cnty. of San Francisco (American Beverage II)*, 916 F.3d 749 (9th Cir. 2019) (en banc).

59. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1222.

60. *Id.* at 1212.

61. *See id.* ("[H]ow much leeway should this Court grant the government when it seeks to compel a product's manufacturer to convey the state's subjective—and perhaps even ideological—view that consumers should reject this otherwise legal, but disfavored, product?").

62. *See id.* at 1217 ("[T]he images fall outside the ambit of *Zauderer*.").

mandate was needed to remedy deception.<sup>63</sup> In addition, the court held that the graphic warnings “do not constitute the type of ‘purely factual and uncontroversial’ information” to which *Zauderer* applies.<sup>64</sup> In so doing, the court seemed to reread *Zauderer* as limiting its lesser review to statements that are factual and noncontroversial, a point that was not clear in the Supreme Court’s opinion.

Once having rejected *Zauderer*’s rational basis standard, the court in *R.J. Reynolds* went on to apply *Central Hudson*’s intermediate scrutiny in a way that placed a high demand on the evidence presented, requiring the government to show that the warnings would in fact result in reduced smoking rates.<sup>65</sup> The decision also hinted at the history of industry acceptance of warnings in general,<sup>66</sup> but held that only warnings that are “a remedial measure designed to counteract specific deceptive claims” would have placed them in *Zauderer*’s ambit.<sup>67</sup>

In a 2014 decision, *American Meat Institute v. USDA (AMI)*, the D.C. Circuit addressed the constitutionality of compelled country-of-origin disclosures on meat products.<sup>68</sup> There, the court held “that *Zauderer* in fact does reach beyond problems of deception, sufficiently to encompass the disclosure mandates at issue” in that case.<sup>69</sup> So holding, the court explicitly overruled *R.J. Reynolds*’ ruling that *Zauderer* applied only when

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63. *See id.* at 1213–17 (“[B]y its own terms, *Zauderer*’s holding is limited to cases in which disclosure requirements are ‘reasonably related to the State’s interest in preventing deception of consumers.’ *Zauderer* ‘carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.’” (citations omitted)).

64. *Id.* at 1216.

65. *Id.* at 1217–21.

66. *See id.* at 1215 (“The Companies have never argued that *no* disclosure requirements are warranted; they merely object to the form and content of the specific requirements proposed by the FDA. . . . Moreover, the Companies generally acknowledge the need for effective warnings.”).

67. *Id.*

68. *Am. Meat Inst. v. U.S. Dep’t of Agric. (AMI)*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc).

69. *Id.* at 20.



disclosures remedied deception.<sup>70</sup> Moreover, in assessing the governmental interest in country-of-origin disclosures, the court noted that this information “has an historical pedigree that lifts it well above ‘idle curiosity.’”<sup>71</sup> The court further explained that “country-of-origin label mandates indeed have a ‘long history.’ Congress has been imposing similar mandates since 1890, giving such rules a run just short of 125 years.”<sup>72</sup> This is relevant for the First Amendment inquiry, the court argued, because it signals the value of the information to the consumer.<sup>73</sup> Moreover, such disclosure requirements tend to have a long, constitutionally uncontroversial history.<sup>74</sup>

Then-Judge Kavanaugh, concurring in the judgment, likewise emphasized the longstanding character of country-of-origin designations.<sup>75</sup> With respect to determining which state interests are sufficient to justify compelled disclosures, he noted that “[h]ere, as elsewhere in First

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70. *Id.* at 22–23 (“To the extent that other cases in this circuit may be read as holding to the contrary and limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them.”).

71. *Id.* at 23.

72. *Id.*; see *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (finding adequate justification for applying strict scrutiny in “a long history, a substantial consensus, and simple common sense”); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628–29 (1995) (same).

73. See *AMI*, 760 F.3d at 24 (“The Congress that extended country-of-origin mandates to food did so against a historical backdrop that has made the value of this particular product information to consumers a matter of common sense.”).

74. See *id.* at 26

The self-evident tendency of a disclosure mandate to assure that recipients get the mandated information may in part explain why, where that is the goal, many such mandates have persisted for decades without anyone questioning their constitutionality. In this long-lived group have been not only country-of-origin labels but also many other routine disclosure mandates about product attributes, including, for instance, disclosures of fiber content, care instructions for clothing items, and listing of ingredients. (internal citations omitted).

75. See *id.* at 30 (Kavanaugh, J., concurring) (“For many decades, Congress has mandated such country-of-origin labels for a variety of products.”).

Amendment free speech law, history and tradition are reliable guides.”<sup>76</sup> But whereas mandated disclosures “to prevent consumer deception or to ensure consumer health or safety” including nutrition labels and health warnings reflect a justified state interest, “a country-of-origin disclosure requirement obviously does not serve those interests.”<sup>77</sup> Judge Kavanaugh nevertheless found the justification in the “historically rooted interest in supporting American manufacturers, farmers, and ranchers as they compete with foreign manufacturers, farmers, and ranchers.”<sup>78</sup> He thus concluded that the “historical pedigree is critical for First Amendment purposes and demonstrates that the Government’s interest here is substantial.”<sup>79</sup> Ultimately, while both the *AMI* majority and the Kavanaugh concurrence invoked the disclosures’ historical pedigree, neither inquired whether such disclosures existed in 1791, making their approach fundamentally different than Judge Ikuta’s public health originalism.

In contrast, Judge Brown’s *AMI* dissent challenged the historical perspective, noting that “in the First Amendment context, which has been steadily evolving since the late 1800s, history is not ‘telling’; rather, it is an especially poor substitute for reasoned judgment.”<sup>80</sup> She specifically rejected the idea “that a time-tested consensus can be a proxy for the substantiality of the government’s interest in the First Amendment context.”<sup>81</sup> Indeed, she concluded, “[i]f that were true, the commercial speech doctrine would never have developed at all.”<sup>82</sup> The change over time in the doctrinal treatment of commercial

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76. *Id.* at 31.

77. *Id.*

78. *Id.* at 32 (further noting that “[s]ince the early days of the Republic, numerous U.S. laws have sought to further that interest, sometimes overtly and sometimes subtly”).

79. *Id.*

80. *Id.* at 48 (Brown, J., dissenting).

81. *Id.* at 50.

82. *Id.*

speech means that “citation to early labeling regimes tells us nothing useful.”<sup>83</sup>

Finally, the Ninth Circuit offered perhaps its most relevant interpretation of *Zauderer* prior to *American Beverage* (and prior to *NIFLA*) in its 2017 decision, *CTIA-The Wireless Ass’n v. City of Berkeley*.<sup>84</sup> *CTIA* concerned the City of Berkeley’s requirement that cell phone sellers provide a warning about cell phone safety, as originally determined by the FCC based on its findings.<sup>85</sup> To analyze the disclosure, the court for the first time addressed whether *Zauderer* applies to commercial speech without the goal of preventing consumer deception.<sup>86</sup> Agreeing with the D.C. Circuit’s approach in *AMI* and that of several sister circuits, the Ninth Circuit held that it does.<sup>87</sup> In so doing, the court quoted language from *AMI* noting the “historical pedigree” of country-of-origin information,<sup>88</sup> though it did not rely on historical pedigree to uphold the cell phone safety disclosures. Rather, *CTIA* treated *Zauderer* as a true form of

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83. *Id.* at 49.; *see id.* (noting further “[t]hat ‘Congress has been imposing [country-of-origin] mandates since 1890,’ eighty-six years before commercial speech received explicit protection, thus tells us very little about the practice’s constitutionality” (quoting the majority opinion)).

84. *See generally* *CTIA—The Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017), *vacated*, 138 S. Ct. 2708 (2018), *remanded*, 928 F.3d 832 (9th Cir. 2019). After the *American Beverage II* en banc decision was handed down, a panel of the Ninth Circuit affirmed *CTIA* on remand. We return to this latest decision in *CTIA* in Part III *infra*.

85. *CTIA—The Wireless Ass’n*, 854 F.3d at 1114 (challenging the FCC’s requirement to warn prospective purchasers about exposure to radio-frequency radiation).

86. *Id.* at 1116 (“This is the first time we have had occasion in this circuit to squarely address the question whether, in the absence of a prevention-of-deception rationale, the *Zauderer* compelled-disclosure test applies.”).

87. *Id.* at 1114. (“Several of our sister circuits . . . have answered this question. They have unanimously concluded that the *Zauderer* exception for compelled speech applies even in circumstances where the disclosure does not protect against deceptive speech.”).

88. *Id.* at 1117 (citing *Am. Meat Inst. v. U.S. Dep’t of Agric. (AMI)*, 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc)).

rational basis review.<sup>89</sup> The Supreme Court later vacated this decision in light of *NIFLA*, and we will return to it in Part IV.<sup>90</sup>

### B. *The American Beverage Litigation in Context*

The *American Beverage* litigation involved a San Francisco ordinance that attempted to address increases in obesity and other conditions related to consuming sugary beverages.<sup>91</sup> The ordinance required certain disclosures on advertisements for sugary beverages, including the warning that drinking such beverages “contributes to obesity, diabetes, and tooth decay.”<sup>92</sup> The required warning had to cover at least 20 percent of the ad.<sup>93</sup>

Determining that the speech at issue was commercial speech, the district court analyzed the warning requirement

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89. See *id.* at 1118 (“Under *Zauderer*, compelled disclosure of commercial speech complies with the First Amendment if the information in the disclosure is reasonably related to a substantial governmental interest and is purely factual.”).

90. See *supra* note 56 and accompanying text.

91. See Cara B. Ebbeling et al., *A Randomized Trial of Sugar-Sweetened Beverages and Adolescent Body Weight*, 367 *NEW ENG. J. MED.* 1407, 1407–16 (2012) (finding that consumption of sugar-sweetened beverages may cause excessive weight gain). See generally Maira Bes-Rastrollo et al., *Sugar-Sweetened Beverages and Weight Gain in Children and Adults: A Systematic Review from 2013–2015 and a Comparison with Previous Studies*, 10 *OBESEITY FACTS* 674 (2018) (suggesting that sugar-sweetened beverage consumption is positively associated with or has an effect on obesity in children and adults); Amelie Keller & Sophie Bucher Della Torre, *Sugar-Sweetened Beverages and Obesity Among Children and Adolescents: A Review of Systematic Literature Reviews*, 11 *CHILDHOOD OBESEITY* 338 (2015) (concluding that there was a direct association between sugar-sweetened beverage consumption and weight gain and obesity in children and adolescents).

92. See *Am. Beverage Ass’n v. City & Cnty. of San Francisco*, 187 F. Supp. 3d 1123, 1126 (N.D. Cal. 2016)

In essence, the ordinance requires certain kinds of advertisements related to sugar-sweetened beverages . . . to display a warning from the City that says: “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.” S.F. Health Code § 4203(a).

93. *Id.* at 1130.

under *Zauderer*<sup>94</sup> and concluded that both the tooth decay<sup>95</sup> and the diabetes/obesity warning,<sup>96</sup> were likely constitutional under its less stringent standard of review.<sup>97</sup> Moreover, the district court determined that the asserted chilling effect on speech was insufficiently substantiated,<sup>98</sup> and, in any event, “*Zauderer* dictates that a compelled disclosure need only be reasonably related to the government’s interest in order for the advertiser’s rights to be adequately protected.”<sup>99</sup> This treated *Zauderer* as a straightforward rational basis requirement.

But a panel of the Ninth Circuit reversed, holding that the warning requirements imposed “an ‘unjustified or unduly burdensome disclosure requirement that might offend the First Amendment by chilling protected commercial speech.’”<sup>100</sup> Writing for the panel majority, Judge Ikuta concluded that the ordinance was unduly burdensome and chilled speech.<sup>101</sup> The panel also held that “the ordinance was not purely factual and

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94. *See id.* at 1133–36 (“Because commercial speech is at issue in this facial challenge, and the challenged ordinance requires disclosure rather than suppression of speech, strict scrutiny is not required under *Zauderer* . . .”).

95. *See id.* at 1136–39 (“[T]hat the warning that drinking SSBs ‘contributes’ to tooth decay is likely factual and accurate. The City has a legitimate interest in public health and safety, and the warning that SSBs contribute to tooth decay is reasonably related to the City’s interest in public health and safety.” (quoting *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985))).

96. *See id.* at 1139–42

[I]t is likely the City’s mandated warning . . . is factual and accurate, and the City had a reasonable basis for identifying SSBs as a cause. The City has a legitimate interest in public health and safety, and the warning that SSBs contribute to obesity and diabetes is reasonably related to the City’s interest in public health and safety, particularly in light of the evidence indicating that SSBs are a significant source of calories as well as a significant source of added sugar.

97. *Id.* at 1142.

98. *Id.* at 1142–45.

99. *Id.* at 1145.

100. *Am. Beverage Ass’n v. City & Cnty. of San Francisco (American Beverage I)*, 871 F.3d 884, 888 (9th Cir. 2017) (quoting *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985)).

101. *Id.* at 897.

uncontroversial.”<sup>102</sup> This analysis reveals Judge Ikuta’s approach to *Zauderer* before *NIFLA* was decided. She noted that, at the time, “[t]he Supreme Court has not yet considered whether the *Zauderer* framework applies when a state requires disclosures for a different state interest, such as to promote public health.”<sup>103</sup> Nonetheless, she found, in accordance with Ninth Circuit precedent<sup>104</sup> and that of several sister circuits, that the *Zauderer* framework “applies beyond the context of preventing consumer deception.”<sup>105</sup> The crux of the analysis was whether the information conveyed was “purely factual and uncontroversial.”<sup>106</sup> Judge Ikuta concluded that the disclosures required by San Francisco were not, therefore they violated the First Amendment.<sup>107</sup> In particular she noted, “a literally true but misleading disclosure creates the possibility of consumer deception.”<sup>108</sup>

The panel’s conclusion echoed the D.C. Circuit’s *R.J. Reynolds* decision, which signaled a tightening review of what “purely factual and uncontroversial” means.<sup>109</sup> In *AMI*, the D.C. Circuit did not doubt that country-of-origin information was “purely factual and uncontroversial.”<sup>110</sup> But Judge Kavanaugh

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102. *Id.*

103. *Id.* at 892.

104. *Id.* at 893 (citing *CTIA—The Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017)).

105. *Id.* at 892 (citing decisions by the First, Second, Sixth, Ninth and D.C. circuits).

106. *Id.* at 892–93.

107. *Id.* at 895–97.

108. *Id.* at 893. (quoting *CTIA—The Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105, 1119 (9th Cir. 2017)).

109. *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012) (rejecting the graphic cigarette warnings in that case as not falling within this category, due in part to their largely emotional appeal). Judge Rogers rejected this view. She concluded that “the warning labels present factually accurate information and address misleading commercial speech, as defined in Supreme Court precedent.” *Id.* at 1222 (Rogers, J., dissenting).

110. *Am. Meat Inst. v. U.S. Dep’t of Agric. (AMI)*, 760 F.3d 18, 26–27 (D.C. Cir. 2014) (“The self-evident tendency of a disclosure mandate to assure that recipients get the mandated information may in part explain why, where that is the goal, many such mandates have persisted for decades without anyone questioning their constitutionality.”)

noted that it is not entirely clear what exactly “uncontroversial” means.<sup>111</sup> In contrast to the disclosures in *R.J. Reynolds*, the country-of-origin information, he asserted, “cannot be considered ‘controversial’” and he cited “the historical pedigree” of the disclosure requirement among his reasons for upholding it.<sup>112</sup> This interpretation infused the “uncontroversial” requirement of *Zauderer* with a historical inquiry as to the specific disclosure. In contrast, Judge Ikuta’s interpretation of “uncontroversial” seems to imply that there must be an absence of debate, that is, a warning is controversial if it is disputed.<sup>113</sup>

San Francisco’s ordinance, she also found, was not factually accurate because it was unqualified.<sup>114</sup> Rather than stating “that *overconsumption* of sugar-sweetened beverages contributes to obesity, diabetes, and tooth decay, or that consumption of sugar-sweetened beverages *may* contribute to obesity, diabetes, and tooth decay,” the warning implied that drinking would contribute to the conditions noted.<sup>115</sup> Moreover, the warning did not take the role of sugary beverages in an otherwise balanced diet into account.<sup>116</sup> Thus, “the accuracy of

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111. *Id.* at 34 (Kavanaugh, J., concurring) (“To be sure, determining whether a disclosure is ‘uncontroversial’ may be difficult in some compelled commercial speech cases, in part because it is unclear how we should assess and what we should examine to determine whether a mandatory disclosure is controversial.”).

112. *Id.*

But regardless of how the “uncontroversial” requirement might play out in other cases, the issue poses little difficulty here. Unlike the mandated disclosures at issue in *R.J. Reynolds* . . . a country-of-origin label cannot be considered “controversial” given the factually straightforward, evenhanded, and readily understood nature of the information, as well as the historical pedigree of this specific kind of disclosure requirement.

113. *See* *Am. Beverage Ass’n v. City & Cnty. of San Francisco (American Beverage D)*, 871 F.3d 884, 893 (9th Cir. 2017) (stating that a disclosure that is true but omits key information about terms can be misleading and create the possibility of deception).

114. *Id.* at 895.

115. *Id.*

116. *See id.*

Although San Francisco’s experts state that “there is a clear scientific consensus” that sugar-sweetened beverages contribute to *obesity* and diabetes through “excessive caloric intake” and “by

the warning is in reasonable dispute.”<sup>117</sup> Finally, she noted, the warning does not apply to other products containing sugar, instead singling out sugar-sweetened beverages.<sup>118</sup> Thus, she concluded, “rather than being ‘purely factual and uncontroversial,’” the warning requires the Associations to convey San Francisco’s disputed policy views.”<sup>119</sup>

Concurring in the judgment, Judge Nelson rejected the “tenuous conclusion that the warning’s language is controversial and misleading.”<sup>120</sup> Rather, she would have reversed based on the city’s failure to demonstrate “that the twenty percent requirement at issue here would not deter certain entities from advertising in their medium of choice.”<sup>121</sup> The en banc majority shared this concern,<sup>122</sup> but its subsequent analysis was complicated by *NIFLA*.

### C. Enter NIFLA

After the panel decision was handed down in *American Beverage I*, the Supreme Court decided *NIFLA*. The *NIFLA*

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adding extra calories to the diet,” the experts do not directly challenge the conclusion of the Associations’ expert that “when consumed as part of a diet that balances caloric intake with energy output, consuming beverages with added sugar does not contribute to *obesity* or *diabetes*.” (emphasis added) (citation omitted).

117. *Id.*

118. *Id.*

The warning is required exclusively on advertisements for sugar-sweetened beverages, and not on advertisements for other products with equal or greater amounts of added sugars and calories. By focusing on a single product, the warning conveys the message that sugar-sweetened beverages are less healthy than other sources of added sugars and calories and are more likely to contribute to *obesity*, diabetes, and tooth decay than other foods. This message is deceptive in light of the current state of research on this issue. (emphasis added).

119. *Id.* at 896.

120. *Id.* at 899 (Nelson, J., concurring).

121. *Id.*

122. See *Am. Beverage Ass’n v. City & Cnty. of San Francisco (American Beverage II)*, 916 F.3d 749, 757 (9th Cir. 2019) (en banc) (“On this record, therefore, the 20% requirement is not justified and is unduly burdensome when balanced against its likely burden on protected speech.”).



decision's gloss on *Zauderer*, in turn, resulted in a fractured en banc analysis in *American Beverage II*. So what exactly happened in *NIFLA* that caused such fracturing?

*NIFLA* concerned a California statute requiring two types of compelled disclosures at crisis pregnancy centers (CPCs).<sup>123</sup> The first, to be posted at licensed facilities, required information about the existence of free or low-cost family planning programs in the state.<sup>124</sup> The second, to be posted at unlicensed facilities, stated that the facility was not a licensed medical facility.<sup>125</sup> Justice Thomas, writing for the Court, rejected the application of *Zauderer* to the first,<sup>126</sup> but assumed its applicability to the second.<sup>127</sup> Despite this assumption, the Court concluded that disclosure applicable to unlicensed facilities was “unduly burdensome” and thus unconstitutional under *Zauderer*.<sup>128</sup>

In the context of the licensed facility disclosure, Justice Thomas characterized *Zauderer* as applying to “laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech’”<sup>129</sup> and as “govern[ing] only ‘commercial advertising’ and requir[ing] the disclosure of ‘purely factual and uncontroversial information about the terms under which . . . services will be available.’”<sup>130</sup> He concluded that *Zauderer* was inapplicable to the licensed facility disclosures, because the disclosures were of neither purely factual information about the terms of service nor were they

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123. See *Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2368 (2018) (“[T]he FACT Act imposes two notice requirements on facilities that provide pregnancy-related services—one for licensed facilities and one for unlicensed facilities.”).

124. See *id.* (“Licensed clinics must notify women that California provides free or low-cost services.”).

125. See *id.* (“Unlicensed clinics must notify women that California has not licensed the clinics to provide medical services.”).

126. *Id.* at 2372.

127. See *id.* at 2378 (“[T]he unlicensed notice does not satisfy *Zauderer*, assuming that standard applies.”).

128. *Id.* (“[W]e conclude that the unlicensed notice is unjustified and unduly burdensome under *Zauderer*.”).

129. *Id.* at 2372.

130. *Id.*

uncontroversial.<sup>131</sup> Indeed, he reinterpreted the “uncontroversial” requirement so as to encompass the entire topic of abortion.<sup>132</sup> In effect, according to Justice Thomas, even if the information itself was indisputable, it was controversial because it pertained to a procedure (abortion) that generated great controversy. By so doing, he went even further than the *American Beverage I* panel. Indeed, it seems that his interpretation of “uncontroversial” means that as long as a topic is broadly controversial (such as abortion),<sup>133</sup> any information relating to it, even if it is factual and accurate (such as the existence of free or low-cost family planning programs in California), could be deemed controversial. Nevertheless, apparently in response to Justice Breyer’s claim, in his dissent, that the majority’s approach would threaten a wide swath of health and safety laws, Justice Thomas added that “[c]ontrary to the suggestion in the dissent, we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”<sup>134</sup>

Where did the reference to “health and safety warnings long considered permissible” come from? Not from *Zauderer*, which contains no such discussion. Instead, while rejecting the notion that the law should be given greater leeway because it regulated professional speech, a category that Justice Thomas claimed the Court had never previously recognized for First Amendment purposes, Justice Thomas insisted that “[l]ongstanding torts for professional malpractice, for example, ‘fall within the traditional purview of state regulation of professional

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131. *Id.*

132. *Id.* (“The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about state-sponsored services—including abortion, anything but an ‘uncontroversial’ topic. Accordingly, *Zauderer* has no application here.”).

133. It seems worth noting, however, that the *NIFLA* majority gives no guidance whatsoever that would help lower courts to determine which topics, aside from abortion, are controversial in this sense. We return to this question in Part III.

134. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2376 (2018); *id.* at 2379–81 (Breyer, J., dissenting). We discuss the dissent further in Part III.

conduct.”<sup>135</sup> Likewise, “the requirement that a doctor obtain informed consent to perform an operation is ‘firmly entrenched in American tort law.’”<sup>136</sup> But beyond these doctrinal truisms, no further explanation of the “long considered permissible” justification for health and safety warnings can be found in the Court’s opinion in *NIFLA*.

That lack of explanation created a challenge for the Ninth Circuit when it reconsidered *American Beverage I* for en banc review. As Judge Graber, writing for the *American Beverage II* en banc majority, explained, “*NIFLA* requires us to reexamine how we approach a First Amendment claim concerning compelled speech.”<sup>137</sup> Nevertheless, she concluded that *NIFLA* did not actually abrogate the previous interpretation of *Zauderer* in the Ninth Circuit and its sister circuits upon which the *American Beverage I* panel had relied.<sup>138</sup> Health and safety warnings, pre- and post-*NIFLA*, remain subject to *Zauderer* review because “*NIFLA* preserved the exception to heightened scrutiny for health and safety warnings.”<sup>139</sup> And although the Supreme Court, post-*NIFLA*, had vacated the Ninth Circuit’s decision in *CTIA*, the en banc majority continued to rely on that case.<sup>140</sup> By contrast, Judge Ikuta, the author of the *American Beverage I* panel decision, read *NIFLA* as significantly

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135. *Id.* at 2373 (majority opinion).

136. *Id.* Of course, these statements undermine the assertion that professional speech is not a distinctive form of speech. See Haupt, *supra* note 10, at 189 (“[P]rofessional speech cannot logically be the same as other speech, yet be governed by a different doctrinal framework.”).

137. *Am. Beverage Ass’n v. City & Cnty. of San Francisco (American Beverage II)*, 916 F.3d 749, 756 (9th Cir. 2019) (en banc).

138. *Id.* (“[N]othing in *NIFLA* suggests that *CTIA* was wrongly decided. . . . *NIFLA* did not address, and *a fortiori* did not disapprove, the circuits’ precedents, including *CTIA*, which have unanimously held that *Zauderer* applies outside the context of misleading advertisements.”).

139. *Id.* (“*Zauderer* provides the appropriate framework to analyze a First Amendment claim involving compelled commercial speech—even when the government requires health and safety warnings, rather than warnings to prevent the deception of consumers.”).

140. See *id.* at 755 (“We rejected the argument that intermediate scrutiny—as required by *Central Hudson* for situations in which speech is restricted or prohibited—should govern.” (citing *CTIA–Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105, 1115–17 (9th Cir. 2017))).

modifying the *Zauderer* framework. We turn to the details of her analysis in Part II.

In another concurrence, Judge Christensen and Chief Judge Thomas agreed with the majority that *Zauderer* applied, but returned to the question of whether the compelled warning was “purely factual.”<sup>141</sup> A final concurrence by Judge Nguyen rejected application of *Zauderer* outside of false and misleading commercial speech and would instead have applied the intermediate scrutiny review of *Central Hudson*.<sup>142</sup> She suggested that “it is the commercial message’s accuracy—not its completeness—that demarcates the boundary between *Central Hudson*’s intermediate scrutiny and *Zauderer*’s rational basis test.”<sup>143</sup>

In short, the majority opinion and three concurrences in *American Beverage II* vividly illustrate the wide range of doctrinal uncertainty and resulting disagreement about the scope and nature of First Amendment review of compelled, commercial disclosures that existed both prior to and after *NIFLA*. The remainder of our discussion will focus on the “public health originalism” approach.

## II. PUBLIC HEALTH ORIGINALISM, HISTORY, AND IMPLICATIONS

The uncertainty created by *NIFLA*’s treatment of *Zauderer* opened the door for Judge Ikuta’s novel suggestion that the constitutionality of mandatory disclosure laws depends upon whether they were accepted as constitutional in 1791.<sup>144</sup> In this Part we show why that approach is misguided. We begin by examining Judge Ikuta’s concurrence more closely, explaining how her use of history differs in significant ways from that of the Supreme Court. Next, we argue that whatever the general

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

142. *Id.* at 767–68 (Nguyen, J., concurring).

143. *Id.*

144. *See id.* at 762 (Ikuta, J., concurring) (“The types of speech exempt from First Amendment protection are ‘well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,’ from 1791 to present.” (quoting *United States v. Stevens*, 559 U.S. 460, 468–69 (2010))).

merits or flaws of originalism as a method for interpreting the Speech Clause, relying on 1791 as the critical date for determining the constitutionality of state health and safety warnings is deeply problematic. It also appears to misconceive the history of health and safety warning laws. Any serious originalist analysis of the subject must consider earlier conceptions of the police power and its relationship to individual liberty. In 1791, and probably also in 1868, the police power was widely accepted as limiting individual rights in order to advance health, safety, or morals.<sup>145</sup> From that perspective, far from being viewed as an impermissible restraint on individual freedom, the mandated disclosure in *American Beverage II*, like many other contemporary disclosure laws, would have been viewed as a relatively uncontroversial exercise of the police power.<sup>146</sup> Finally, we consider the potential impact of Judge Ikuta's approach on the states' ability to protect the public from unsafe products. By restricting states' ability to mandate health and safety warnings, public health originalism may counter-intuitively drive states to consider more paternalistic measures.

#### A. Judge Ikuta's Concurrence

The role that public health originalism would confer to history in determining the constitutionality of compelled health and safety warnings is not entirely clear. Like the en banc majority, Judge Ikuta began her analysis by turning to *NIFLA*.<sup>147</sup> *NIFLA*, she argues, "broke new ground" in several ways.<sup>148</sup> First, it clarified "that government-compelled speech is

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145. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1872) (discussing the nature and scope of health and safety regulations arising under the states' police powers); Barnett & Bernick, *supra* note 26, at 1663–66 (discussing "the origins of the 'police power' before 1868").

146. See *infra* notes 149–194 and accompanying text.

147. See *Am. Beverage Ass'n v. City & Cnty. of San Francisco (American Beverage II)*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc) (Ikuta, J., concurring) ("In *National Institute of Family & Life Advocates v. Becerra (NIFLA)*, the Supreme Court provided a framework for analyzing First Amendment challenges to government-compelled speech.").

148. *Id.*

a content-based regulation of speech.”<sup>149</sup> Hence, such regulations “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”<sup>150</sup> Second, *NIFLA* commanded that “governments may not ‘impose content-based restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect.’”<sup>151</sup>

After presenting this framework, Judge Ikuta concluded that San Francisco’s ordinance fails to qualify for the exemption from strict scrutiny provided by *Zauderer* because the warning was neither factual nor noncontroversial.<sup>152</sup> Only after reaching that conclusion did she look to history.<sup>153</sup> In so doing, she rejected the en banc majority’s claim that “*NIFLA* preserved the exception to heightened scrutiny for health and safety warnings,”<sup>154</sup> arguing instead that “*NIFLA* made clear that *only* ‘health and safety warnings long considered permissible’ would be excepted.”<sup>155</sup> This statement suggests that Judge Ikuta saw the requirement of a historical pedigree as an *additional* demand, imposed on even those warnings that would otherwise qualify for *Zauderer*’s lower level of scrutiny. In other words, even if a mandated warning law qualified for *Zauderer*, it would not pass muster unless the state could also show that it was “long considered permissible.”<sup>156</sup>

It is possible, however, that Judge Ikuta saw the “long permissible” requirement as offering an alternative to *Zauderer*. In effect, health and safety laws that would not otherwise merit

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149. *Id.* at 759. This conclusion does not seem to be “new” in light of the Court’s decision in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (holding that a Vermont statute regulating speech related to marketing of pharmaceuticals was “designed to impose a specific, content-based burden on protected expression”).

150. *American Beverage II*, 916 F.3d at 759 (internal quotations omitted) (citing Nat’l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2371 (2018)).

151. *Id.*

152. *Id.* at 761.

153. *Id.* at 762.

154. *Id.* at 756.

155. *Id.* at 762 (emphasis added).

156. *See id.*

*Zauderer*'s more lenient review might not require strict scrutiny if they were "long permissible." For one thing, she discussed the test only after concluding that the ordinance did not merit an exemption under *Zauderer*.<sup>157</sup> If a warning law had to pass both tests, *Zauderer* and the "long permissible" test, there would have been little reason to discuss the latter once the ordinance had failed the former. Moreover, Judge Ikuta's statement that "only 'health and safety warning laws long considered permissible' would be excepted," came in apparent response to the majority's assertion that *NIFLA* "preserved the exception to heightened scrutiny for health and safety warning laws."<sup>158</sup> The majority reached that conclusion by referencing Justice Thomas' response to Justice Breyer's charge that the *NIFLA* majority's opinion would threaten a wide array of health and safety laws.<sup>159</sup> Thus although Justice Thomas did not clarify the relationship between *Zauderer* and the laws subject to his reassurance about the continued constitutionality of health and safety laws, it is certainly plausible that he meant to convey that there are some health and safety laws that may fail to qualify for *Zauderer* but may nevertheless be constitutional due to their long pedigree. Judge Ikuta may have meant to adopt that position.

Ultimately, however, it may not matter whether Judge Ikuta saw the "long permissible" test as one that must be met in addition to *Zauderer*, or as an alternative path for health and safety laws to escape strict scrutiny. If her test offers a second pathway for state laws to survive, it is a narrow one that, coupled with her strict interpretation of *Zauderer*, will result in few cases passing muster. If she read the "long permissible requirement" as an additional element that laws must satisfy on top of *Zauderer*'s "factual and noncontroversial requirement,"

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157. *See id.* ("Because *Zauderer* does not apply here, *NIFLA* directs us to consider whether the ordinance survives heightened scrutiny.").

158. *Id.*

159. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2376 (2018) ("Contrary to the suggestion in the dissent, we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.").

her approach cannot provide the reassurance that the *NIFLA* majority may have meant to offer in responding to Justice Breyer.<sup>160</sup> Instead, as Judge Ikuta reformulated it, the test is rigidly originalist and likely fatal to almost all contemporary health or safety laws.

To see why Judge Ikuta's approach undermines *NIFLA*'s reassurance, recall that Justice Thomas answered Justice Breyer's concerns in dissent for the future of common health and safety laws by saying that the Court's decision would not undermine "health and safety warnings long considered permissible."<sup>161</sup> Judge Ikuta quoted Justice Thomas' language, but she also changed it in a critical way by adding the word "only" before the quote.<sup>162</sup> Thus, Justice Thomas' comment can be, and is most naturally, read as saying that nothing in *NIFLA* threatened health and safety laws, which as a class have long been considered constitutional.<sup>163</sup> Judge Ikuta, in contrast, transformed the test to suggest that "only" those health and safety laws that have long been considered permissible remain constitutional.<sup>164</sup> A statement made to reassure those who might fear that *NIFLA* might dramatically reduce the states' capacity to mandate health and safety warnings instead became one suggesting that few warning laws will merit that protection.

Moreover, in turning to history to determine the constitutionality of particular health and safety laws, Judge Ikuta did not invoke broad conceptions of tradition, but rather a narrow originalism that asks "Was this particular law thought to be constitutional in 1791?"<sup>165</sup> As Marc O. DeGirolami has recently explained, the Supreme Court uses history in different ways. In one mode of interpretation, which he coins "traditionalist interpretation," the Court takes "presumptive

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160. The extent of this reassurance is itself unclear. *See infra* Part III.

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

162. *Am. Beverage Ass'n v. City & Cnty. of San Francisco (American Beverage II)*, 916 F.3d 749, 762 (9th Cir. 2019) (en banc) (Ikuta, J., concurring).

163. *See supra* notes 146–147 and accompanying text.

164. *See American Beverage II*, 916 F.3d at 762 (explaining the rationale behind the scrutiny applied to public health warnings).

165. *See id.* (noting that there is no tradition of health and safety speech regulation dating back to 1791).



influence of political and cultural practices of substantial duration” to determine the constitutionality of a challenged law.<sup>166</sup> This approach is often used to decide whether long-held practices are constitutional.<sup>167</sup> The approach is distinct from originalism, which relies on “sources at (or immediately preceding and post-dating ratification)” to determine the meaning of a constitutional term.<sup>168</sup> Thus, the originalist cares only about the public understanding of a practice’s constitutionality at the time of ratification, when the Constitution’s meaning was “fixed.”<sup>169</sup> In contrast, the judge using traditionalist interpretation considers the practice’s acceptance by and role in society in the decades since ratification.<sup>170</sup>

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166. Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1125 (2020) [hereinafter DeGirolami, *The Traditions*] (expanding on traditionalist interpretation); see Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1653 (2020) (“Traditionalist constitutional interpretation takes political and cultural practices of long age and duration as constituting the presumptive meaning of the text.”).

167. See DeGirolami, *The Traditions*, *supra* note 166, at 1124 (“[T]raditionalist interpretation is pervasive, consistent, and recurrent across the Court’s constitutional doctrine.”).

168. *Id.* at 1150. There is a rich body of literature describing different modes of originalism, and how the approach has evolved over time. A full discussion of this literature is beyond the scope of this paper. However, for present purposes we rely on a conception of originalism that Randy Barnett has called the “new originalism.” Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–29 (1999). This approach requires the court to look to the popular meaning of a constitutional term at the time of ratification, rather than the subjective intent of the framers. See *id.* at 620–21. Judge Ikuta’s opinion seems to adopt new originalism, as she does not consider the framer’s intentions, but the legal treatment of warning laws in 1791. See *American Beverage II*, 916 F.3d at 762 (“The types of speech exempt from First Amendment protection are ‘well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,’ from 1791 to present.”).

169. See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) (“If you want to know what the letter means (or more precisely, what it communicates), you will need to know what the words and phrases used in the letter meant at the time the letter was written.”).

170. See *supra* note 166 and accompanying text.

In her concurrence, Judge Ikuta seems to have embraced traditionalist interpretation only to transform it into a relatively rigid form of originalism.<sup>171</sup> In applying the test to San Francisco's ordinance she wrote:

California has made no showing that the warning here was “long considered permissible,” nor could it do so. The types of speech exempt from First Amendment protection are “well-defined and narrowly limited classes of speech, the prevention and punishment of which have been thought to raise any Constitutional problem,” from 1791 to present. See *United States v. Stevens*, 559 U.S. 460, 468–69 (2010). . . . These limited exceptions include defamation, obscenity, and fraud . . . not newly invented classes of speech . . . NIFLA did not specify what sorts of health and safety warning date back to 1791, but warnings about sugar-sweetened beverages are clearly not among them.<sup>172</sup>

The passage from *Stevens*<sup>173</sup> that Judge Ikuta cited quotes from the Supreme Court's decision in *R.A.V. v. City of St. Paul*.<sup>174</sup> In that case, the Court stated:

From 1791 to the present, however, our society, like other free but civilized societies has permitted restrictions upon the content of speech in a few limited areas, which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>175</sup>

As DeGirolami convincingly argues, the Court's discussions of history in *R.A.V.* and *Stevens* exemplify traditionalist

171. Some theorists of originalism distinguish between interpretation, which must rely on the fixed understandings of the framing period, and construction, which allows for a broader reliance on the “spirit” of the text. See Barnett & Bernick, *supra* note 17, at 5. This approach could theoretically converge with traditionalist interpretation. Judge Ikuta's approach, however, is lacking in such nuances, as she would ask simply whether the specific disclosure at issue was extant in 1791.

172. *American Beverage II*, 916 F.3d at 762 (Ikuta, J., concurring) (quoting *United States v. Stevens*, 559 U.S. 460, 468–69 (2010)).

173. 559 U.S. 460 (2010).

174. 505 U.S. 377 (1992).

175. *Id.* at 382–83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

interpretation.<sup>176</sup> The Court in these cases did not state that the determination of the constitutionality of a type of speech depended solely on whether it was presumed constitutional when the Speech Clause was ratified in 1791. Instead, the Court spoke about a continuum of understanding “from 1791 to the present” that some types of speech are of such low value as to be subject to regulation.<sup>177</sup> Moreover, the Supreme Court’s opinions suggest that the categories are to be determined based on longstanding understandings,<sup>178</sup> not the understanding at the moment of ratification.

In her rephrasing of *Stevens*, however, Judge Ikuta transformed the Supreme Court’s use of traditionalist interpretation into the originalist conclusion that a specific type of warning label law can only be constitutional (or only constitutional if it isn’t otherwise saved by *Zauderer*) if *it* was considered constitutional in 1791.<sup>179</sup> Coupled with her insistence that the determination be based on the history of a very specific type of warning label (“about sugar-sweetened beverages”) rather than a broader category (health and safety warnings, or warnings about dangerous foods), Judge Ikuta has erected an extraordinarily high hurdle for warning labels, or perhaps any content-based health or safety law.

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176. See DeGirolami, *The Traditions*, *supra* note 166, at 1142 (noting that the Supreme Court has often relied on traditional exclusory categories in free speech cases).

177. See *id.* (noting that the Court does not focus on the meaning at enactment, but rather, the meaning from the range of years from 1791 to present (quoting *R.A.V.*, 505 U.S. at 382–83)).

178. See *id.* As DeGirolami notes, the Court has at times insisted upon a “highly specific description of [the tradition].” *Id.* (citing *Stevens*, 559 U.S. at 469).

179. See *Am. Beverage Ass’n v. City & Cnty. of San Francisco (American Beverage II)*, 916 F.3d 749, 762 (9th Cir. 2019) (en banc) (Ikuta, J., concurring) (“The types of speech exempt from First Amendment protection are ‘well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,’ from 1791 to present.” (quoting *Stevens*, 559 U.S. at 468–69)).

### B. Judge Ikuta's Originalism

Like other methods of constitutional interpretation, originalism comes in many flavors. Initially, its proponents stressed the intentions of the Framers.<sup>180</sup> More recently, leading originalists have adopted what Randy Barnett has called the “new originalism,” which argues that constitutional terms must be read by looking to their public meaning at the time of ratification, when their meaning was fixed.<sup>181</sup> Judge Ikuta's brief invocation of originalism offered no explanation of the mode of originalism she intends. However, because she pointed to the lack of sugary beverages in 1791 as the determinative factor, we will assume that she accepts the broader “new originalism” that considers general understandings at the time of ratification rather than the specific intentions of the Framers. (After all, she doesn't ask if James Madison indulged in or endorsed sugary beverages).

Whatever the merits of the new originalism as a method of constitutional interpretation in general,<sup>182</sup> or as applied to the Speech Clause in particular,<sup>183</sup> Judge Ikuta's use of it in *American Beverage II* is deeply problematic for a number of reasons. Most obviously, she overlooked the critical fact that the First Amendment applies to the states, and hence limits the

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180. See Sunstein, *supra* note 17, at 1673 (describing originalism (citing Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980))); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (“By ‘originalism’ I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.”).

181. Barnett, *supra* note 168, at 620–29 (outlining the tenets of “new originalism”).

182. See *supra* note 17 and accompanying text.

183. Originalism has had far less currency with respect to the Speech Clause than with other constitutional provisions. This may reflect the significant disparity between extant doctrine and contemporary understandings of free speech and the historical understanding of the Clause that likely viewed the protections of free speech as limited to prior restraints or certain other limitations on political speech. See Bunker, *supra* note 17, at 330, 350–52 (articulating the disagreements over the application of various forms of originalism to the First Amendment); Campbell, *supra* note 17, at 249–51 (noting that there are multiple understandings about what the Framers meant by the First Amendment's protection regarding free speech).

states' police power, only through the Fourteenth Amendment.<sup>184</sup> Thus it is not at all clear why 1791 as opposed to 1868 is the critical date for determining the constitutionality of state-mandated health warnings.<sup>185</sup> After all, to the extent that the application of the First Amendment to state health laws was fixed at the moment of ratification, it would have been fixed in 1868, rather than 1791.<sup>186</sup> Thus the question should have been whether the Reconstruction Era would have assumed that the constitutionality of warning laws depended upon the public understanding of the issue in 1868 or whether the Reconstruction meaning demanded a reference to 1791.<sup>187</sup> Judge Ikuta never addresses that issue.

More interestingly, Judge Ikuta failed to see that the use of 1791 as the critical date may lead to a very different conclusion than the one she drew. Her public health originalism assumes that the absence of sugary beverages and warnings about them in 1791 means that the original fixed understanding was that such warnings violated the Speech Clause.<sup>188</sup> In other words, the absence of a warning implies that the Speech Clause was assumed to apply. But in reaching that conclusion, Judge Ikuta overlooked the fact that while the First Amendment did not apply to the states in 1791, "health laws of every description" were understood to be the provenance of the states.<sup>189</sup> Indeed, in

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184. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) ("The First Amendment, as made applicable to the states by the Fourteenth, commands that a state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." (internal citations omitted)).

185. See *supra* notes 168–176 and accompanying text.

186. See Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 464 (2012) ("Much recent scholarship has suggested that originalist analyses of Bill of Rights provisions applied to the states via the Fourteenth Amendment should consider the original understanding as of 1868 in addition [or as opposed] to that of 1791.").

187. See *id.* (discussing the application of historical context to constitutional rights made applicable to the states through the Fourteenth Amendment via a lens of originalism).

188. See *American Beverage II*, 916 F.3d at 762 ("NIFLA did not specify what sorts of health and safety warnings date back to 1791, but warnings about sugar-sweetened beverages are clearly not among them.").

189. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824)

*Federalist* 17, Alexander Hamilton opined that the federal government would have little incentive to intrude upon the police power as “[t]he regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition.”<sup>190</sup> Hence, precisely because the Speech Clause did not apply to the states, the framing era would not have assumed that it limited health laws.<sup>191</sup> Or to put it another way, health

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They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves . . . health laws of every description . . . are component parts of this mass.

The federal government did enact a few health laws in the early years, but these were very limited and did not extend to regulating affairs internal to the states. For a discussion of federal health laws in the early decades under the Constitution, see Parmet, *supra* note 20, at 323–25.

190. THE FEDERALIST NO. 17, at 93 (Alexander Hamilton) (E. H. Scott ed., 1868). Emphasizing that the Federalist effort focused on the establishment of a federal constitution, Hamilton added:

The variety of more minute interests, which will necessarily fall under the superintendence of *local* administrations, and which will form so many rivulets of influence, running through every part of the society, cannot be particularized, without involving a detail too tedious and uninteresting to compensate for the instruction it might afford.

*Id.* at 94 (emphasis added). Importantly Hamilton never suggested that the Constitution undermined the states’ ability to engage in local administration.

191. It might be said that Judge Ikuta’s assumption that a law cannot be constitutional unless it existed and was accepted as such in 1791 simply follows from the Supreme Court’s statements in *NIFLA*, *Stevens*, and *R.A.V.*, that no categories of laws should not be exempted from the First Amendment unless there is a long history of treating them as such. See *Nat’l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2373 (2018); *United States v. Stevens*, 559 U.S. 460, 468–69 (2010); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992). However, as noted above, the Court in these cases used traditionalist interpretation, not originalism, and looked to the treatment of laws across decades, not solely in 1791. Thus, the Supreme Court’s approach allows for a far wider lens and permits consideration of understandings of the application of the Speech Clause to state police power laws across time. Moreover, the Court in these cases was discussing categories of speech, rather than asking whether a specific law (mandated warnings on sugary beverages) was accepted as constitutional. Judge Ikuta’s approach would appear to strike down almost any law relating to speech that did not exist in 1791, even those that fall into broad categories that were accepted as constitutional in 1791.

laws (and other police power regulations) would have been presumed in 1791 to be beyond the scope of the Clause.<sup>192</sup>

Nor does substituting 1868 for 1791 as the critical date for determining the meaning of the First Amendment solve all of the problems with public health originalism. Recall first that the First Amendment was not incorporated into the Fourteenth Amendment until the twentieth century<sup>193</sup> and there is no reason to believe that the Reconstruction Congress, even if it accepted incorporation of the First Amendment, thought that the Fourteenth Amendment limited state *health laws*.<sup>194</sup> Rather, the police power jurisprudence during the

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For a further discussion of Judge Ikuta's approach, see *supra* notes 146–179 and accompanying text.

192. To be sure, state constitutions had speech clauses in the antebellum period, and these clauses necessarily applied to state, as opposed to federal, law. However, such clauses were most commonly applied in cases concerning the regulation of the press, or libel. *See, e.g.*, *Republica v. Oswald*, 1 U.S. 319, 325 (1788) (construing Sec. VII of the Pennsylvania Declaration of Rights by stating “[t]hey give to every citizen a right of investigating the conduct of those who are entrusted with the public business; and they effectively preclude any attempt to fetter the press by the institution of a licenser”); *Commonwealth v. Kneeland*, 37 Mass. (1 Pick.) 206, 219 (1838) (upholding conviction for blasphemy stating that the constitutional provision “was to prevent the enactment of license laws, or other direct restraint upon publication, leaving individuals at liberty to print, with the previous permission of any office of the government”). We have been unable to find any reported cases prior to Reconstruction in which a state constitutional provision was used to challenge a state health law.

193. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes, we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

194. *See The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 63 (1872) (holding that health laws are a “component part” of the “immense mass of legislation” left to the states); Parmet, *supra* note 29, at 481–501 (discussing the evolution of public health’s place in police power jurisprudence from 1868–1905); THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 573–76 (1868) (asserting that regulations made under the exercise of police power must sometimes change to accord with the general well-being of the citizens, but such an exercise cannot come into conflict with constitutional provisions).

mid-nineteenth century continued to treat the protection of public health as firmly within the states' police power, and not limited by the Fourteenth Amendment.

Moreover, the First Amendment was not thought to regulate commercial speech until 1975 when the Supreme Court decided *Bigelow v. Virginia*.<sup>195</sup> Thus, if a category of speech is exempt from the First Amendment if and only if it was presumed to be exempt at the time of the framing of either the First or the Fourteenth Amendment, *all* commercial speech regulations should be seen as exempt from the First Amendment, as none were not subject to the Speech Clause at the time of the framing of either Amendment.<sup>196</sup> It is partly for this reason that commentators have noted that the Supreme Court's First Amendment jurisprudence shows little signs of relying on originalism (as opposed to traditionalism).<sup>197</sup> A truly originalist approach to the First Amendment, even one based on new originalism, would be far more (if not totally) tolerant of regulations of commercial speech than is current doctrine.<sup>198</sup>

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195. See *Bigelow v. Virginia*, 421 U.S. 809 (1975). The Court made the application of the First Amendment to commercial speech even clearer the next year in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 780 (1976).

196. See Frederick Schauer, *Commercial Speech and the Perils of Parity*, 25 WM. & MARY BILL OF RTS. J. 965, 971 (2017) (asking whether the equal treatment of commercial speech by the First Amendment should be based on "older" originalism or "contemporary" originalism).

197. See Bunker, *supra* note 17, at 330 ("For many scholars interested specifically in the free speech and press guarantees of the First Amendment, there was little doubt that originalism was a defeated interpretive philosophy.").

198. Commentators have also argued that the very broad interpretation that the Court has accorded to the First Amendment in recent years fails the originalism test. Without getting into the question of whether the framing generation would have limited the First Amendment to prohibiting prior restraints, or limitations on political speech, it is clear that the Court reads the Amendment as applying in situations from the regulations of video games to campaign finance laws that would not have accorded with original understanding of the Speech Clause. See *Brown v. Ent. Merch. Ass'n.*, 564 U.S. 786, 790 (2011) (noting that video games qualify for protection under the First Amendment); *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek



### C. *The Original Understanding of Warning Laws*

We have already argued that the suggestion that the Speech Clause prohibits health and safety warning laws that were not in effect in 1791 ignores the facts that the Clause was not read as limiting the police power until the twentieth century, and did not apply to commercial speech regulations until the 1970s.<sup>199</sup> A supporter of this approach might nevertheless respond by claiming that there is no evidence that the Speech Clause applied to state health laws before the mid-twentieth century because there were few such laws, and none implicated speech. Thus the framing generation might have assumed that the police power did not extend to speech.

This argument, while plausible on its face, is unconvincing for three related reasons. First, it overlooks early understandings of the relationship between rights and the police power. Second, it erroneously imagines a pre-modern era in which health and safety laws were the exceptions, and individual liberty (including freedom of speech) was the norm. Finally, it ignores the history of mandatory warning and labeling laws. Although to the best of our knowledge there were no mandated warnings about sugary beverages prior to this century, there were mandatory labeling laws in the framing period and in the century that followed it, and there is no evidence that these were ever thought to clash with the Speech Clause. We take each argument in turn.

Scholars have long debated the intended reach of the Speech Clause.<sup>200</sup> For present purposes, we put aside these debates to focus more broadly on understandings of the relationship between rights and the police power from 1791 to 1868. As Jud Campbell has observed, “Founding Era constitutionalism allowed for restrictions of natural liberty to promote the public good—generally defined as the good of the

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declaratory rulings before discussing the most salient political issues of our day.”).

199. See *supra* Parts I, II.A–B.

200. For a discussion of the literature, see Campbell, *supra* note 17, at 249–50.

society as a whole.”<sup>201</sup> Campbell explains that during the framing period, natural rights “were not legal ‘trumps’ in the way that we often talk about rights today.”<sup>202</sup> Rather, they were understood as “relative and relational”<sup>203</sup> to notions of the common good. Although members of the framing generation did not always agree on every aspect of the relationship between natural rights and the social contract, there was general agreement that “natural rights were circumscribed by political authority to pursue the general welfare.”<sup>204</sup>

This view that natural rights, including those relating to speech, were correlative with the police power continued through the middle of the nineteenth century.<sup>205</sup> This helps to explain why, as William Novak has noted, “it is extremely difficult to find judicial declarations of substantive limits on the police power of the state (especially in matters concerning public health and safety) before the Civil War.”<sup>206</sup> During this period, two common law maxims in particular were especially important in understanding the relationship between rights, the police power, and the common good.<sup>207</sup> *Sic utere tuo, ut alienum non laedas* underscored that individual rights were constrained by “all manner of wholesome and reasonable laws . . . for the good and welfare” of the state.<sup>208</sup> *Salus populi suprema lex*, on the other hand, expressed the priority of laws

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201. *Id.* at 259.

202. *Id.* at 253.

203. NOVAK, *supra* note 29, at 26.

204. Campbell, *supra* note 17, at 276.

205. *See* NOVAK, *supra* note 29, at 29–30 (detailing the beliefs evident in the natural law canon that humans are social beings).

206. *Id.* at 188.

207. *See id.* at 42 (“The public vision of the common law was best expressed in two of its most influential, commonly cited maxims: *salus populi suprema lex est* . . . and *sic utere tuo ut alienum non laedas* . . .”).

208. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851). For a further discussion see Barnett & Bernick, *supra* note 26, at 1664 (articulating the police power was occasionally interpreted as an expression of the common law maxim relating to nuisance).

that promote the public good, “champion[ing] public good over private interest.”<sup>209</sup>

Although the full contours of the police power were never clearly defined, it was always understood to encompass laws that sought to protect public health and safety.<sup>210</sup> Thus in the Supreme Court’s first discussion of the police power in *Gibbons v. Ogden*,<sup>211</sup> Chief Justice Marshall explained that the power extended to inspection and quarantine laws, as well as “health laws of every description.”<sup>212</sup> In later cases, the Court continued to identify the police power with health regulations to such an extent that the determination whether a state law sought to protect public health was often critical, if not determinative, of whether it was within the police power and hence constitutional.<sup>213</sup>

Without question, the relationship between the police power and individual liberty began to change in the middle of the nineteenth century as older notions of a well-regulated society gave way to a more individualistic form of liberalism,<sup>214</sup> and courts began to impose substantive limitations on the police

209. NOVAK, *supra* note 29, at 46. Novak cautions against the temptation to see the *salus populi* “as demonstrating the existence of a uniform and consistent American police-state tradition, a direct nineteenth century precursor to the New Deal.” *Id.* at 236–37. Rather the tradition was distinctive “from modern understandings of law, the state, regulation, and private rights.” *Id.*

210. *See id.* at 193 (noting the emphasis of health in explications of the police power). According to Novak, “public health was so vital to nineteenth-century American governance that it sometimes served as a *raison d’être* for political organization.” *Id.* Richard Epstein, in contrast, has argued that the “old” public health aligned with market failures, and only limited individual rights when doing so was necessary to prevent externalities, primarily in the case of communicable diseases and public nuisances. *See generally* Richard A. Epstein, *Let the Shoemaker Stick to His Last: A Defense of the “Old” Public Health*, 46 PERSP. BIOLOGY & MED. S138 (2003) (explaining the traditional and modern forms of public health law).

211. 22 U.S. (9 Wheat.) 1 (1824).

212. *Id.* at 203.

213. *See* Parmet, *supra* note 24, at 481–501 (discussing the evolution of public health’s place in police power jurisprudence from 1868–1905).

214. *See* Barnett & Bernick, *supra* note 26, at 1666 (explaining that after 1868, and the adoption of the Fourteenth Amendment, judges started interpreting the police power in terms of the rights of individuals).

power.<sup>215</sup> Still, throughout the nineteenth century, and even through the *Lochner* period, the Court accepted that the protection of public health was a core component of the police power.<sup>216</sup> Moreover, even as the Court began to see individual rights as establishing judicially-enforceable limitations on the police power, it accepted that states could impose reasonable limits on individual liberty in furtherance of the public's health, without violating the protections for liberty erected by the Fourteenth Amendment.<sup>217</sup> Although post-*Slaughter-House*,<sup>218</sup>

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215. The critical pre-Civil War case to describe external, substantive limitations on the police power was *Wynehemer v. People*, 13 N.Y. 378 (1856). The move to viewing the police power as subject to judicially-enforceable substantive limitations is often associated with Thomas Cooley's 1868 *Constitutional Limitations* and Christopher Tiedeman's 1886 *Treatise on the Limitations of the Police Power*. See generally COOLEY, *supra* note 194; CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT (1886).

216. See Parmet, *supra* note 24, at 493–501 (explaining that public health laws were upheld as valid exercises of the police power amidst arguments that they deprived individuals of fundamental liberties). It is worth noting that this analysis suggests that contrary to the claim that the Supreme Court is reverting to *Lochner* in its First Amendment jurisprudence, see *supra* note 1 and accompanying text, the Court is actually doing something quite different by overlooking the centrality of public health to the police power jurisprudence in the *Lochner* period. Or, to put it another way, the Court is imposing far more onerous limitations on public health powers than did the *Lochner* court.

217. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905) (articulating that public health laws that are reasonable do not violate the Constitution); *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 393 (1902) (explaining that the regulation in the case was lawfully adopted under the police power); *Powell v. Pennsylvania*, 127 U.S. 678, 683 (1888) (associating public health with government purposes); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1872) (connecting the police power with public health). Commentators on the police power during this period agreed that public health remained a legitimate rationale for limiting individual liberty. See COOLEY, *supra* note 194, at 573 (discussing the police power's extension to "the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State" (quoting Thorpe v. Rutland & Burlington R.R., 27 Vt. 140, 149 (1854))); Barnett & Bernick, *supra* note 26, at 1674 (noting that the promotion of public health is a valid form of the police power).

218. The Court's ruling in the *Slaughter-House Cases* effectively curtailed the development of a robust police power jurisprudence relating to the privileges and immunities clause. See *The Slaughter-House Cases*, 83 U.S. (16

these cases generally focused on the Due Process Clause, there is no reason to think that the generation that ratified the Fourteenth Amendment would have understood the Speech Clause (which doctrinally applies to the police power only through the Due Process Clause) as overriding public health laws.<sup>219</sup> Rather, throughout the nineteenth century and into the early twentieth century, the Court and commentators agreed that Due Process permitted limiting liberty through reasonable health laws.<sup>220</sup>

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Wall.) at 74–79 (explaining the difference between being a citizen of a state and a citizen of the United States).

219. However, as the doctrine of constitutional limitations developed in the late nineteenth century, commentators and courts increasingly saw the police power as subject to judicial review. *See* COOLEY, *supra* note 194, at 585 (discussing the judicial review of a regulation giving harbor masters the authority to regulate and station ships, which ultimately held that the regulation was sustainable as an exercise of police power regulating the manner in which individuals could exercise individual rights over property involved in commerce (citing *Vanderbilt v. Adams*, 7 Cow. 349, 351 (N.Y. Sup. Ct. 1827))). By 1904, Ernst Freund could view the police power as being limited by the freedoms of speech and press. *See* ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY & CONSTITUTIONAL RIGHTS* 13 (1904) (noting that the principal limitations upon police legislation are laws forbidding the interference with free speech). Still, he accepted that numerous mandatory notification laws, including a New York law requiring boarding houses to post their rates, remained constitutional. *See id.* at 36–37 (addressing exercises of the police power relating to bonds and deposits). For a fuller discussion of how the First Amendment was understood in the years between Reconstruction and the early twentieth century, see DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997) at 147–49 (detailing the jurisprudence discussing the application of the Fourteenth Amendment to protect individual liberties from state encroachment). Although Rabban argues that free speech was understood more in the years following Reconstruction to limit the police power in favor of individual rights, he does not suggest that it was read even in this later period to limit public health laws regulating commercial speech. *Id.*

220. The Supreme Court cases from the period extolling the states' power to protect health are legion. *See, e.g., The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 62 (connecting the police power with public health); *Powell*, 127 U.S. at 683 (associating public health with government purposes); *Campagne Francaise de Navigation a Vapeur*, 186 U.S. at 388 (stating that all provisions relating to public health are an exercise of the police power); *Jacobson*, 197 U.S. at 24–25 (demonstrating that laws relating to public health and public safety are reasonable regulations). Expressing the prevailing view in their 1892 treatise, Leroy Parker and Robert Worthington wrote that “[i]t needs no argument to prove that the highest welfare of the state is subserved by

Moreover, from the pre-colonial period through the late nineteenth century (and beyond), public health laws, although different in many ways from contemporary health laws, were plentiful.<sup>221</sup> Laws regulating sanitation, demanding the abatement of nuisances, imposing quarantines, and regulating the sale of potentially unwholesome foods and beverages were common in England long before the establishment of the North American colonies.<sup>222</sup> This regulatory tradition continued in the colonial period and lasted through the early years of the Constitution.<sup>223</sup> To give just a few examples, as early as 1646, Massachusetts regulated the quality of bread, and in 1784, it barred the sale of unwholesome food.<sup>224</sup> In the 1780s, New York reenacted its quarantine laws and began to require medical licensing.<sup>225</sup> In 1704, Charleston, South Carolina regulated slaughter-houses and privies.<sup>226</sup>

Nor did public health laws disappear in the period leading up to and following Reconstruction. Even as a more *laissez-faire* attitude took hold, and support for the “well-regulated society” declined, public health regulations were enhanced and regularized, especially in urban areas. Throughout the nineteenth century, rapidly growing cities were faced with waves of devastating epidemics.<sup>227</sup> In response, a strong

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protecting the life and health of its citizens . . .” LEROY PARKER & ROBERT H. WORTHINGTON, *THE LAW OF PUBLIC HEALTH & SAFETY AND THE POWERS AND DUTIES OF BOARDS OF HEALTH* xxxviii (1892).

221. See Parmet, *supra* note 20, at 282–85 (discussing the many sanitary laws dating back to the late Medieval and Renaissance eras and continuing through to colonial times).

222. See *id.* at 282–84 (taking a deeper look at medieval English laws aimed at protecting public health).

223. See *id.* at 286–302 (providing an overview of public health laws in Colonial New England, New York and the Mid-Atlantic Colonies, and the South).

224. See *id.* at 290–91.

225. See *id.* at 296; Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501, 511 (2019) (discussing the emergence of medical and other professional licensing and the police power).

226. See Parmet, *supra* note 20, at 301.

227. See INST. OF MED., COMM. FOR THE STUDY OF THE FUTURE OF PUBLIC HEALTH, *THE FUTURE OF PUBLIC HEALTH* 58 (1988) (explaining that disease spread rampantly in the nineteenth century due to urbanization).

sanitary movement developed, which led jurisdictions to establish standing, professionalized boards of health, and promulgate robust and far-reaching sanitary codes.<sup>228</sup> As Novak shows, by 1872, New York's sanitary code covered an extraordinarily wide array of activities from alcohol to firecrackers, and poison to theaters.<sup>229</sup> During the middle and late nineteenth century, jurisdictions also mandated vaccination,<sup>230</sup> imposed quarantines,<sup>231</sup> and regulated professions in the name of public health.<sup>232</sup> Thus, from colonial times through and beyond the ratification of the Fourteenth Amendment, public health laws regulating the sale of food would not have been seen as an absurdity, as Judge Ikuta's comments imply. Rather, they would have been recognized as a well-established and mundane exercise of the police power.<sup>233</sup>

To be sure, most public health laws, even those that regulated food and beverages, did not implicate speech. Mandatory warnings were far less ubiquitous in the nineteenth century than they became in the twentieth century.<sup>234</sup> Still, the regulation of product labels, including via warnings, was not unknown in either 1791 or 1868. For example, in their history of government regulation of branding and labeling of foods,

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228. See *id.* at 58–62 (noting the nineteenth century's recognition of public health issues, resulting in the adoption of sanitary laws, public health surveys, waste disposal, etc.).

229. NOVAK, *supra* note 29, at 198–200 (providing a list of persons, places, and things covered by New York's sanitary laws).

230. See LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 348–49 (3d ed. 2016) (elaborating on the development of mandatory vaccination laws beginning with the smallpox vaccine).

231. See, e.g., Jennifer Jolly-Ryan, *Balancing Interests and Risk of Error: What Quarantine Process Is Due After Ebola*, 96 NEB. L. REV. 100, 110–14 (2017) (discussing the history of quarantine).

232. See Haupt, *supra* note 225, at 511–14 (discussing the traditional justifications for professional licensing).

233. This is not to say that the sugary beverages would have been viewed as unhealthy in the nineteenth century; rather that regulations of items that were thought unhealthy to consume were neither uncommon nor assumed to conflict with individual rights.

234. For a discussion of why such laws proliferated in the twentieth century, see *infra* notes 268–284 and accompanying text.

Peter Barton Hutt and Peter Barton Hutt II cite the Assize of Bread and Ale law of 1266 as the first example in Anglo-American law of an affirmative branding law.<sup>235</sup> Notably this law did not simply prohibit false labeling, it also required sellers to include specific information regarding the weight of a loaf, and the name of the owner.<sup>236</sup> Likewise, in 1480, Scotland required the labeling of poisons.<sup>237</sup> Similar requirements that sellers provide information relating to food appear in numerous other statutes across English legal history.<sup>238</sup> Such laws made their way to the English colonies. In 1646, for example, the Massachusetts Bay Colony mandated that “every Baker shall have a distinct mark for his Bread.”<sup>239</sup>

Laws mandating markings or warnings continued throughout the nineteenth century. In 1829, for example, New York enacted the first American law requiring that arsenic or prussic acid be labeled as a poison.<sup>240</sup> Other states, including Ohio, Wisconsin, and Pennsylvania enacted similar laws prior to Reconstruction.<sup>241</sup>

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235. See Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 FOOD DRUG COSM. L.J. 2, 14 (1984) (“This statute specifically required what may well be the first example of affirmative food labeling in history . . .”).

236. See *id.* (discussing the historical context of warning labels).

237. EDWARD KREMERS & GEORGE URDANG, *HISTORY OF PHARMACY: A GUIDE AND A SURVEY* 389 n.1480 (1940) (stating that the first poison law in Scotland was issued by James I).

238. See Hutt & Hutt II, *supra* note 235, at 14–17 (discussing laws regarding requirements for providing food information that came after the Assize of Bread and Ale law of 1266).

239. *Id.* at 36 (quoting THE LAWS AND LIBERTIES OF MASSACHUSETTS 3 (1648)).

240. Marian Moser Jones & Isidore Daniel Benrubi, *Poison Politics: A Contentious History of Consumer Protection Against Dangerous Household Chemicals in the United States*, 103 AM. J. PUB. HEALTH 801, 802 (2013), <https://perma.cc/5RMR-J4B8> (PDF).

241. See *id.* at 810 n.9 (“Ohio (1852), Pennsylvania (1860), and Wisconsin (1862) also enacted laws that required sellers of poisons to include both a label on poisons and a record of the poison’s sale.”). It is worth noting that despite his support for freedom of expression, John Stuart Mill approved of laws requiring markings on poisons and dangerous drugs. See JOHN STUART MILL, *ON LIBERTY* (1859), <https://perma.cc/87PU-T26P> (PDF) (“Such a precaution, for example, as that of labelling the drug with some word expressive of its



Poison warnings were not the only mandatory warning laws extant during the middle and late nineteenth century.<sup>242</sup> Warnings about ingredients in food were common. Reviewing the landscape in 1904, shortly before the first federal drug labeling act was enacted,<sup>243</sup> Ernst Freund remarked that, “A very common form of notice consists in marks, signs, labels, or stamps, which are required to be affixed to articles of commerce in order to advise the public of their true nature.”<sup>244</sup> Although these laws were sometimes challenged under the emerging substantive due process doctrine that reviewed state police power regulations for their reasonableness, and their

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dangerous character, may be enforced without violation of liberty: the buyer cannot wish not to know that the thing he possesses has poisonous qualities.”); NOVAK, *supra* note 29, at 181 (“As Mill and Cooley recognized, prohibition obliterated established property and economic rights in the liquor trade. But according to these state jurists, such destruction was simply an extension of the principles and practices of well-regulated governance serving public morality.”).

242. In his rejection of the “new public health,” Epstein argues that in the earlier period, public health was rightly confined to limiting infectious diseases and nuisances. See Epstein, *supra* note 210, at S139. These laws cannot be fit into those categories. Nor can they easily be explained as preventing deception, as many required the affirmative listing of ingredients or warnings. Thus, these laws were early consumer-protection, public health laws quite analogous to the type of warning laws at issue in *NIFLA* and *American Beverage*. See *supra* Part I. In all cases, the laws attempted to provide individuals with information about the dangers of a product or service that they might not have otherwise known about. See *supra* notes 239–241 and accompanying text. Thus, these laws sought to protect otherwise competent individuals from dangers to their own health.

243. Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768.

244. FREUND, *supra* note 219, at 38. In his discussion of labeling laws, Freund cites to one case from a lower court in Texas striking down the state’s labeling laws. See *id.* (citing *Dorsey v. State*, 44 S.W. 514 (Tex. Crim. App. 1898)). As Freund notes, the court there found the state law to be unduly oppressive, but suggested that the law would be upheld if it provided greater specificity. *Id.* Moreover, the court in that case did not view the law as implicating speech, but rather as a substantive regulation on industry, which applying the more limited police power jurisprudence of the era, the court saw as unreasonable and oppressive. See *Dorsey v. State*, 44 S.W. 514, 532–33 (Tex. Crim. App. 1898) (finding that the law was impermissible because it was too general in its terms in that “[i]t simply embraces all articles of food or drink, without naming any, and makes the mixture of any articles of food, however nutritious, without labeling the product, an offense”).

relationship to public health, the challenges were not based on, nor were the cases decided on, the statues' impact on *speech*.<sup>245</sup> Indeed, in his influential 1868 treatise that sought to establish limits on the police power, and expand judicial protections for individual liberty, Judge Cooley never discussed labeling laws in conjunction with his examination of either freedom of the press or speech.<sup>246</sup>

In short, warning laws, especially with respect to food and beverages, existed in 1791 and even more so in 1868. Moreover, at no time prior to the ratification of either the Speech Clause or the Fourteenth Amendment did American jurists treat such laws as unconstitutionally infringing upon free speech.<sup>247</sup> Rather such laws were understood in relationship to the police power jurisprudence of the era. And although that jurisprudence changed significantly between 1791 and 1900, prior to the twentieth century, it never extended so far as to envision that freedom of speech overrode product labeling laws.<sup>248</sup> Rather than being the original understanding, the view expressed in Judge Ikuta's concurrence, as well as in the *American Beverage II* majority opinion and *NIFLA*, came far later.

#### D. *Public Health Law after Public Health Originalism*

Although health and safety warning laws have long existed, they are undoubtedly far more common today than they were even fifty years ago.<sup>249</sup> One reason for this may be the Supreme

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245. See, e.g., *Stolz v. Thompson*, 46 N.W. 410, 411 (Minn. 1890) (affirming a law requiring disclosure of aluminum in baking soda); *People v. Arensberg*, 11 N.E. 277, 281 (N.Y. 1887) (affirming the conviction of a defendant who violated a butter purity statute by failing to disclose the use of an alternate milk).

246. See COOLEY, *supra* note 194, at 414–66.

247. See *supra* notes 210–213 and accompanying text.

248. See *supra* notes 213–216 and accompanying text.

249. See Stephanie (Malchine) Neitzel, *One Size Fits All: A Federal Approach to Accurate Labeling of Consumer Products*, 23 J. HEALTH CARE L. & POL'Y 87, 88–103 (2020) (“[S]tates are becoming increasingly active in taking initiative to regulate potentially hazardous substances within their marketplaces . . .”).

Court's own jurisprudence. Another may be the influence of the libertarian critique of public health, which has led policymakers to seek alternatives to more paternalistic, command and control regulations.

As noted above, the Supreme Court first distinguished laws barring commercial speech from disclosure laws in *Zauderer*.<sup>250</sup> In affirming a provision of an Ohio law that permitted disciplining attorneys for using graphic illustrations in advertisements, the Court explained that “disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech,”<sup>251</sup> and that an advertiser’s interest in “not providing any particular factual information in his advertising is minimal.”<sup>252</sup> In short, as the Court saw it, laws that required the disclosure of factual information did not raise the same constitutional alarms as laws that banned commercial speech.

The disparate constitutional status of laws banning and laws requiring speech took on new importance in subsequent years as the Supreme Court looked less favorably on laws that prohibited commercial speech, even when they sought to protect health or safety. For example, in 2001 in *Lorillard Tobacco Co. v. Reilly*,<sup>253</sup> the Court applied a relatively stringent version of the *Central Hudson* test to strike down a Massachusetts regulation banning certain outdoor and point-of-sale advertisements of tobacco products.<sup>254</sup> The next year, in *Thompson v. Western States Medical Center*,<sup>255</sup> the Court struck down a provision of the Food and Drug Administration Modernization Act of 1997 that banned advertisements for compounded pharmaceuticals.<sup>256</sup> Then in *Sorrell v. IMS Health*

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250. See *supra* notes 47–50 and accompanying text.

251. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985).

252. *Id.*

253. 533 U.S. 525 (2001).

254. *Id.* at 554–56.

255. 535 U.S. 357 (2002).

256. *Id.* at 357. Interestingly, the Court in *Thompson* rejected the government’s argument that advertisements for compounding pharmacies could endanger the public’s health. *Id.* at 373–75. Sadly, the Court’s prediction proved false, as became evident when 64 people were killed, and 751 were

*Inc.*,<sup>257</sup> the Court found that a Vermont law banning the sale of physician prescription information violated the First Amendment.<sup>258</sup> Without deciding whether the law in that case constituted commercial speech, the Court stated that all laws that discriminate on the basis of speech or the speaker require “heightened scrutiny.”<sup>259</sup> Relying on *Sorrell*, the Second Circuit in *United States v. Caronia*<sup>260</sup> held that the FDA’s ban on promoting off-label uses for prescription drugs was unconstitutional.<sup>261</sup>

Such cases have led numerous commentators to warn that the FDA’s regulatory oversight of drug advertising is imperiled.<sup>262</sup> Critically, however, the peril did not appear, at least initially, to touch mandatory disclosure and warning laws precisely due to *Zauderer*.<sup>263</sup> Although lower court cases such as

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injured in a meningitis outbreak associated with the New England Compounding Center. See Nathaniel A.W. Crider, *What You Don’t Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, 48 COLUM. J.L. & SOC. PROBS. 1, 17 (2014); Kevin Outterson, *Perspective: Regulating Compounding Pharmacies After NECC*, 367 NEW ENG. J. MED. 1969, 1969 (2012).

257. 564 U.S. 552 (2011).

258. *Id.* at 557.

259. *Id.* at 566. This insistence that all content-based regulations of speech are presumptively unconstitutional was reiterated by the Court in *Reed v. Town of Gilbert*, 576 U.S. 155, 2226 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

260. 703 F.3d. 149 (2d Cir. 2012).

261. *Id.* at 169.

262. See generally Kapczynski, *supra* note 15; Aaron S. Kesselheim & Michelle M. Mello, *Prospects for Regulation of Off-Label Drug Promotion in an Era of Expanding Commercial Speech Protection*, 92 N.C. L. REV. 1539 (2014). See Christopher Robertson, *When Truth Cannot Be Presumed: The Regulation of Drug Promotion Under an Expanding First Amendment*, 94 B.U. L. REV. 545, 552–55 (2014).

263. See Stephen D. Sugarman, *Compelling Product Sellers to Transmit Government Public Health Messages*, 29 J.L. & POL. 557, 561 (2014) (explaining that because of the Supreme Court’s holding in *Zauderer*, laws that require firms to disclose or warn about “facts that are incontestable” are allowable).

*Brown & Williamson*<sup>264</sup> and *AMI* portended that the Supreme Court's newfound protection for commercial speech might extend to mandated warnings and disclosures, at least until *NIFLA*, *Zauderer* remained unchallenged by the high Court.<sup>265</sup> As a result, advocates and policymakers who were concerned about the health harms associated with dangerous products or activities were well-advised to seek laws that mandated disclosures rather than laws that restricted speech.<sup>266</sup> Given the Supreme Court's jurisprudence, it was reasonable pre-*NIFLA* to assume that the latter were far more likely to survive a First Amendment challenge than were laws banning advertising.<sup>267</sup>

Constitutional jurisprudence was not, however, the sole reason why advocates and policymakers came to rely upon mandated disclosure and warning laws. In addition to being constitutionally safer, many commentators argued that mandatory warning and disclosure laws were less paternalistic and more respectful of individual liberty than command and control laws that restricted the sale or use of dangerous products.<sup>268</sup> After all, disclosures and warnings do not limit consumer choice. Instead, they seek to provide consumers with

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264. 710 F.2d 1165 (6th Cir. 1983).

265. See *infra* Part III.B.; see also Aaron Stenz, Note, *The Controversial Demise of Zauderer: Revitalizing Zauderer Post-NIFLA*, 104 MINN. L. REV. 553, 568–71 (2019) (discussing *Zauderer* pre-*NIFLA* and stating that lower courts applied *Zauderer* inconsistently).

266. See Sugarman, *supra* note 263, at 567–75 (arguing that compelled health and safety laws do not offend the First Amendment).

267. See *id.*

268. See Bloche, *supra* note 31, at 1359 (“Public education efforts, mandatory disclosure of ingredients and risks, and the prospect of liability for gratuitously hazardous food products can make a difference in this regard without overriding people’s eating preferences.”); Lewis Grossman, *FDA and the Role of the Empowered Consumer*, 66 ADMIN. L. REV. 627, 642 (discussing the FDA’s increasing reliance on mandated disclosures as a move from a paternalistic approach to regulation to one that empowers consumers). For a fuller discussion as to whether laws that limit the rights of industries to protect the health of consumers can be considered paternalistic, see Wendy Mariner, *Paternalism, Public Health, and Behavioral Economics: A Problematic Combination*, 46 CONN. L. REV. 1817, 1825–29 (2014); Wendy E. Parmet, *Paternalism, Self-Governance, and Public Health: The Case of E-Cigarettes*, 70 MIA. L. REV. 879, 892–95 (2016).

information about a product's risk.<sup>269</sup> Hence mandatory disclosure and warning laws can be viewed as a form of "soft paternalism," or "weak-form debiasing" that simply help to correct for market inefficiencies and the limits of human rationality.<sup>270</sup> In an era, such as our own, in which paternalistic regulations are widely scorned,<sup>271</sup> especially for risks that do not appear to present harm to others, mandated speech laws easily became the preferable regulatory option.

In some circumstances, mandated warnings and disclosures are also the more politically viable option.<sup>272</sup> Precisely because speech mandates are seen as less restrictive on consumer choice than laws limiting the sale or use of products, they often encounter less (or less successful) pushback.<sup>273</sup> At the same time, because such laws often impose far fewer costs on industry than other forms of product regulation,<sup>274</sup> industry opposition

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269. See Neitzel, *supra* note 249, at 87 ("Accurate labeling of food and other consumer commodities empowers citizens to make informed decisions concerning the products they choose to bring into their lives.").

270. David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687, 1729 (2014). The literature on "soft paternalism" is extensive. See generally, e.g., Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659 (2004); Sunstein, *supra* note 17; Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175 (2003), <https://perma.cc/8AY2-8NB8> (PDF).

271. Many commentators argued that public health laws relating to non-communicable diseases are inappropriately paternalistic. See, e.g., Epstein, *supra* note 210; Mark A. Hall, *The Scope and Limits of Public Health Law*, 46 PERSPS. BIOLOGY & MED. S199, S199 (2003), <https://perma.cc/9G5Z-9PCY> (PDF); Friedman, *supra* note 270, at 1767–69 (arguing that paternalistic interventions aimed at non-communicable diseases are often not politically viable).

272. See Friedman, *supra* note 270, at 1733 ("The political feasibility of disclosure may indeed tempt policymakers.").

273. See *id.* ("With the exception of Mississippi, the positive reaction to the soft paternalism of mandatory calorie disclosure has not been overwhelmed by any noticeable popular backlash . . .").

274. See Robin Hanson, *Warning Labels as Cheap-Talk: Why Regulators Ban Drugs*, 87 J. PUB. ECON. 2013, 2015 (2003), <https://perma.cc/ZX9F-FV8R> (PDF) (explaining, from an economic game-theory standpoint, why speech regulation is more cost effective than other forms of government oversight).

may be less fierce.<sup>275</sup> In some instances, industry may even be willing to accept warning laws in lieu of more stringent regulations. For example, the first federal law requiring warning labels on cigarettes was passed with the support of the tobacco companies in part because the regulations precluded more stringent FTC regulations of cigarette advertising.<sup>276</sup>

That Cigarette Labeling Law also contained another provision that frequently accompanies warning labels: preemption.<sup>277</sup> To give just a few examples, FDA labeling requirements preempt tort claims relating to medical devices,<sup>278</sup>

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275. For example, in 2012, New York City promulgated an ordinance that regulated portion sizes. The ordinance might have been less offensive from a constitutional perspective than the San Francisco ordinance, because it did not touch upon speech or any other constitutionally-protected right. See Lindsay F. Wiley, *Sugary Drinks, Happy Meals, Social Norms, and the Law: The Normative Impact of Product Configuration Bans*, 46 CONN. L. REV. 1877, 1880–81 (2014). Nevertheless, the ban engendered intense opposition from industry. See, e.g., Adam Gabbatt, *New York City Soda Ban Struck Down by Judge in Eleventh-Hour Ruling*, GUARDIAN (Mar. 11, 2013, 4:24 AM), <https://perma.cc/Z5VK-49M3>. Ultimately the law was struck down on state administrative law grounds. See *N.Y. Statewide Coal. of Hisp. Chambers of Comm. v. N.Y. City Dept. of Health & Mental Hygiene*, 16 N.E.3d 538, 541 (N.Y. 2014) (“We hold that the New York City Board of Health, in adopting the ‘Sugary Drinks Portion Cap Rule,’ exceeded the scope of its regulatory authority.”). Industry continues to oppose a wide range of measures that aim to protect Americans from unhealthy foods. See, e.g., Lawrence O. Gostin, *“Big Food” Is Making America Sick*, 94 MILBANK Q. 480 (2016), <https://perma.cc/ZZ62-E8W6> (PDF). In 2019, industry-led opposition helped to defeat a measure similar to New York’s portion law in the California legislature. See Patrick McGreevy, *California’s Proposed Ban on “Big Gulp”-Style Sodas is Shelved*, L.A. TIMES (Apr. 10, 2019, 9:39 AM), <https://perma.cc/DW2Q-Z94V>.

276. See ALLAN M. BRANDT, *THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA* 251–61 (2007) (explaining that The Federal Cigarette Labeling and Advertising Act of 1965 prohibited “FTC requirements for health warnings in ads for four years”).

277. See *id.*

278. See *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 312 (2008) (“The MDA’s pre-emption clause bars common-law claims challenging the safety or effectiveness of a medical device marketed in a form that received premarket approval from the FDA.”).

generic drugs,<sup>279</sup> and dietary supplements.<sup>280</sup> The federal Nutrition Labeling and Education Act<sup>281</sup> also preempts state labeling laws that are not “identical” to federal requirements.<sup>282</sup> Even the calorie disclosure requirements in the Affordable Care Act<sup>283</sup> preempt state and local laws that require food establishments to post the calories of their fare.<sup>284</sup> Thus by preventing inconsistent or stronger state regulations and litigation, mandated warning laws may benefit industry as much as public health.

What then might be the public health impact if courts adopt public health originalism and strike down all warning and disclosure laws that were not in effect in 1791?<sup>285</sup> A full analysis of that question is beyond the scope of this discussion, but a few comments are worth noting.

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279. See *Mut. Pharms. Co. v. Bartlett*, 570 U.S. 472, 472 (2013) (“State-law design-defect claims that turn on the adequacy of a drug’s warnings are pre-empted by federal law . . .”); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 624 (2011) (“Here, state law imposed a duty on the Manufacturers to take a certain action, and federal law barred them from taking that action. The only action the Manufacturers could independently take . . . is not a matter of state-law concern.”).

280. *Dachauer v. NBTY, Inc.*, 913 F.3d 844, 848 (9th Cir. 2019) (holding that federal law “preempts state-law requirements for claims about dietary supplements that differ from the FDCA’s requirements”).

281. 21 U.S.C. § 343-1(a)(5).

282. *Id.*

283. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

284. See Jason P. Block, *The Calorie-Labeling Saga—Federal Preemption and Delayed Implementation of the Public Health Law*, 2018 NEW ENG. J. MED. 1, 1 (stating that the ACA preempts state and local food regulatory requirements).

285. The discussion that follows focuses solely on the impact of Judge Ikuta’s approach on disclosures and warnings that are required by statute or regulation, as opposed to common law duties to warn or informed consent. Were a court to conclude that these common law regulations of speech were unconstitutional because they were not in effect in 1791, the impact might be quite different and potentially greater than that discussed below. *NIFLA* emphasizes that informed consent and tort liability for professional malpractice have a long history. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2373 (2018).



First, a very wide array of federal, state, and local laws might be affected. In addition to the FDA regulations requiring warnings on direct-to-consumer advertisements,<sup>286</sup> the adoption of public health originalism may threaten laws requiring that alcoholic beverages warn about the risks of drinking during pregnancy,<sup>287</sup> and that smokeless tobacco products carry warnings about the risks associated with their use.<sup>288</sup> The federal law mandating warnings on vaccines might also be imperiled.<sup>289</sup> At the state level, California’s Prop. 65,<sup>290</sup> which requires businesses to give “reasonable warnings” about products which may expose people to carcinogens would be likely to fail<sup>291</sup> as might a New York City requirement providing warnings about health risks of high sodium food.<sup>292</sup> So, too, might laws requiring hospitals to warn parents about child seat belts or the availability of pediatric vaccines.<sup>293</sup>

Whether public health would suffer if these or many other laws fall is unclear. The empirical literature on the efficacy of disclosure laws is vast and suggests wide variation depending on the specific nature (size, visibility, and content) of the required warning.<sup>294</sup> While there is no question that the public

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286. See 21 U.S.C. § 352(n).

287. See 27 U.S.C. § 215.

288. See 15 U.S.C. § 4402.

289. See 42 U.S.C. § 300aa-26. For a further discussion of warnings and vaccines, see *infra* notes 350–353 and accompanying text.

290. Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE § 25249.5–.14 (West 2020).

291. *Id.* Even without Judge Ikuta’s approach, this law has been found unconstitutional as applied. See, e.g., Nat’l Ass’n of Wheat Growers v. Zeise, 309 F. Supp. 3d 842, 853 (E.D. Cal. 2018).

292. N.Y. Health Code § 81.49 (McKinney 2020).

293. See *NIFLA*, 138 S. Ct. at 2380–81 (Breyer, J., dissenting) (claiming that numerous common medical disclosure requirements are threatened by the majority’s decision).

294. Hanson, *supra* note 274, at 2014 (reviewing the literature and concluding that the impact of warnings “range from mild to non-existent”); Robinson et al., *supra* note 31, at 21–22 (arguing for the use of a cost-benefit approach to warnings that takes into account the risk of a product and noting that poorly tailored warnings may lead consumers to avoid less risky products and turn instead to more dangerous ones); David W. Stewart and Ingrid M. Martin, *Intended and Unintended Consequences of Warning Messages: A*

can suffer from warning overload,<sup>295</sup> studies suggest that tobacco warnings, especially graphic warnings (that appear to be the most constitutionally vulnerable), can reduce tobacco use.<sup>296</sup> Likewise, research suggests that well-designed warning labels about sugar-sweetened beverages can correct misperceptions about sugary beverages and lower consumption.<sup>297</sup> But the actual impact of a constitutional doctrine that effectively forecloses the government's ability to require health or safety warnings would likely depend on whether other regulatory tools replaced compelled speech. One possibility, certainly unintended by many of those who challenge warning laws, is that preemption would fall alongside warning laws, leaving industry more vulnerable to state tort

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*Review and Synthesis of Empirical Research*, 13 J. PUB. POL'Y & MKTG. 1 (1994), <https://perma.cc/VY3B-RWXQ> (PDF) (reviewing literature and concluding that impact of warning messages depends upon their specific design); Monica Trommelen, *Effectiveness of Explicit Warnings*, 25 SAFETY SCI. 79, 79 (1997), <https://perma.cc/B9B4-AQUU> (PDF) (conducting a study on explicit warnings and finding that “[t]he results indicate that with explicit warnings, subjects perceived the products investigated as more hazardous and the possible injuries more severe”).

295. See Robinson et al., *supra* note 31, at 14–21 (arguing that excessive use of warnings may lead consumers to ignore them).

296. See, e.g., Chris Skurka et al., *Independent or Synergistic? Effects of Varying Size and Using Pictorial Images in Tobacco Health Warnings*, 198 DRUG & ALCOHOL DEPENDENCE 87, 90 (2019), <https://perma.cc/4YYS-PWC5> (PDF); Hsiao-Yn Lee et al., *The Effect of E-Cigarette Warning Labels on College Students' Perception of E-Cigarettes and Intention to Use E-Cigarettes*, 76 ADDICTIVE BEHAVS. 106, 109 (2018), <https://perma.cc/29XQ-27HC> (PDF); Seth M. Noar et al., *The Impact of Strengthening Cigarette Pack Warnings: Systematic Review of Longitudinal Observational Studies*, 164 SOC. SCI. & MED. 118, 125 (2016), <https://perma.cc/752A-974T> (PDF). But see Pieter Van Dessel et al., *Graphic Cigarette Pack Warnings Do Not Produce More Negative Implicit Evaluations of Smoking Compared to Text-Only Warnings*, PLOS ONE (March 15, 2018), <https://perma.cc/YZD7-2ALG> (finding that graphic warnings were associated with a more positive evaluation of smoking than text-only warnings).

297. See Grant E. Donnelly et al., *The Effect of Graphic Warnings on Sugary-Drink Purchasing*, 29 PSYCH. SCI. 1321, 1329 (2018), <https://perma.cc/65V3-R5B3> (PDF); Eleni Mantzari et al., *Impact of Warning Labels on Sugar-Sweetened Beverages on Parental Selection: An Online Experimental Study*, 12 PREVENTIVE MED. REPS. 259 (2018), <https://perma.cc/4DJ4-XPCF> (PDF); Alyssa J. Moran & Christina A. Roberto, *Health Warning Labels Correct Parents' Misperceptions About Sugary Drink Options*, 55 AM. J. PREVENTIVE MED. e19 (2018), <https://perma.cc/F8Z8-P74U> (PDF).

claims. Whether that would create greater health benefits than warning laws is certainly questionable, but at least plausible in some cases.

In addition, without the ability to rely on warning labels, public health advocates and regulators might push harder for more restrictive command and control regulations. Without question, they would fail in many cases, leading to less regulation in some areas, potentially jeopardizing public health. But it is certainly possible that in some cases, regulators would succeed in banning or restricting the use of products, or imposing more onerous excise taxes. In some cases, this might actually lead to greater health gains than can be achieved by warning laws (although at the price of less consumer choice). In other cases, public health might actually suffer if access to products that can benefit the health of some patients is restricted because regulators lack the capacity to warn other consumers who may be harmed about the product.

In either case, the result may well be paradoxical. Rather than ensuring a world of limited regulation, Judge Ikuta's form of public health originalism might presage an increased reliance on the type of command and control market regulations that were a well-accepted feature of the police power in the pre-liberal era.

### III. THE FUTURE OF COMPELLED DISCLOSURES IN PUBLIC HEALTH REGULATION

So where are we today? Does *NIFLA* command either Judge Ikuta's public health originalism or a different approach to compelled health and safety disclosures? As we have already argued, Judge Ikuta's approach would threaten a wide range of health and safety laws.<sup>298</sup> But even if courts do not adopt her notion of public health originalism, commentators have worried that *NIFLA* itself might threaten environmental disclosures,<sup>299</sup>

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298. See *supra* notes 285–293 and accompanying text.

299. See, e.g., Lauren L. Sherman, Note, *A Warning for Environmental Warnings: Regulatory Uncertainty in the Face of First Amendment Regulation*, 27 N.Y.U. ENV'T L.J. 240, 296 (2019) (asserting that *NIFLA* makes it difficult

as well as laws requiring “disclosures in the realms of medicine, law, business, education, child welfare, banking, alcohol and drugs, and even barbering and cosmetology.”<sup>300</sup> In addition, as discussed above, federal regulation by the FDA may also be in peril.<sup>301</sup> In the FDA context, for example, a new round of First Amendment objections to the latest iteration of graphic tobacco warnings released in August 2019 is likely.<sup>302</sup> Drug companies have also raised First Amendment objections to recent Department of Health and Human Services regulations requiring the disclosure of drug prices.<sup>303</sup>

In his *NIFLA* dissent, Justice Breyer emphatically warned of the dangers of calling wide swaths of ordinary public health and safety warnings into question.<sup>304</sup> These concerns are likely

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for governments making disclosure requirements to “connect an action or product with the risk or policy issue that they are trying to address”).

300. Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61, 111 (2019); see *id.* at 111–18 (presenting a range of disclosures implicated by *NIFLA*).

301. See, e.g., Kapczynski, *supra* note 15, at 180 (“There may be no edifice of public regulatory power more immediately threatened by this trend [of commercial speech protections expansion] than the Food and Drug Administration.”); Lim, *supra* note 2, at 141–48 (discussing recent commercial warnings and disclosures that may be threatened by *NIFLA*); Carl Wiersum, *No Longer Business as Usual: FDA Exceptionalism, Commercial Speech, and the First Amendment*, 73 FOOD & DRUG L.J. 486, 486 (2018) (“[I]n the last two decades, FDA has lost case after case with respect to challenges under the First Amendment.”); see also *supra* notes 286–297 and accompanying text.

302. See *Cigarette Health Warnings*, FOOD & DRUG ADMIN., <https://perma.cc/A2T4-V3JR> (last updated Jan. 30, 2020) (showing the thirteen different proposed cigarette health warnings to promote greater public understanding of the negative health consequences of smoking); see also Sheila Kaplan, *The F.D.A.’s New Cigarette Warnings Are Disturbing. See for Yourself.*, N.Y. TIMES (Aug. 15, 2019), <https://perma.cc/G974-TLC8> (quoting a spokesperson for R.J. Reynolds Tobacco, who stated that the company “firmly support[s] public awareness of the harms of smoking cigarettes, but the manner in which those messages are delivered to the public . . . cannot run afoul of the First Amendment protections that apply”).

303. See, e.g., *Merck & Co. v. U.S. Dep’t of Health & Hum. Servs.*, 962 F.3d 531, 533 (D.D.C. 2019) (ruling that the court need not reach plaintiff’s First Amendment claims against drug-pricing disclosure regulation because the regulation violates Administrative Procedures Act).

304. See *Nat’l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2381 (Breyer, J., dissenting) (“Historically, the Court has been wary of

heightened in light of the current pandemic<sup>305</sup> and potential issues relating to the authorization and dissemination of a vaccine.<sup>306</sup>

Starting with the observation that all disclosure laws are inherently content based because they require articulating a specific message, he cautioned that “the majority’s view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.”<sup>307</sup> In this respect, *NIFLA* is similar to *Reed v. Town of Gilbert*,<sup>308</sup> which, taken to apply across all areas of the First Amendment, would dramatically alter the doctrinal role of content neutrality.<sup>309</sup> Likewise, if taken literally, even without Judge Ikuta’s gloss, *NIFLA* would dramatically expand commercial speech protection to the detriment of consumer and public health protection.<sup>310</sup> But application of the type of aggressive content-neutrality prescribed in *Reed* is incompatible with the normative underpinnings of large areas of speech as well as many seemingly settled areas of First Amendment

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claims that regulation of business activity, particularly health-related activity, violates the Constitution.”).

305. See Lauren M. Sauer, *What is Coronavirus?*, JOHNS HOPKINS MED., <https://perma.cc/8L4G-FDL5> (last updated Oct. 16, 2020) (discussing the ongoing coronavirus pandemic).

306. See Maggie Fox, *Federal Government Wants to Deliver Vaccine Shots Within a Day or Two of FDA Approval, Officials Say*, CNN (Oct. 16, 2020 8:37 PM), <https://perma.cc/5YUE-6AD6> (reporting that the federal government hopes to start vaccinating people against coronavirus very soon after FDA emergency authorization).

307. *NIFLA*, 138 S. Ct. at 2380 (Breyer, J., dissenting).

308. 576 U.S. 155 (2015).

309. See *id.* at 177 (Breyer, J., concurring) (noting many “examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place”).

310. See, e.g., *Leading Cases, First Amendment—Freedom of Speech—Compelled Speech—National Institute of Family & Life Advocates v. Becerra*, 132 HARV. L. REV. 347, 351 (2018) [hereinafter *Leading Cases*] (“Taken as written, *NIFLA* represents a dramatic expansion of the scope of First Amendment protection for commercial speech that threatens the entire foundation of a broad range of consumer protections.”).

jurisprudence.<sup>311</sup> It may also undermine the state's ability to protect public health.

In this Part, we reiterate that *NIFLA* itself does not require “public health originalism.” And even if a traditionalist perspective is to inform First Amendment analysis of compelled disclosures, history suggests that there is a long tradition of such practices on the state and federal levels. We then turn to the sites of conflict and doctrinal contestation that *NIFLA* left open. In so doing, we focus in particular on the understanding of “uncontroversial” in the wake of *NIFLA*. Given that the subject of that decision was abortion, there might be good reason to question its applicability to other topics.<sup>312</sup> In fact, commentators have already suggested that *NIFLA* is best read as an abortion decision.<sup>313</sup> Finally, taking the *NIFLA* majority at its word, it is quite possible—though entirely unsupported by the Court's own analysis—that the majority does not, in fact, envision its approach as challenging the wide range of areas Justice Breyer's dissent identifies.<sup>314</sup> We therefore end by suggesting that if the majority really means what it said in *NIFLA* to assuage the dissent's concerns, the decision by its own terms must be read narrowly.

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311. See, e.g., Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 YALE L.J.F. 150, 171 (2017) (“But emphasizing content neutrality does not resolve, and instead exacerbates, the theoretical and doctrinal uncertainties at the root of the professional speech issue.”).

312. See *Leading Cases*, *supra* note 310, at 355 (“If the Court did not intend *NIFLA* to signal the defeat of all commercial disclosure requirements, then the rationales underlying the decision seem intended to justify differential treatment of abortion opponents and reproductive rights supporters.”). See generally Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1210 (2014) (asserting that abortion exceptionalism leads courts to ignore “fundamental principles [in First Amendment jurisprudence] or distort them beyond recognition”).

313. See, e.g., Chemerinsky & Goodwin, *supra* note 300, at 66 (“*NIFLA v. Becerra* is only secondarily about speech. Instead, we believe this case is primarily about the conservative Justices' hostility to abortion rights.”).

314. See *infra* Part III.C.

A. *Originalism and Traditionalism in Public Health Regulation*

*NIFLA* does not require rigid originalism. None of what follows is to suggest that *NIFLA* is correctly decided. In fact, we have each previously argued that it is not.<sup>315</sup> We merely contend here that *NIFLA* does not require lower courts to employ a novel originalist approach such as Judge Ikuta's.<sup>316</sup> Instead, *NIFLA* might require a form of traditionalism that can accept many (if not all) health and safety disclosures.<sup>317</sup>

As discussed above, Justice Thomas' analysis in *NIFLA* is better characterized as traditionalist, rather than originalist. Recall that he nodded to history only in response to Justice Breyer's concern, in dissent, about the impact of the majority's approach on health and safety laws. For the Court, Justice Thomas stated, "Contrary to the suggestion in the dissent, we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."<sup>318</sup> Likewise, he acknowledged the longstanding torts of malpractice and informed consent.<sup>319</sup> Nowhere did he state that only laws that existed at some specific prior time would be constitutional; nor even that only those laws that were long recognized were constitutional. Rather, Justice Thomas sought to reassure that despite the application of strict scrutiny in that case, health and safety laws that had long been considered permissible faced no

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315. See Parmet, *supra* note 10, at 1490–91; Haupt, *supra* note 10, at 197–98.

316. See *supra* notes 163–166 and accompanying text (noting that Judge Ikuta's opinion differs from the *NIFLA* majority opinion in its addition of the word "only").

317. See *supra* Part II.C (arguing that there is a long history of health and safety warning laws).

318. Nat'l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2376 (2018).

319. See *id.* at 2373 ("Longstanding torts for professional malpractice, for example, 'fall within the traditional purview of state regulation of professional conduct.'" (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))).

jeopardy.<sup>320</sup> Thus, history was used to save health and safety laws, not to limit them.

Justice Kennedy's concurrence likewise urged a historical perspective. He urged that the analysis should "begin by reading the First Amendment as ratified in 1791."<sup>321</sup> His admonition, however, remained at such a high level of abstraction that it failed to provide clear guidance to the lower courts on how to do so. But like the majority, Justice Kennedy did not demand "public health originalism" as deployed by Judge Ikuta.

If Judge (now Justice) Kavanaugh's approach in *AMI* is a guide for the future direction the Court might take if it decides to look to history to determine the constitutionality of compelled speech laws, the posture is decidedly traditionalist, rather than originalist.<sup>322</sup> The difference between the *AMI* majority and Judge Kavanaugh's concurrence, as Robert Post explains it, is the willingness "to name names": whereas the court relies on the indirect reference of a "long history of country-of-origin" information, Judge Kavanaugh noted that the interest was to support American farmers and ranchers, but that the state had been reluctant to articulate this interest.<sup>323</sup> Nonetheless, as we

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320. *See id.* at 2376 (stating affirmatively that no existing health and safety laws hang in the balance of constitutionality).

321. *Id.* at 2379 (Kennedy, J., concurring)

It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for generations to come.

322. *See Am. Meat Inst. v. U.S. Dep't of Agric. (AMI)*, 760 F.3d 18, 30 (D.C. Cir. 2014) (Kavanaugh, J., concurring) (addressing the constitutionality of compelled country-of-origin disclosures on meat products).

323. *See Post, supra* note 30, at 890 (quoting Judge Kavanaugh's concurring opinion).



explained earlier, both the majority<sup>324</sup> and Judge Kavanaugh<sup>325</sup> took a historical perspective that included consideration of the long history of country-of-origin information. With respect to public health disclosures, Judge Kavanaugh's admonishment to explicitly name the state interest arguably will be easier to meet than articulating the state interest in *AMI*. What is more, in directly contrasting country-of-origin labels and disclosures "to ensure consumer health and safety," Kavanaugh placed the latter on constitutionally firmer footing.<sup>326</sup>

Typically, the state interest in public health warnings will be supported by health data indicating a scientific finding of some health danger. This finding will likely be more easily articulable the more fully the science has developed and the stronger the scientific consensus. Theoretically, the stance that courts take when reviewing the underlying data depends upon if the regulation falls within *Zauderer*, which permits rational basis review, or outside of that case, in which case strict scrutiny is applicable.<sup>327</sup> In *NIFLA*, however, the Court appeared to test the strength of the support for the regulation prior to determining the standard of review that was applicable.<sup>328</sup> In effect, a type of strict scrutiny was applied to determine if strict scrutiny applied.<sup>329</sup> That move relied on the Court's use of the "uncontroversial" prong of *Zauderer*, to which we now turn.

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324. See *AMI*, 760 F.3d at 23–24 (majority opinion) (“[C]ountry-of-origin label mandates indeed have a ‘long history.’ Congress has been imposing similar mandates since 1890, giving such rules a run just short of 125 years.”).

325. See *id.* at 32 (Kavanaugh, J., concurring) (“That historical pedigree is critical for First Amendment purposes and demonstrates that the Government’s interest here is substantial.”).

326. See *supra* note 77 and accompanying text.

327. See *supra* notes 47–50 and accompanying text.

328. See *Leading Cases*, *supra* note 310, at 353 (“Instead of focusing on whether consumers’ informational interest justified lesser scrutiny of disclosure mandates, as the Court did in *Zauderer*, Justice Thomas focused on the harm of requiring anti-choice clinics to advertise ‘the very practice . . . [they] are devoted to opposing.’” (quoting *NIFLA*, 138 S. Ct. at 2371)).

329. Judge Ikuta’s original panel decision in *American Beverage I* also utilized the uncontroversial language in *Zauderer* in such a way as to require a type of strict scrutiny to determine whether strict scrutiny was applicable.

## B. *Zauderer After NIFLA*

*NIFLA* added new uncertainty to the meaning of *Zauderer*'s "uncontroversial" prong. What is controversial in *NIFLA* was not the existence of California's legislation or the licensing of facilities, but rather the entire topic of abortion.<sup>330</sup> What does it mean to interpret "uncontroversial" as required by *Zauderer* as encompassing the entire topic as in *NIFLA*? Take questions surrounding the safety of childhood vaccines as one example.<sup>331</sup> The science itself is uncontroversial, but the topic is nonetheless subject to widespread public controversy.<sup>332</sup> The FDA operates within the scientific realm, but under the First Amendment's reinterpretation in *NIFLA*, can labels that offer information to which many (or even just a few) laypeople disagree meet the test of being "uncontroversial"?<sup>333</sup> Similarly, imagine the new COVID-19 vaccines. Can the FDA still require a warning label about their risks, or the fact that they were authorized without completing all of the regulatory steps that would ordinarily be required for full FDA approval? The debates about the coronavirus vaccines, and the warnings that it should contain

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See *Am. Beverage Ass'n v. City & Cnty. of San Francisco (American Beverage D)*, 871 F.3d 884, 890–91 (9th Cir. 2017).

330. See *Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2372 (2018) (describing abortion as "anything but an 'uncontroversial' topic" and concluding that "[a]ccordingly, *Zauderer* has no application here").

331. See Bill Bero, *The Great Vaccination Safety Debate—To Vaccinate Your Child or Not*, FRANCISCAN HEALTH (Oct. 30, 2016), <https://perma.cc/L7DQ-PAVQ> (discussing the current debate regarding whether vaccinations are safe for children).

332. See *id.* (asserting that the many health organizations including the "American Academy of Pediatrics, [t]he Centers for Disease Control and Prevention, [and] National Institutes of Health" say that vaccines are safe despite the ongoing debate).

333. This is a question distinct from the fact that there may be scientific disagreement which the law already addresses in various ways. See Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. 671, 671 (2017) ("[P]rofessions are best conceptualized as knowledge communities whose main reason for existence is the generation and dissemination of knowledge. But knowledge communities are not monolithic; there is a range of knowledge that is acceptable as good professional advice. Advice falling within this range should receive robust First Amendment protections.").

(given the lack of full approval) are likely to be intense.<sup>334</sup> Would this mean that the FDA could not require that manufacturers provide any specific information about what is and is not known about new vaccines? Future judicial interpretations of “uncontroversial” in light of *NIFLA* could potentially allow the existence of such controversy to undermine the government’s efforts to ensure transparency. Indeed, warnings may be less legally viable precisely when they are needed most, for new products in which the risks are less well-known.

The D.C. Circuit’s majority opinion and the Kavanaugh concurrence in *AMI* addressed the broader problem with the “uncontroversial” prong by taking a historical view.<sup>335</sup> Would such a historical perspective inform the permissibility of vaccine labels or public health information regarding the benefits of vaccinating people during a pandemic? Posing this question illustrates the limits of the historical view. In other words, what is or is not a controversial issue cannot be resolved by looking (only) to historical practice. Indeed, such an approach might force a court to see controversies where none now exist, or to miss controversies that new scientific findings have now ignited.

In the Ninth Circuit, the meaning of “uncontroversial” was tested in its decision in *CTIA*,<sup>336</sup> after the Supreme Court remanded that case in light of *NIFLA*.<sup>337</sup> Importantly, the Ninth Circuit’s second decision in *CTIA* (which reaffirmed its earlier holding) did not read *NIFLA* “as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial.”<sup>338</sup> Rather, the Ninth Circuit interpreted the problem in *NIFLA* to be that “[w]hile factual, the compelled statement took sides in a heated

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334. See Alec Tyson et al., *U.S. Public Now Divided Over Whether to Get COVID-19 Vaccine*, PEW RSCH. CTR. (Sept. 17, 2020), <https://perma.cc/GE8L-MCNC> (announcing that the percentage of Americans who report that they would get the coronavirus vaccine has sharply declined since earlier this year due to concerns about the safety and effectiveness of the vaccine).

335. See *supra* notes 73–79 and accompanying text.

336. *CTIA—The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 844 (9th Cir. 2019).

337. *Id.* at 836.

338. *Id.* at 845.

political controversy, forcing the clinic to convey a message fundamentally at odds with its mission.”<sup>339</sup> This is why the compelled disclosure “was deemed controversial within the meaning of *Zauderer* and *NIFLA*.”<sup>340</sup> We will return to the question whether this is the most plausible reading of *NIFLA*. However, applied to the disclosures at issue in *CTIA*, this understanding allowed the Ninth Circuit to determine that, despite disagreement about the dangers posed by radio-frequency radiation, the “required disclosure is uncontroversial within the meaning of *NIFLA*. It does not force cell phone retailers to take sides in a heated political controversy.”<sup>341</sup> Moreover, the court quoted the “long considered permissible” part of *NIFLA*, noting that the disclosure at issue in *CTIA* was “a short-hand description of the warning the FCC already requires cell phone manufacturers to include in their user manuals.”<sup>342</sup> The court did not, however, specify the length of time for which these warnings have been included, much less what “long considered permissible” means in this context.

Contrasting our vaccine/FDA label scenario with the *CTIA* warnings illustrates the uncertainty *NIFLA* invites. In *CTIA*, the Ninth Circuit explained that “the compelled statement [in *NIFLA*] took sides in a heated political controversy.”<sup>343</sup> If this is the correct understanding of “uncontroversial,” we may be faced with a continuum of controversies. We find it difficult to imagine a more politically divisive topic than abortion.<sup>344</sup> Perhaps the

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339. *Id.*

340. *Id.*

341. *Id.* at 848.

342. *Id.*

343. *Id.* at 845.

344. This is not to say that there is not significant agreement in the medical community about numerous facts relating to the safety of abortion. The fact that a topic is controversial does not mean that all facts related to it are uncertain. See *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (invalidating Louisiana’s law that required physicians who perform abortions to have admitting privileges at a nearby hospital, and holding it unconstitutional under *Whole Woman’s Health v. Hellerstedt*); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016) (holding that Texas law’s requirement that providers have admitting privileges at local hospital located no more than thirty miles from their abortion facility imposed undue burden on women’s right to seek previability abortions). *But see* Aziza Ahmed, *Medical*

emergent popular disagreement—contra the scientific consensus—surrounding vaccines is sufficiently controversial to place it in a similar category.<sup>345</sup> But *NIFLA* itself provides no guidance on this point, nor does it help us to understand what other disputes are sufficiently controversial so that *Zauderer*'s rational basis review does not apply, even when the compelled speech is supported by scientific consensus.

### C. *Reconciling NIFLA and Public Health Regulation*

We end our exploration of *NIFLA*'s impact on public health regulation by taking the majority at its word. In response to Justice Breyer's dissent, the majority asserted: "Contrary to the suggestion in the dissent, we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."<sup>346</sup> If that were so, certainly the "public health originalism" approach must fail. But beyond that, lower courts would still lack necessary guidance helping to decide which types of public health and safety warnings may be compelled by the state.

What would a First Amendment framework look like that did actually address the dissent's concerns? In order to sketch the outlines of an answer, we must return to the underlying normative interests.<sup>347</sup> A theoretically grounded defense of the *NIFLA* majority's assertion would have required unpacking these interests. We argue here that *NIFLA*, if read narrowly,

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*Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J.L. & MED. 85, 86–87 (2015) (arguing that courts have selectively relied on medical expertise in their abortion jurisprudence).

345. See Emmarie Huetteman et al., *In Debate, Pence and Harris Offer Conflicting Views of Nation's Reality*, KAISER HEALTH NEWS (Oct. 8, 2020), <https://perma.cc/8Q73-U3FC> (illustrating the topics that Mike Pence and Kamala Harris discussed in their vice-presidential debate including the administration of a COVID vaccination and abortion).

346. Nat'l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2376 (2018).

347. See generally Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277 (2014) (examining free speech theory in the context of compelled disclosures).

could largely be squared with the state's interest in regulating public health and safety. However, a normative justification for the permissibility of health and safety warnings that rests solely on their historical pedigree seems difficult to conceive. Perhaps in light of democratic self-government concerns, what has long been deemed permissible cannot easily be undone. Indeed, this seems to be the normative thrust of *AMI*.<sup>348</sup>

We only offer a first rough sketch of a normatively grounded analysis here.<sup>349</sup> One plausible reading of *NIFLA* that would permit public health and safety warnings would place a clearer focus on listener autonomy interests.<sup>350</sup> This suggests that the nods in *NIFLA* toward accepting malpractice liability and informed consent despite the restraints they impose on speech are thus best understood as acknowledging the value of expertise to patients.<sup>351</sup> Of course, *NIFLA* itself failed to take such a perspective or to give weight to the interest of CPC “patients” in receiving factual information regarding the options available to them.<sup>352</sup> With respect to the continued viability of *Zauderer*-type disclosures after *NIFLA*, then, the bulk of disclosures we discussed in Part III.D would survive only if we understand the *NIFLA* majority's vague gesture at tort law and informed consent as affirming the value of expertise.<sup>353</sup> As we noted, rather than limiting consumer choice, disclosures and warnings add to consumers' available information regarding the

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348. See *supra* notes 73–74 and accompanying text.

349. For another recent effort, see Lim, *supra* note 8, at 192.

350. See Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 378 (2008) (“Listener autonomy differs from speaker autonomy in that it refers to the autonomy to think and deliberate, to consider choices, and to evaluate information and ideas—rather than the autonomy to perform the act of speaking.”).

351. See Haupt, *supra* note 311, at 1271 (discussing how clients and patients benefit from professional expertise).

352. See *NIFLA*, 138 S. Ct. at 2388 (Breyer, J., dissenting) (“Abortion is a controversial topic . . . but the availability of state resources is not a normative statement or a fact of debatable truth. The disclosure includes information about resources available . . . and it expresses no official preference for one choice over the other.”).

353. See *supra* notes 291–296 and accompanying text.

risks and benefits of a product (as affirmed by expertise) and thus enable informed consumer choice.<sup>354</sup>

In the same vein, “uncontroversial” must be tied to expertise.<sup>355</sup> This does not mean that only compelled disclosures tied to expertise are permissible, but health and safety warnings informed by and consistent with expertise provide the strongest basis for regulation.<sup>356</sup> At the same time, it is important to acknowledge that the category of public health and safety regulations has traditionally been permissible.<sup>357</sup> In our view, this suggests that while courts should ask if the type of regulation is a traditional one, they should assess the content based on the current state of scientific expertise.<sup>358</sup> Indeed, the *NIFLA* majority’s own reference to the traditional regimes of malpractice and informed consent supports this reading.<sup>359</sup> As a matter of tort law, the substantive content of both custom and information necessary for informed consent is not set at some point in the past but rather reflects current custom and information about risks.<sup>360</sup> In effect, tradition has never

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354. See *supra* notes 268–271 and accompanying text.

355. See *Leading Cases, supra* note 310, at 352 (“Many scholars . . . have seized on the word ‘uncontroversial,’ . . . arguing that it should refer to the possibility of disagreement over a compelled disclosure’s truth, and some supporting heightened judicial scrutiny of compelled factual disclosures when the context or relevance of the disclosure is controversial.”).

356. See *Haupt supra* note 311, at 1253 (“Knowledge communities have specialized expertise and are closest to those affected . . . . The professions as knowledge communities have a fundamental interest in not having the state . . . corrupt or distort what amounts to the state of the art in their respective fields.”).

357. See *supra* Part II.C.

358. Of course, expertise is dynamic rather than static in its development over time. For example, we do not suggest that medical expertise as it existed at some point in the past ought to determine the content of contemporary regulation. Rather, the type of regulation (i.e., police powers public health and safety regulation) is one that has historically existed without raising constitutional concerns. See *supra* Part II.

359. See *supra* notes 135–136 and accompanying text.

360. See *Corbin, supra* note 347, at 1288 (“Standard informed consent requirements are neutral as to what decision the patient makes. They are designed to ensure that patients understand the proposed procedure, its physical risks and benefits, and the risks and benefits of the alternatives.”).

demanded that speech regulations affirm messages that are outdated in terms of the science.<sup>361</sup>

Thus, in the context of public health and safety disclosures, what constitutes a potential health risk ought to be decided based on expertise and the underlying scientific information that experts are interpreting, regardless of popular controversies surrounding the issue. Courts, accordingly, should uphold warnings that are consistent with expertise. In that regard, expertise is outside of the political process such that ordinary First Amendment doctrine—including in particular the requirement for content neutrality—does not apply.<sup>362</sup> Moreover, the argument that the disclosure requirement results from the state “taking sides” is an unhelpful way of addressing these types of disclosures.<sup>363</sup> The *CTIA* decision on remand attempted to cabin the reach of “uncontroversial,” as a plausible reading of *NIFLA* would demand.<sup>364</sup> At the same time, we do not think that this emphasis on the connection between history and expertise provides a sufficient normative explanation for the result in *NIFLA* where political divisiveness rather than expert knowledge seems to have driven the analysis. To be sure, as we have already noted, few issues are as divisive as abortion. And so the most plausible justification for *NIFLA* remains that it is primarily an abortion decision wrapped into a First Amendment claim. There may be some other topics, as we have discussed above, that are so controversial, and about which people hold such deeply held personal beliefs that perhaps the state should not be able to compel speech, even if it is supported by expertise. But we are fairly certain that whereas abortion is on the other

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361. See *id.* at 1333 (“On the contrary, providing misinformation precludes true informed consent.”).

362. See Haupt, *supra* note 225, at 539–43 (describing the democratic dimension of professional advice). See generally ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012) (developing a theory of First Amendment rights that seeks to explain both the need for the free formation of public opinion and the need for the distribution and creation of expertise).

363. See *supra* note 340 and accompanying text.

364. See *supra* notes 337–340 and accompanying text.



side of that boundary, the fact that sugary sodas cause cavities is not.<sup>365</sup>

Ultimately, the normative inquiry demonstrates that *NIFLA* must be interpreted quite narrowly. The *NIFLA* majority starts its analysis from the premise that content-based restrictions on speech are presumptively unconstitutional.<sup>366</sup> But as Justice Breyer noted, the requirement of content-neutrality is particularly problematic with respect to health and safety warnings, because they must be content-based by design: they warn of a specific risk.<sup>367</sup> The poison warning cannot say “Poison or not poison.” It also matters if the warning label is true or false. An aggressive form of content-neutrality, however, is not primarily the result of *NIFLA* but rather results from the doctrinal combination of *Reed* and *Sorrell* we discussed earlier.<sup>368</sup> There are contexts in which content-neutrality is inapposite.<sup>369</sup> In the area of health and safety disclosures, our laws have never demanded it and it ought to be rejected.<sup>370</sup> Prohibiting such warnings does not square with our constitutional tradition, nor does it permit self-governance, as it

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365. See Anna Schaefer, *What Does Soda Do to Your Teeth?*, HEALTHLINE, <https://perma.cc/7AU8-V2W2> (last updated Sept. 17, 2018) (summarizing scientific findings that soda causes tooth erosion and cavities).

366. See Nat’l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2371 (2018) (“As a general matter, such laws ‘are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.’” (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015))).

367. See *id.* at 2380 (Breyer, J., dissenting) (“Virtually every disclosure law could be considered ‘content based,’ for virtually every disclosure requires individuals ‘to speak a particular message.’” (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 175–76 (2015))); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 589 (2011) (Breyer, J., dissenting) (“Regulatory programs necessarily draw distinctions on the basis of content.”).

368. Cf. *Reed v. Town of Gilbert*, 576 U.S. 155, 177 (2015) (Breyer, J., concurring) (providing “examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place”).

369. See, e.g., Haupt, *supra* note 311, at 151 (suggesting that content neutrality should be rejected in the context of professional speech).

370. See *Reed*, 576 U.S. at 177 (Breyer, J., concurring) (providing the regulation of prescription drugs as an example of regulated speech that involves content discrimination but the presumption against constitutionality has no place (citing 21 U.S.C. § 353(b)(4)(A))).

disables consumers from using the disclosure law to protect themselves.

### CONCLUSION

The Supreme Court's current First Amendment doctrine has set public health and safety regulation and commercial speech on a collision course. Most recently, the *NIFLA* decision has prompted grave concerns about the constitutionality of compelled disclosures. The Ninth Circuit's en banc decision in *American Beverage II*—one of the earliest interpretations of *NIFLA* by a federal appellate court—vividly illustrates the consequences of the interpretive uncertainty created by the Court in the area of commercial speech more generally and compelled public health and safety warnings specifically. Judge Ikuta's concurrence, advancing an analytical approach we call "public health originalism," magnifies the risk, offering a profoundly misguided interpretation of *NIFLA*, that was made possible, in part, by the confusion created by *NIFLA*.

As we have shown, public health originalism fails on its own terms. Since the Constitution's founding, health and safety warnings have existed and have not been thought to clash with freedom of speech. Nor should they be so viewed today. *NIFLA* does not require public health originalism. Nevertheless, if as the *NIFLA* majority insists, and as we have shown, the decision does not call into question wide swaths of public health and safety regulation, it must be read quite narrowly. If it is not, the doctrinal and normative ailments that are afflicting First Amendment jurisprudence will begin to afflict our health.