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# Informed Consent as Compelled Professional Speech: Fictions, Facts, and Open Questions

Nadia N. Sawicki\*

Until recently, First Amendment jurisprudence was not considered particularly relevant to the context of physician-patient communication. As explained by First Amendment Scholar Robert Post, physicians regularly face liability on the basis of what they say or fail to say, “[w]ithout so much as a nod to the First Amendment . . . .”<sup>1</sup>

In the past few years, however, legislative efforts to define the contours of informed consent in the provision of abortion services have brought increased attention to the First Amendment’s role in medical practice. Many states have enacted statutes requiring physicians to provide women seeking abortions with specific information beyond the bounds of what would be required under common law—that having an abortion increases the risk of breast cancer, infertility, and suicide;<sup>2</sup> that medical abortion may be

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1. Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 950 (2007).

2. See *State Policies in Brief: Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (July 1, 2015), [https://www.guttmacher.org/statecenter/spibs/spib\\_MWPA.pdf](https://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf) (citing laws requiring disclosure of links between abortion and breast cancer, infertility, and psychological harm); S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(ii) (2015) (requiring disclosure of “[i]ncreased risk of suicide ideation and suicide”), *upheld* by Planned Parenthood of Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008). Many researchers dispute the validity of these required disclosures. See Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 CORNELL J.L. & PUB. POL’Y 1, 12–13 (2011).

reversed;<sup>3</sup> that a fetus is a unique human being with whom the woman enjoys a constitutionally protected relationship;<sup>4</sup> and visual descriptions of the fetus as displayed on an ultrasound.<sup>5</sup> Beyond the abortion context, new laws regulating physician speech on topics such as gun ownership,<sup>6</sup> sexual orientation change efforts,<sup>7</sup> medical marijuana,<sup>8</sup> and physician aid-in-dying<sup>9</sup> raise similar questions about the constitutional limits of state control over physician-patient communication. These laws call attention to the fact that physicians frequently engage in significant communicative activities.<sup>10</sup>

Unfortunately, the Supreme Court has provided only limited guidance on the intersection between physician speech and the First

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3. ARIZ. REV. STAT. ANN. § 36-2153(A)(2)(h)-(i) (2015); ARK. CODE ANN. § 20-16-1703(b)(1)(G) (2015). Most doctors agree that the science behind the abortion-reversal claim is erroneous. See Rick Rojas, *Arizona Orders Doctors to Say Abortions With Drugs May Be Reversible*, N.Y. TIMES, Apr. 1, 2015, at A11 (quoting the chairwoman of the Arizona section of the American Congress of Obstetricians and Gynecologists, who described the claim that medical abortion can be reversed as having “no data behind it, absolutely no science to show that this is an effective method”).

4. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b); N.D. CENT. CODE § 14-02.1-02 (2015); KAN. STAT. ANN. § 65-6709(b)(5), 65-6710 (2015).

5. LA. REV. STAT. ANN. § 40:1299.35.2(D)(2)(b) (2008) (amended 2013); N.C. GEN. STAT. § 90-21.85(a) (2011), *held unconstitutional* by *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); OKLA. STAT. tit. 63, § 1-738.3d(B) (2010), *held unconstitutional* by *Nova Health Sys. v. Pruitt*, 292 P.3d 28 (Okla. 2012); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2011), *preliminary injunction vacated* by *Tex. Med. Provs. Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012).

6. *Wollschlaeger v. Governor of Fla.*, 797 F.3d 859 (11th Cir. 2015) (upholding Florida law banning doctors from inquiring about patients’ gun ownership).

7. *Pickup v. Brown*, 740 F.3d 1208, 1236 (9th Cir. 2014) (upholding California ban on conversion therapy for children, applying rational basis review); *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014) (upholding New Jersey ban on conversion therapy as a regulation of professional speech that passes intermediate scrutiny). *See also* H.B. 2307, 78th Leg. Assemb., Reg. Sess. (Or. 2015); D.C. CODE §§ 7:1231.01-15 (2015) (prohibiting mental health professionals from engaging in sexual orientation change efforts with minors); *and* 405 ILL. COMP. STAT. ANN. 48/30 (2016) (same).

8. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (enjoining the federal government from revoking a physician’s license on the basis of the physician’s recommendation of medical marijuana; applying strict scrutiny).

9. *Final Exit Network, Inc. v. State*, 722 S.E.2d 722 (Ga. 2012) (holding GA. CODE ANN. § 16-5-5(b) (1994) to be an unconstitutional restriction of speech, applying strict scrutiny); *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014) (holding the State could prosecute an individual for assisting another in committing suicide, but not for encouraging or advising another to commit suicide; applying strict scrutiny).

10. *See* Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1318 (2016) (noting the frequency with which professionals engage in speech related to clients’ constitutional or legal rights).

Amendment.<sup>11</sup> In a case containing its most authoritative statement on the issue, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court dismissed a free speech challenge to Pennsylvania's abortion-specific informed consent statute in three brief sentences:

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, *see Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, *cf. Whalen v. Roe*, 429 U.S. 589, 603, 97 S.Ct. 869, 878, 51 L.Ed.2d 64 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.<sup>12</sup>

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11. *Id.* at 1335.

12. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992). Numerous commentators have criticized the Court's First Amendment analysis in *Casey* as incomplete. *See, e.g.*, Post, *supra* note 1, at 946 (referring to the Supreme Court's analysis of the First Amendment issues in *Casey* as "puzzling"); Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2356 (2012) (describing the Supreme Court's discussion of the First Amendment in *Casey* as "incredibly limited"); Sonia M. Suter, *The First Amendment and Physician Speech in Reproductive Decision Making*, 43 J.L. MED. & ETHICS 22, 24 (2015) (criticizing the *Casey* opinion on the grounds that it "failed to characterize the nature of the compelled speech, specify the strength of the First Amendment interest, or articulate the standard of review that applied"); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 773 (1999) (noting that the *Casey* passage "provides little guidance" on First Amendment issues); Scott W. Gaylord, *A Matter of Context: Casey and the Constitutionality of Compelled Physician Speech*, 43 J.L. MED. & ETHICS 35, 36 (2015) (describing courts' struggle to determine the proper standard of review to use in light of Supreme Court precedent); B. Jessie Hill, *Casey Meets the Crisis Pregnancy Centers*, 43 J.L. MED. & ETHICS 59, 60 (2015) (noting that the Supreme Court "has not addressed the First Amendment standards applicable to professional speech at length," and has discussed them "only obliquely"); Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1259 (2016) (describing the doctrinal basis of professional speech as "indeterminate at best," and describing the Supreme Court's pronouncements in *Casey* as "cryptic"). *See also* *Stuart v. Camnitz*, 774 F.3d. 238, 249 (4th Cir. 2014) ("The single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech to the extraordinary extent present here.").

Lower courts since *Casey* have struggled to identify the appropriate constitutional standards for reviewing state regulations of physician speech, and the result is an uncertain body of law with a great deal of room for creative argument.<sup>13</sup>

The purpose of this Article is to clarify the boundaries of physicians' First Amendment rights when communicating with patients. More specifically, this Article seeks to identify the most doctrinally consistent reading of Supreme Court free speech jurisprudence to understand what limits the First Amendment's protection against compelled speech imposes in the context of state informed consent mandates.<sup>14</sup> Its conclusion is that as a general matter, physicians have First Amendment rights that are independent of (and therefore supplement) their patients' constitutional rights, but that these rights are limited. The First Amendment permits states to impose physician speech mandates that are reasonably related to the regulation of medical practice—a regulatory sphere that has been interpreted quite broadly. The mandate must, however, compel disclosure of only “factual and uncontroversial” information; that said, there is a great deal of ambiguity about what this limitation means. Informed consent mandates that require physicians to communicate “ideological” speech are likely subject to strict scrutiny; though, again, the definition of what counts as “ideological” speech is widely disputed. And while an otherwise unconstitutional speech mandate will not be cured simply because a physician can disassociate himself from the objectionable speech, there is some uncertainty as to whether a physician's inability to disassociate himself from otherwise factual, uncontroversial, and ideological informed consent mandates might render those mandates unconstitutional under the Supreme Court's compelled speech jurisprudence.

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13. Zick, *supra* note 10, at 1298.

14. This Article focuses exclusively on compulsions of physician speech, rather than prohibitions, which might be evaluated under different constitutional standards. Suter, *supra* note 12, at 28; Post, *supra* note 1, at 980–81; Martha Swartz, *Physician-Patient Communication and the First Amendment After Sorrell*, 17 MICH. ST. J. MED. & L. 101, 113–14 (2012). *But see* *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (“There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance . . .”).

While the primary context in which this question has arisen is that of abortion-specific informed consent mandates, this inquiry has broader implications for informed consent law as a whole.<sup>15</sup> If the First Amendment imposes substantial limits on the type of physician speech that states can compel, then every state informed consent law—from the most benign to the most controversial—is potentially at risk. It is the Author’s hope that this Article’s point-by-point explanation of the facts, fictions, and open questions relating to this issue will provide readers with an accessible guide to First Amendment doctrine in the context of compelled physician speech.

FICTION: PHYSICIAN SPEECH RECEIVES NO PROTECTION UNDER THE FIRST AMENDMENT.

FACT: PHYSICIAN SPEECH DOES RECEIVE SOME PROTECTION UNDER THE FIRST AMENDMENT.

Healthcare providers in the United States have been heavily regulated since the 1800s. Most notably, physicians whose practice departs from the standard of care are subject to malpractice liability. Malpractice suits arise not only when injury results from a physician’s actions, but also when injury results from a physician’s words—for example, when the physician gives a patient incorrect medical advice, fails to tell a patient about a treatment option, or fails to inform a patient of risks associated with treatment. As Robert Post notes, “Without so much as a nod to the First Amendment, doctors are routinely held liable for malpractice for speaking or for failing to speak.”<sup>16</sup> In this light, it may first appear that physicians’ rights to protection from state speech regulations are nonexistent.<sup>17</sup>

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15. Other less-controversial contexts in which informed consent disclosure mandates have come under dispute include breast cancer counseling (Susan G. Nayfield et al., *Statutory Requirements for Disclosure of Breast Cancer Treatment Alternatives*, 86 J. NAT’L CANCER INSTIT. 1202 (1994); Nancy M. Capello, *Decade of ‘Normal’ Mammography Reports—The Happygram*, 10 J. AMER. COLL. RADIOL. 903 (2013); *Outdated Breast Cancer Informed Consent Law Repealed*, PENN. MED. SOC’Y, <http://www.pamedsoc.org/MainMenuCategories/Laws-Politics/News-from-Harrisburg/Legislation-News/Breast-cancer-informed-consent.html> (last updated Feb. 20, 2014); end-of-life care (Patient Self-Determination Act, 42 U.S.C. § 1395cc(f)(1) (2000); and dental amalgams (see Post, *supra* note 1).

16. Post, *supra* note 1, at 950.

17. *Id.* at 951 (noting that First Amendment values “seem to carry very little force” in the context of informed consent); Keighley, *supra* note 12, at 2348–49 (noting that circuit courts’

But while the practice of medicine is highly regulated, and while reasonable medical regulations are rarely challenged by health care providers, this does not lead to the conclusion that physicians lack First Amendment rights altogether.<sup>18</sup>

First, some government speech mandates would raise obvious First Amendment concerns.<sup>19</sup> If, for example, a state required that physicians tell their patients that the Patient Protection and Affordable Care Act (PPACA) infringes on their personal liberties, or that legislators who vote in favor of PPACA ought not be re-elected, surely the state would bear a significant burden in defending such a law against a First Amendment challenge.<sup>20</sup>

Moreover, First Amendment jurisprudence in the context of pure commercial speech, a category of speech that receives lesser constitutional protection than private speech, provides that even state mandates of messages that are not as politically or ideologically charged are subject to constitutional review under the *Zauderer* and *Central Hudson* standards.<sup>21</sup> For example, we would likely view “with constitutional alarm” any laws that prohibited physicians from communicating truthful information to patients, or compelled physicians to convey inaccurate or misleading information.<sup>22</sup> While courts and commentators have struggled to identify the precise boundaries of the distinction between commercial and professional

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decisions in abortion informed consent cases suggest that “physicians retain virtually no First Amendment rights while they are practicing medicine.”); Zick, *supra* note 10, at 1292 (noting that malpractice and professional licensing laws “are typically merely considered incidental regulations of speech, and as such are not generally subject to First Amendment challenge or scrutiny”); *id.* at 1297 (citing *Lowe v. SEC*, 472 U.S. 181, 232 (1985)).

18. See generally Post, *supra* note 1; Keighley, *supra* note 12; Halberstam, *supra* note 12; Zick, *supra* note 10.

19. Zick, *supra* note 10 at 1321–22 (citing examples).

20. See, e.g., Hill, *supra* note 12, at 65–66 (noting that ideologically charged compelled physician speech would be subject to a high standard of scrutiny). But see Post, *supra* note 1, at 952 (arguing that the reason for striking down a law compelling physicians to speak on political matters is because such a law would not count as regulation of professional speech; rather, it would “compel speech that is not understood as included within the practice of medicine,” and therefore be subject to *Wooley v. Maynard*, 430 U.S. 705 (1977)). See also *infra* text at notes 32–33.

21. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

22. Post, *supra* note 1, at 977–78.

speech,<sup>23</sup> many agree that professional speech ought to receive at least as much protection (if not more) than commercial speech.<sup>24</sup> As Daniel Halberstam writes, “[a]t a minimum, professional speech should be accorded no less protection than commercial speech . . . . Indeed, as compared to commercial speech, we might even expect the deeper relationship between physician and patient to lead, at least in some cases, to protection beyond that afforded to commercial speech.”<sup>25</sup>

Despite the intuitive appeal of the claim that professional speech should be entitled to at least the same level of protection as commercial speech, as a practical matter, the First Amendment protections physicians receive in the context of medical practice are likely to be somewhat limited. As Robert Post notes, “in the context of medical practice we insist upon competence, not debate, and so we subject professional speech to an entirely different regulatory regime.”<sup>26</sup> It would indeed be problematic to envision a degree of First Amendment protection that “would render ordinary informed consent doctrine constitutionally questionable, so that every malpractice case involving informed consent would suddenly entail large constitutional questions.”<sup>27</sup> The rest of this Article outlines the contours of these First Amendment protections, limited as they might be.

**FICTION:** PHYSICIANS’ FIRST AMENDMENT RIGHTS ARE MERELY DERIVATIVE OF THEIR PATIENTS’ RIGHTS.

**FACT:** PHYSICIANS HAVE FIRST AMENDMENT RIGHTS INDEPENDENT OF THEIR PATIENTS.

The claim that physicians’ First Amendment rights are merely derivative of their patients’ rights—rather than arising from the physicians’ own constitutional interests—is a common

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23. See generally *id.* at 974–78; Suter, *supra* note 12, at 23; Swartz, *supra* note 14, at 122.

24. See, e.g., Post *supra* note 1, at 977–78; Keighley, *supra* note 12, at 2367.

25. Halberstam, *supra* note 12, at 838.

26. Post, *supra* note 1, at 950.

27. *Id.* at 973. See also *id.* at 981 (“The history and importance of mandated medical disclosures is so entrenched that it cannot be called into constitutional question.”).



misconception, one grounded in the Supreme Court's language in *Whalen v. Roe*.<sup>28</sup>

*Whalen v. Roe*, one of the two cases cited in *Casey* as relevant to the issue of physicians' First Amendment rights, considered the constitutional implications of New York statutes requiring physicians to report patients' prescription drug information to the state. The petitioners in *Whalen* were patients bringing Fourteenth Amendment privacy claims, as well as physicians independently alleging that the laws violate the Fourteenth Amendment by "unnecessarily invad[ing] . . . the doctor's right to prescribe treatment for his patients solely on the basis of medical considerations."<sup>29</sup> In rejecting the physicians' claim, the Court held that it was "derivative from, and therefore no stronger than, the patients."<sup>30</sup>

Notably, the physicians' claim in *Whalen* was not a First Amendment claim about the right to speak, but rather a Fourteenth Amendment claim about the right to prescribe without undue interference by the state. And the Supreme Court's decision in *Casey*, while containing a brief citation to *Whalen*, by no means established that physicians' First Amendment rights are merely derivative of their patients' rights.

For example, consider a law like the one described earlier, requiring physicians to make statements opposing PPACA when meeting with patients. Any First Amendment objection the physician might have to such a law, and any constitutional challenge thereby brought, would surely be separate from her patients' right to privacy in medical decision-making.<sup>31</sup> A patient making medical decisions is

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28. 429 U.S. 589 (1977). See Gaylord, *supra* note 12, at 44 ("As *Whalen* instructs, the physicians' rights are derivative of her patients' . . . [b]ecause the physician's rights are derived from those of his or her patient, the doctor cannot receive greater protection under the First Amendment than the patient gets under the due process clause."); Halberstam, *supra* note 12, at 835 ("The First Amendment aspect of [the contraception and abortion] decisions has frequently gone unappreciated, in part . . . due to the Court's own statements implying that a physician's constitutional rights are to be subsumed under the rights of the patient to receive treatment.").

29. Appellees' Brief at \*5, *Whalen v. Roe*, 429 U.S. 589 (1977) (No. 75-839), 1976 WL 181401 (U.S.); *Whalen*, 429 U.S. at 604 (referring to physicians' argument that the laws "impair their right to practice medicine free of unwarranted state interference").

30. *Whalen*, 429 U.S. at 604.

31. Note, however, that the precise contours of a patient's constitutional rights to privacy in medical decision-making are far from clear. See, e.g., *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (assuming, without deciding, that a patient's constitutional liberty

not constrained in her choices if her physician makes political statements during their encounter; she may be offended, but unless the physician makes these statements against the patient's objections, the patient's right of autonomous decision-making is not infringed in any way. This scenario demonstrates that physicians' rights to speak freely can be infringed upon by state regulation without an associated infringement on the patients' constitutional rights.

The scenario above might, however, be challenged on the grounds that it does not in fact represent a case of compelled professional speech. Just because a person holds a license to practice medicine does not mean that every word she says will be considered "professional speech," even if she utters those words while providing medical care to a patient.<sup>32</sup> Similarly, not every state speech mandate affecting physicians should be treated as a regulation of professional speech; mandates of ideological or political statements, for example, may be better interpreted as compulsions of private speech subject to the dictates of *Wooley* and *Barnette*.<sup>33</sup> Thus, one might argue that while physicians have First Amendment rights as private speakers, independent of their patients, their rights to speak as professionals are necessarily derivative.

A compelling defense to this challenge is offered by Claudia Haupt, who theorizes a model of professional speech rights grounded in shared knowledge communities.<sup>34</sup> She argues that separate and apart from the patient's interest in decisional autonomy, physicians have an independent autonomy interest in ensuring that their speech is consistent with professional norms.<sup>35</sup> "The professional not only speaks for herself, but also as a member of a learned profession—that is, the knowledge community."<sup>36</sup> Therefore, the speaker has an "*autonomy interest in communicating her message according to the*

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interest under the Fourteenth Amendment encompasses the refusal of lifesaving medical treatment).

32. Post, *supra* note 1, at 952–53; Halberstam, *supra* note 12, at 843. Post offers, as examples, a spontaneous utterance made by a physician who twists his ankle, or a prayer said by a surgeon before an operation. Post, *supra* note 1, at 952 (concluding that only speech that "forms . . . the practice of medicine" counts as professional speech).

33. Post, *supra* note 1, at 952; Haupt, *supra* note 12, at 1299–1300.

34. See generally Haupt, *supra* note 12.

35. *Id.* at 1272–73.

36. *Id.*

*standards of the profession to which she belongs . . . . Physicians, for instance, thus cannot be compelled to speak in a way that undermines their profession's scientific insights.*<sup>37</sup>

Post offers another nuanced explanation of the imperfect overlap between physicians' First Amendment rights and patients' constitutional rights: he recognizes that physicians have independent First Amendment rights to freedom of speech, but acknowledges that the reasons they hold those rights may be more closely tied to the patient's right to accurate medical information than to traditional justifications offered in defense of the right to freedom of speech, such as the speaker's autonomy interests, the importance of maintaining a free marketplace of ideas, or the value of public discourse to democratic self-governance.<sup>38</sup> However, the fact that the values underpinning the importance of free speech vary depending on the speaker does not imply that a professional speaker lacks independent First Amendment rights. Under Post's view, therefore, while physicians may raise free speech challenges to state laws compelling informed consent speech, the patients' interests in obtaining accurate information surely has some relevance to the constitutional analysis.<sup>39</sup>

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37. *Id.* (emphasis added).

38. Post, *supra* note 1, at 977–80, 984–85. See also Keighley, *supra* note 12, at 2370–77 (discussing, among other issues, the limited applicability of the “marketplace of ideas” argument to context of physician-patient communication); Zick, *supra* note 10, at 1344–45 (“Commentators have argued that professional speech regulations generally implicate the free speech rights of both clients and professionals, and that coverage and protection for professional speech is justified under some or all of the principal First amendment theories—autonomy, self-government, and the search for truth.”).

39. Post, *supra* note 1, at 985 (arguing that while medical providers have a right to sue when they are forced to communicate misleading information, “the content of this right must be determined by the public’s interest in the receipt of unbiased, expert, medical information.”). See also Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015) [hereinafter Post, *Compelled Commercial Speech*] (discussing the informational function of commercial communication); Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, MINN. L. REV. at 8 (forthcoming 2016), draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2738808&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2738808&download=yes) [hereinafter Norton, *Truth and Lies in the Workplace*] (arguing that while individual professional speakers like physicians and attorneys “have substantial expressive interests of their own, governments—and courts—often choose to privilege their listeners’ autonomy, enlightenment and self-government interests in receiving accurate information”); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010) (citing *Zauderer* for the proposition that “First Amendment protection for commercial speech is justified in large part by the information’s value to

Whichever interpretation the reader may find more compelling, it is clear that while the patient's right to accurate information that fosters autonomous medical decision-making is one interest at stake in cases of compelled physician speech, it is far from the only relevant interest. The boundaries of a physician's right to speak freely may be impacted by the patient's informational needs, but this does not lead to the conclusion that the physician's First Amendment rights are purely derivative.

FACT: LAWS COMPELLING PHYSICIAN SPEECH SATISFY FIRST AMENDMENT SCRUTINY IF THEY ARE REASONABLY RELATED TO THE REGULATION OF MEDICAL PRACTICE.

OPEN QUESTION: HOW FAR DO THE STATE'S INTERESTS IN REGULATING THE MEDICAL PROFESSION EXTEND?

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court rejected the physicians' First Amendment challenge to Pennsylvania's informed consent requirements on the grounds that "the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State."<sup>40</sup> This is consistent with the Court's jurisprudence regarding government regulation of professional speech in the practice of the law, which holds that such regulation is permissible only if it aligns with the state's interest in

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consumers." *But see* Robert Post, *A Doctor Has Limited First Amendment Rights*, N.Y. TIMES (Aug. 21, 2014, 2:03 PM), <http://www.nytimes.com/roomfordebate/2014/08/20/when-do-doctors-have-the-right-to-speak/a-doctor-has-limited-first-amendment-rights> ("A doctor may sue to raise this constitutional issue, but it is misleading to imagine that the doctor is asserting her personal First Amendment rights to speak as she wishes. It is more accurate to imagine that she is a constitutional spokeswoman for the rights of her patients to be informed. This is analogous to the kind of First Amendment rights we apply in the domain of what is known as 'commercial speech.'").

40. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (internal citations omitted). This phrasing has been interpreted by some scholars to mean that physicians' First Amendment objections to compelled speech are subject to merely rational basis review. *See, e.g.*, Gaylord, *supra* note 12, at 36. *But see* Halberstam, *supra* note 12, at 837 (cautioning that the *Casey* passage should not be interpreted as requiring "the kind of rationality review used for economic regulations under the Due Process clause," but rather "a more stringent rationality review with some consideration of the First Amendment values 'implicated' in the communications between professional and client").

professional regulation as a whole.<sup>41</sup> In *Keller v. State Bar of California*, a case rejecting the California Bar's use of compulsory attorney dues to finance ideological activities, the Court held that bar dues could only be constitutionally used to fund activities germane to the state's interest in "regulating the legal profession and improving the quality of legal services."<sup>42</sup> Likewise, in *Legal Services Corp. v. Velazquez*, the Court rejected restrictions on federally funded attorney speech on the grounds that they "distort[ed] the legal system by altering the traditional role of the attorneys," thus tying the permissibility of speech restrictions to the state's interest in professional regulation.<sup>43</sup> In *Gentile v. State Bar of Nevada*, another attorney speech case, the Court wrote that "[w]hen a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question."<sup>44</sup> A similar theme was raised in *Zauderer*, when the Court tied the permissibility of compelling attorneys to disclose information in advertisements to the state's interest in preventing consumer deception about the terms under which attorney services are available.<sup>45</sup>

It is insufficient, however, to end this inquiry by concluding that the state's power to regulate physician speech is grounded in its rights to regulate the medical profession as a whole. Unless we understand the precise nature of the state's interest in medical regulation and examine how far the state's powers to regulate medicine might extend, this conclusion is incomplete.

States are authorized to regulate medicine and other professions by virtue of their police power, the unenumerated power to protect

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41. Hill, *supra* note 12, at 61–62 (noting that the Supreme Court has "drawn the line at government regulations that distort the speech of professionals in ways that do not appear to serve any traditional government interest in regulating the profession").

42. *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990).

43. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001).

44. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991). *See also* *Lowe v. SEC*, 472 U.S. 181, 228–29 (White, J. concurring) (noting that professional licensing and qualification standards do not violate the First Amendment even when the profession's work is communicative in nature).

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

the health, safety, and welfare of a state's citizenry.<sup>46</sup> As explained by the Supreme Court in *Dent v. West Virginia*, it is “[t]he power of the State to provide for the general welfare of its people [that] authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud.”<sup>47</sup> The goal of medical regulation as a whole is widely understood to be protecting patients by ensuring that physicians satisfy the standards considered appropriate—by legislators, licensing boards, and medical practitioners—to the medical profession.<sup>48</sup> Thus, “professional standards of care can provide at least partial guidance concerning the proper scope of professional speech regulations.”<sup>49</sup>

However, legislators and medical boards tend to interpret the boundaries of permissible medical regulation quite broadly. For example, in the realm of physician licensure and discipline, physicians are frequently disciplined for “unethical conduct,” even when that conduct takes place outside their professional lives.<sup>50</sup>

46. See Nadia N. Sawicki, *Character, Competence, and the Principles of Medical Discipline*, 13 J. HEALTH CARE L. & POL'Y 285, 289–90 (2010).

47. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

48. See, e.g., Sawicki, *supra* note 46, at 289–90, 294–97 (discussing goals of medical licensure and discipline); Lauren R. Robbins, Comment, *Open Your Mouth and Say 'Ideology': Physicians and the First Amendment*, 12 U. PA. J. CONST. L. 155, 165 (2009) (arguing that government regulation of medicine is intended to “ensure that physicians are practicing medicine within the profession's standards”). See also *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957) (holding that the criteria for professional licensure and discipline “must have a rational connection with the applicant's fitness or capacity to practice” his profession); *Dent*, 129 U.S. at 122 (“The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.”).

49. Zick, *supra* note 10, at 1299 (analyzing the Court's holding in *Milavetz Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010)).

50. The most common grounds for professional discipline of physicians fall into three categories: drug and alcohol abuse, criminal convictions, and unspecified “unprofessional conduct.” Sawicki, *supra* note 46, 303–04. Very few of these cases involve misconduct directly linked to medical practice—for example, in the context of substance abuse, most physicians are disciplined not for practicing medicine under the influence or abusing prescribing privileges, but rather for substance abuse problems not manifesting themselves in the professional sphere (such as driving under the influence). *Id.* at 304. Discipline on the basis of criminal conviction, likewise, is often based on conduct with no apparent impact on patient safety or public health,

Courts frequently uphold disciplinary actions against physicians who engage in character-related misconduct, even when that misconduct does not directly impact patients' medical care.<sup>51</sup>

This suggests that the requirement that physician speech mandates be reasonably related to the regulation of medical practice will not serve as much of a limiting factor in evaluating the constitutionality of these mandates. Between the spectrum of obviously impermissible speech mandates (such as compelled political or ideological speech) and mandates of purely medical information lie a host of other possible disclosure mandates that physicians will claim fall outside the state's authority, but that could reasonably be interpreted to relate to the regulation of medical practice.

FICTION: LAWS COMPELLING PHYSICIAN SPEECH SATISFY FIRST AMENDMENT SCRUTINY ONLY IF THEY REQUIRE DISCLOSURE OF INFORMATION THAT IS TRUTHFUL, NOT MISLEADING, AND RELEVANT TO PATIENTS.

FACT: LAWS COMPELLING PHYSICIAN SPEECH SATISFY FIRST AMENDMENT SCRUTINY ONLY IF THEY REQUIRE DISCLOSURE OF PURELY FACTUAL AND UNCONTROVERSIAL INFORMATION.

OPEN QUESTION: WHAT QUALIFIES AS "PURELY FACTUAL AND UNCONTROVERSIAL" INFORMATION?

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court held that informed consent mandates for abortions passed constitutional muster so long as the state was only compelling physicians to provide "truthful and not misleading" information "relevant" to a woman's decision.<sup>52</sup> This standard has since been used by lower courts in evaluating abortion-related informed consent requirements, and correctly so. But it is essential to recognize that the "truthful, not misleading, and relevant" requirement is a condition on the constitutionality of disclosure laws under the Fourteenth Amendment's "undue burden" standard, rather than a condition of the

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such as personal income tax fraud, shoplifting, public drunkenness, and violence against friends, family, or strangers outside the treatment context. *Id.* at 304–05.

51. *Id.*

52. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882–83 (1992).

First Amendment.<sup>53</sup> Therefore, in cases where the physician's First Amendment rights are not expressed in a context of a woman's Fourteenth Amendment right (as where states impose informed consent mandates in non-reproductive contexts), the "truthful, not misleading, and relevant" requirement would not apply.

To understand the requirements for evaluating physician speech mandates outside the abortion context, we must turn instead to *Zauderer*, a compelled-speech case dealing with attorney advertising.<sup>54</sup> In *Zauderer*, the Court upheld a state law requiring attorneys to include "purely factual and uncontroversial information" about the terms of their services in advertising.<sup>55</sup> Although attorneys are professionals, the Court described this case as one dealing with commercial speech, likely because the case dealt exclusively with attorneys' commercial advertisements rather than their speech in communications with clients.<sup>56</sup> For the reasons noted above, however, the Court would likely treat professional speech as being entitled to at least the same level of protection as commercial speech, if not more. Therefore, courts facing First Amendment challenges to

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53. *Id.* at 883 (holding that the informed consent requirements about fetal characteristics and post-pregnancy assistance "cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden" in its analysis of the patients' Fourteenth Amendment claims). See generally Post, *supra* note 1, at 945–46 (noting that only after introducing the "truthful and not misleading" standard in the context of the patients' due process claim did the court turn to the First Amendment arguments); Keighley, *supra* note 12, at 2354 *et seq.* (noting that the *Casey* opinion's "brief treatment of the First Amendment issues" arose only after its discussion of the Fourteenth Amendment undue burden standard and provided "minimal information about how the Court views the interplay between the state's ability to regulate the medical profession and physicians' First Amendment rights"); Suter, *supra* note 12, at 23–24 (noting the distinction between the "bulk of the plurality opinion," which addressed the substantive due process issue and the application of the undue burden standard to the informed consent law, and the "mere two sentences" of discussion of the First Amendment issues).

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

55. *Id.* Some commentators have interpreted *Zauderer*'s requirement that the disclosure be factual as being linked to the requirement that a disclosure be a reasonable regulation of commercial activity. See Post, *supra* note 1, at 971 (arguing, with respect to abortion informed consent laws, "[i]f the disclosures required . . . are false, [the state] can have no legitimate interest in mandating them, and they are unconstitutional because irrational").

56. Note that one lower court has questioned whether the *Zauderer* test is even applicable outside the advertising context. *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015) ("[T]he Supreme Court's opinion in *Zauderer* is confined to advertising, emphatically and, one may infer, intentionally.").



physician speech mandates should, at the very least, evaluate the compelled speech to see if it is “purely factual and uncontroversial.”<sup>57</sup> This, in fact, is the approach that the Third Circuit took in *Casey*.<sup>58</sup>

Robert Post notes that *Zauderer*'s limitation that disclosure mandates be “factual and uncontroversial” may not be an appropriate test in the professional speech context, given that professionals by their very nature are required to give their clients opinions (legal opinions, medical opinions, etc.) in addition to providing them with facts.<sup>59</sup> Thus, professional regulations and malpractice standards necessarily implicate the ways in which professionals convey opinions to their clients. However, I would suggest that the existence of liability standards for medical malpractice in contexts where physicians' communications are implicated does not negate the applicability of the *Zauderer* standard to professional contexts. Malpractice law imposes liability for physician speech that falls outside the standard of care, either because a physician is providing incorrect information or dangerous opinions (in which case the threat of liability operates as a restriction on speech), or because the physician fails to provide information as part of informed consent (in

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57. There remains some uncertainty, however, as to whether the *Zauderer* test applies only in contexts where the state's interest is preventing consumer deception, or where other state interests might justify use of the *Zauderer* standard. The Supreme Court has not clarified this issue. Compare *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014) (agreeing with *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213 (2012) that the *Zauderer* test is “limited to cases in which disclosure requirements are ‘reasonably related to the State’s interest in preventing deception of consumers’”) with *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (overruling *Nat'l Ass'n of Mfrs.*, holding that the use of *Zauderer* is not limited to cases where the state's interest is preventing consumer deception). See also Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 542 (2012) (concluding that the “curing consumer deception” standard is only one of many permissible government goals). For the purposes of this Article, it is assumed that *Zauderer* applies more broadly. See *Am. Meat Inst.*, 760 F.3d at 22 (“The language with which *Zauderer* justified its approach, however, sweeps far more broadly than the interest in remedying deception.”).

58. *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 705–06 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992) (reviewing Pennsylvania's abortion informed consent requirements under the *Zauderer* standard). One might question whether there is a practical difference between *Casey*'s “truthful, not misleading and relevant” standard and *Zauderer*'s “factual and uncontroversial” standard. While the two are indeed similar, my interpretation is that the *Zauderer* standard may more limited in what it allows, given how broadly the definition of “controversial” might be construed.

59. Email from Robert Post, Dean and Sol & Lillian Goldman Professor of Law, Yale Law School, to author (Sept. 2, 2015, 09:58 EST) (on file with author).

which case the threat of liability effectively operates as a speech mandate requiring disclosure of certain types of factual information). But in no way does the modern common law of malpractice or informed consent require that physicians share specific opinions mandated by the state on a particular topic. And to the extent that statutory disclosure mandates might require disclosure to all patients of opinions not verifiable by factual inquiry—for example, “The best treatment in your case would be mastectomy combined with chemotherapy”—those would certainly be constitutionally problematic. Therefore, it is likely that an inquiry into the constitutionality of a professional speech mandate would be subject to *Zauderer*’s “factual and uncontroversial” requirement.

This, of course, leaves us with the open question of what counts as “purely factual and uncontroversial information,” and who bears the burden of proving whether this requirement is or is not satisfied.<sup>60</sup> The Supreme Court has provided little guidance for determining whether a given disclosure is “factual and uncontroversial” under the *Zauderer* standard, as opposed to non-factual or controversial, and therefore subject to a different standard of review. In *Zauderer*, the Court did not define “factual and uncontroversial,” but merely concluded that disclosures of clients’ cost obligations under contingent fee arrangements “easily pass[] muster” under this standard.<sup>61</sup> In *Milavetz*, a more recent case applying *Zauderer* to a federal requirement that bankruptcy law firms describe themselves as “debt relief agencies” in advertisements, the Court evaluated whether the mandated disclosure was reasonably related to the state’s interests

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60. For further discussion of the evidentiary and burden-shifting issues, see Post, *supra* note 1, at 972 (arguing that proving falsity under a deferential standard of review “is exceedingly difficult, if not impossible,” and suggesting that the First Amendment shifts the burden of defending mandated disclosures to the state) and *id.* at 988 (discussing “exactly how divided expert opinion must be before the Constitution will permit the political system to override otherwise dominant or officially endorsed professional beliefs”).

61. *Zauderer*, 471 U.S. at 652. Cf. *Nat’l Ass’n of Mfrs.*, 800 F.3d at 527 (questioning whether the Supreme Court in *Zauderer* intended “factual and uncontroversial” to state a legal standard, or whether the reference was merely a descriptive statement about the disclosure requirement in that case).

without even analyzing if the required disclosure was factual and uncontroversial.<sup>62</sup>

In the absence of further guidance from the Court about what types of contested disclosures qualify as factual and uncontroversial, lower courts have been challenged to make such determinations on their own.<sup>63</sup> A number of appellate courts have addressed this issue in both commercial and professional speech cases. While there is clear agreement that a mandated disclosure fails *Zauderer*'s "factual and uncontroversial" requirement if it requires a speaker to communicate subjective opinions rather than facts, other issues are less clear.<sup>64</sup>

### A. *Matters of Public Debate*

The first question frequently addressed by courts in these contexts is whether accurate factual disclosures mandated about *subjects* that are matters of public controversy or debate might be deemed "controversial" and therefore outside the scope of *Zauderer*. In the anomalous case of *Evergreen Ass'n, Inc. v. City of New York*, the Second Circuit addressed a New York law requiring crisis pregnancy

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62. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 248–53 (2010). However, the Court in *Milavetz* seemed to acknowledge that, if the term "debt relief agencies" were found to be misleading, the state could not reasonably argue that mandating the use of this phrase was necessary to serve its interest in preventing consumer deception. *Id.* at 250–53.

63. Note, though, that most courts considering mandated disclosure laws have dealt with fairly straightforward disclosures of purely factual information. *See, e.g.*, *N.Y. State Rest. Ass'n v. NYC Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (holding that a law requiring restaurants to post calorie information on their menus required disclosure of factual information and was therefore subject to *Zauderer* review); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (treating labeling requirements about the content of and disposal methods for lamps containing mercury as requiring disclosure of factual commercial information); *United States v. Wenger*, 427 F.3d 840 (10th Cir. 2005) (treating disclosure of status as a paid stock promoter and financial compensation as meeting *Zauderer*'s factual and uncontroversial requirement).

64. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), *adhered to on reh'g sub nom.*, *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), *overruled by* *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (holding that the phrase "conflict free" is a "metaphor that conveys moral responsibility," and one with which an issuer might strongly disagree); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966–67 (9th Cir. 2009) (holding that requiring an "18" label on violent video games "does not convey factual information" unless the game can be legally classified as "violent"), *aff'd sub nom.*, *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) (note, however, that the Supreme Court did not address this issue on appeal); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (holding that an "18" sticker "ultimately communicates a subjective and highly controversial message—that the game's content is sexually explicit").

centers to disclose, among other things, whether they provide referrals for abortion, emergency contraception, or prenatal care (Services Disclosure) and whether they have a licensed medical provider on staff (Status Disclosure).<sup>65</sup> Although these disclosures appear on their face to be purely factual in nature—that is, they can be verified or rejected objectively by reference to undisputed facts—the court rejected the Services disclosure as unconstitutional on the grounds that it “mandates discussion of controversial political topics”<sup>66</sup> and “requires centers to mention controversial services that some pregnancy services centers . . . oppose.”<sup>67</sup>

However, the Court of Appeals for the District of Columbia in *American Meat Institute v. USDA* took a different view when considering a USDA rule requiring country-of-origin labels on meat products.<sup>68</sup> Neither party disputed that the information required on the label was factual, and the court squarely rejected the idea that the labels might be deemed controversial because they require communication of “a message that is controversial for some reason other than a dispute about simple factual accuracy.”<sup>69</sup> A dissenting opinion in *National Ass’n of Manufacturers v. SEC* agreed, interpreting the court’s decision in *American Meat Institute* to mean that a required disclosure of undisputed facts that somehow “touches on a ‘controversial’ topic . . . cannot render the disclosure ‘controversial’ in the sense meant by *Zauderer*.”<sup>70</sup> Numerous other courts and commentators have likewise concluded that the question

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65. *Evergreen Ass’n, Inc. v. City of N.Y.*, 740 F.3d 233 (2d Cir. 2014), *cert. denied sub nom. Evergreen Ass’n, Inc. v. City of N.Y.*, N.Y., 135 S. Ct. 435 (2014), and *Pregnancy Care Ctr. of N.Y. v. City of N.Y.*, N.Y., 135 S. Ct. 435 (2014).

66. *Id.* at 250. The court distinguished the Services Disclosure from the Status Disclosure, which it upheld, describing it as a “brief, bland, and non-pejorative disclosure.” *Id.*

67. *Id.* at 245 n.6.

68. *Am. Meat Inst. v. USDA*, 760 F.3d 18 (2014). The USDA rule required disclosing the location of each step of the meat production process: “For example, meat derived from an animal born in Canada and raised and slaughtered in the United States, which formerly could have been labeled ‘Product of the United States and Canada,’ would now have to be labeled ‘Born in Canada, Raised and Slaughtered in the United States.’” *Id.* at 21.

69. *Id.* at 27.

70. *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 538 (D.C. Cir. 2015) (Srinivasan, J., dissenting). However, the majority opinion in this case, when discussing the challenges in understanding “uncontroversial” disclosures to be those based on opinion rather than facts, seemingly interpreted the factual country-of-origin labels in *American Meat Institute* as being “controversial” for reasons other than factual accuracy. *Id.* at 528.

of whether a required disclosure is “controversial” speaks only to its factual accuracy, rather than its mere relevance to a topic of public debate.<sup>71</sup> Indeed, this interpretation seems most consistent with the Supreme Court’s statements in the context of state restrictions on speech, where the Court has held that public controversy surrounding accurate factual statements do not render that speech non-commercial and therefore subject to a higher standard of scrutiny.<sup>72</sup>

### *B. Confusing Language and Statutory Definitions*

A second question courts have asked about *Zauderer*’s “factual and uncontroversial” requirement is whether a mandated disclosure might violate that test if it uses language that is misleading, confusing, or might lead to consumer misunderstanding because it relies on a statutory definition that differs from the plain meaning of the language used.<sup>73</sup> In *National Ass’n of Manufacturers v. SEC*, for example, the Court of Appeals for the District of Columbia considered an SEC rule requiring firms to describe their products as “not DRC conflict free” if they are made from minerals originating in

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71. See Post, *Compelled Commercial Speech*, *supra* note 39, at 910 (arguing that “mandated factual disclosures” should not be treated as constitutionally suspect simply “because they occur in circumstances of circumstances of acrimonious political controversy,” and that *Zauderer*’s “uncontroversial” requirement would “seem best interpreted as a description of the epistemological status of the” required disclosure); Norton, *Truth and Lies in the Workplace*, *supra* note 39, at 40–41 (“An approach more consistent with the protection of listeners’ First Amendment interests would thus understand ‘factual and uncontroversial’ in this context to refer to assertions that are provable (or disprovable) as a factual matter in the same way required of contested assertions in defamation, perjury, and antifraud law.”); Gaylord, *supra* note 12, at 49 n.91 (“In the context of professional speech, ‘uncontroversial’ cannot prohibit disclosures related to controversial topics—otherwise *Casey* would have been decided differently.”); Grocery Mfrs. Ass’n v. Sorrell, No. 5:14-cv-117, 2015 WL 1931142, at \*25-26 (D. Vt. Apr. 27, 2015) (holding that compelled disclosures may be interpreted as “controversial” only when they are opinion-based, and not when they purely factual, despite the fact that the disclosure laws were enacted in the context of “partisan debate”).

72. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 n.5 (1980) (refusing to “grant broad constitutional protection to any advertising that links a product to a current public debate”); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983) (citing *Central Hudson* for the proposition that “advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech”).

73. See generally Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1330 (2014) (referring to the invocation of a statutory definition “to transform a plainly ideological statement into a neutral fact” as “sleight of hand”).

the Congo or other countries, where such minerals finance or benefit armed groups in those countries.<sup>74</sup> The court concluded that “it is far from clear that the description at issue—whether a product is ‘conflict free’—is factual and non-ideological.”<sup>75</sup>

The label “[not] conflict free” is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility.<sup>76</sup>

On rehearing, the court again concluded that “the statutory definition of ‘conflict free’ cannot save this law.”<sup>77</sup> In other words, although the phrase “DRC conflict free” was defined in a factual and objectively verifiable way,<sup>78</sup> the phrase could be understood to communicate a judgment about moral responsibility, and therefore fall outside of *Zauderer*’s scope. Robert Post interprets the court’s interpretation as grounded not in the question of whether the mandated disclosure communicates facts, but whether a “reasonable audience” would “understand the phrase to mean a confession of ethical taint and

74. *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 376 (D.C. Cir. 2014), *adhered to on reh’g sub nom.*, *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), *overruled on other grounds* by *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014).

75. *Id.* at 371. *See also* *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (“In our initial opinion we stated that the description at issue—whether a product is ‘conflict free’ or ‘not conflict free’—was hardly ‘factual and non-ideological.’ . . . We see no reason to change our analysis in this respect.”).

76. *Nat’l Ass’n of Mfrs.*, 800 F.3d at 530.

77. *Id.* at 529–30. *But see id.* at 532 (Srinivasan, J., dissenting) (arguing that the meaning of the phrase “conflict free” seems “quite apparent in context,” and that a consumer could “with little effort, learn that it carries a specific meaning prescribed by law”).

78. *Conflict Minerals*, 77 Fed. Reg. 56,274, 56,364 (Sept. 12, 2012) (“The term DRC conflict free means that a product does not contain conflict minerals necessary to the functionality or production of that product that directly or indirectly finance or benefit armed groups, as defined in paragraph (d)(2) of this item, in the Democratic Republic of the Congo or an adjoining country. Conflict minerals that a registrant obtains from recycled or scrap sources, as defined in paragraph (d)(6) of this item, are considered DRC conflict free.”); 15 U.S.C. § 78m(p)(1)(D) (2012) (“[A] product may be labeled as ‘DRC conflict free’ if the product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country.”).

culpability.”<sup>79</sup> Notably, even the dissenting opinion in *National Ass’n of Manufacturers v. SEC*, while disagreeing with the majority’s conclusion that the phrase “conflict free” might be misleading, agreed that some statutorily defined terms could be misleading enough to violate *Zauderer*’s test.<sup>80</sup>

Other federal appellate courts agree. In a dispute about an ordinance requiring cell phone sellers to disclose information to consumers about radiofrequency emissions, the Ninth Circuit in *CTIA—The Wireless Ass’n v. City & County of San Francisco* held that while the “factoids” required to be disclosed were all “literally true” in that they had some scientific basis, their overall meaning was misleading by omission.<sup>81</sup> Among other concerns, the court noted that the word “risk” was “being used . . . in a way different from the usual way”; that the “overall impression” left by the required disclosures was “that cell phones are dangerous and that they have somehow escaped the regulatory process”; and that the classification of a “possible carcinogen” will be misunderstood by the “uninitiated . . . as more dangerous than it really is.”<sup>82</sup> Additional support for this interpretation comes from the Supreme Court’s own language in *Milavetz*, which considered the possibility that the phrase “debt relief agency” might be “misleading,” “confusing,” or likely to be misunderstood as relevant to the question of whether the disclosure

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79. Post, *Compelled Commercial Speech*, *supra* note 39, at 905–06. See also Daniel E. Herz-Roiphe, *Stubborn Things: An Empirical Approach to Facts, Opinions, and the First Amendment*, 113 MICH. L. REV. FIRST IMPRESSIONS 47 (2015) (empirical study of whether consumers believed the statements mandated in cases like *Am. Meat Inst.*, *NAM*, *United Foods*, *Arnold*, and *RJ Reynolds* constituted pure fact or “some opinion”).

80. *Nat’l Ass’n of Mfrs.*, 800 F.3d at 540 (Srinivasan, J., dissenting) (“None of this is to grant the government carte blanche to compel commercial speakers to voice any prescribed set of words as long as the words are defined by statute or regulation. *Zauderer* does not grant the government that kind of license. The government, for instance, could not misleadingly redefine ‘peace’ as ‘war,’ and then compel a factual statement using the term ‘peace’ on the theory that a consumer could consult the government’s redefinition to learn that ‘peace’ in fact means ‘war’ in the specific circumstances . . . A consumer would have no reason to suppose that the word ‘peace’ is a stylized term of art misleadingly redefined to be something far different from its ordinary meaning.”).

81. *CTIA—The Wireless Ass’n v. City & Cnty. of San Francisco*, 827 F. Supp. 2d 1054, 1060–62 (9th Cir. 2012).

82. *Id.* at 1062–63.

law was reasonably related to the state's interest, as required by *Zauderer*.<sup>83</sup>

In the context of reproductive care, however, lower courts have taken a different approach. These courts instead suggest that words or phrases likely to be misinterpreted by patients to have a moral or metaphysical meaning (like the phrase “human being”) are not constitutionally problematic as long as they have a factually based statutory definition.<sup>84</sup> In South Dakota, for example, a statute required physicians to advise patients seeking an abortion that “the abortion will terminate the life of a whole, separate, unique, living human being.”<sup>85</sup> The statute defined the term “human being” as “individual living member of the species of *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation.”<sup>86</sup> At issue was whether the required disclosure was scientifically and factually accurate. The Eighth Circuit in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds* upheld the disclosure, stating that “the truthfulness and relevance of the [human being] disclosure . . . generates little dispute” because it is based on a biological definition.<sup>87</sup> While acknowledging that “[t]aken in isolation,” the human being disclosure “certainly may be read to make a point in the debate about the ethics of abortion,” the court held that in conjunction with the statutory definition of “human being,” the disclosure satisfied constitutional scrutiny.<sup>88</sup>

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83. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250–53 (2010). Note, however, that the Court did not consider the question of whether the required disclosures were “factual and uncontroversial” under *Zauderer*.

84. While the cases described below analyzed the meaning of the mandated disclosures by reference to whether they were “truthful” and “not misleading” under the *Casey* standard, rather than “factual and uncontroversial” under the *Zauderer* standard, their reasoning would apply in both contexts.

85. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2014).

86. S.D. CODIFIED LAWS § 34-23A-1(4) (2006).

87. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 735–36 (8th Cir. 2008).

88. *Id.* The dissenting opinion in *Rounds*, however, vigorously objected to this conclusion.

Although a legislature may choose to give words its own unique definition, it cannot establish by fiat that the term “human being” has only biological connotations, for the constitutional analysis of whether the mandated statements convey factual truths or contestable ideology is not controlled by the wording of the Act.



The District Court for the Southern District of Indiana reached a similar conclusion in *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Department of Health*, a challenge to an Indiana statute requiring physicians to inform women seeking abortions that “human physical life begins when a human ovum is fertilized by a human sperm.”<sup>89</sup> Unlike in *Rounds*, the phrase “human physical life” was not statutorily defined; thus the court turned to the words’ plain meaning.<sup>90</sup> The court described as “significant” the inclusion of “the biology-based word ‘physical’” and concluded that the mandated statement did not require physicians to address “whether the embryo or fetus is a ‘human life’ in the metaphysical sense.”<sup>91</sup>

### *C. Omissions and One-Sided Disclosures*

A third relevant question that some courts have considered is whether accurate factual information might nevertheless violate the “factual and uncontroversial” requirement if it is too one-sided, or omits other relevant information necessary to give context. However, there is little consensus on this issue. In *American Meat Institute*, for example, the court ultimately upheld country-of-origin labeling requirements as being “uncontroversial,” but recognized that “some required factual disclosures could be so one-sided or incomplete that they would not qualify as ‘factual and uncontroversial’” under *Zauderer*.<sup>92</sup> The Northern District of California in *CTIA* likewise understood that some disclosures might fail the *Zauderer* test if they

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*Id.* at 744 (Murphy, J., dissenting). See also *Eubanks v. Brown*, 604 F. Supp. 141 (W.D. Ky. 1984), a pre-*Casey* case considering a Kentucky statute defining “human being” as “any member of the species homo sapiens from fertilization until death.” The court in *Eubanks* found this definitional provision unconstitutional on the grounds that it “incorporate[s] into the law a definition of life as beginning at fertilization, a theory which the Supreme Court . . . has held may not be used by a state in a statute to justify its regulation of abortion.” *Id.* at 144.

89. *Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 794 F. Supp. 2d 892, 914 (S.D. Ind. 2011), *aff’d in part, rev’d in part sub nom.* *Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 699 F.3d 962 (7th Cir. 2012).

90. *Id.* at 917.

91. *Id.* at 918.

92. *Am. Meat Inst. v. USDA*, 760 F.3d 18, 27 (D.C. Cir. 2014).

were “misleading by omission.”<sup>93</sup> In contrast, in a case challenging the FDA’s graphic tobacco labeling regulations, the Sixth Circuit in *Discount Tobacco City & Lottery, Inc. v. United States* held that although the labeling requirements were “inherently persuasive” and not “neutral,” they did in fact describe “the incontestable health consequences of using tobacco” and were therefore appropriate for analysis under *Zauderer*.<sup>94</sup>

In summary, there appears to be wide variation in how lower courts approach the issue of what constitutes “factual and uncontroversial” speech under *Zauderer*. The only firm conclusion that can be reached is that mandated disclosures of subjective opinions do not qualify as “factual” information under *Zauderer*. A somewhat more tentative conclusion is that compelled statements of factually undisputed information are unlikely to run afoul of *Zauderer* simply because that information deals with topics of public debate or controversy. However, greater uncertainty remains as to whether language whose plain meaning differs from its statutory definition, or information that is one-sided, fails the factual and uncontroversial test.

**FICTION:** IN THE MEDICAL CONTEXT, THE STATE MAY COMPEL PHYSICIANS TO SPEAK ON IDEOLOGICAL ISSUES.

**FACT:** EVEN IN THE MEDICAL CONTEXT, COMPELLED IDEOLOGICAL SPEECH IS SUBJECT TO STRICT SCRUTINY.

**OPEN QUESTION:** WHAT QUALIFIES AS IDEOLOGICAL SPEECH?

In *Summit Medical Center of Alabama, Inc. v. Riley*, physicians raised a First Amendment challenge to a statute requiring them to provide patients seeking abortions with “ideologically objectionable” written materials promoting childbirth over abortion.<sup>95</sup> The District Court for the Middle District of Alabama squarely rejected the physicians’ First Amendment claims, dismissing them as being

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93. *CTIA—The Wireless Ass’n v. City & Cnty. of San Francisco*, 827 F. Supp. 2d 1054, 1062 (N.D. Cal. 2011).

94. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 526–37 (6th Cir. 2012).

95. *Summit Med. Ctr. of Ala., Inc. v. Riley*, 274 F. Supp. 2d 1262, 1271 (M.D. Ala. 2003).

precluded by *Casey*.<sup>96</sup> According to the court, the Supreme Court in *Casey* “expressly rejected the notion that a state may require distribution only of ideologically neutral information regarding abortion.”<sup>97</sup>

The District Court’s conclusion in *Summit* flies in the face of decades of First Amendment jurisprudence, which consistently holds that state mandates of ideological speech are subject to the strictest level of scrutiny and are unlikely to ever pass constitutional muster.<sup>98</sup> This doctrinal conclusion is no different when the ideological speech is being compelled in the physicians’ office as part of informed consent to abortion, and *Casey* does not so hold.

As explained earlier, *Casey*’s discussion of the constitutional standard applicable to compelled physician speech was incomplete at best. The Court’s only mention of potential ideological issues was in its discussion of the Fourteenth Amendment implications of the informed consent law; it held that the state may enact laws “designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . . .”<sup>99</sup> But in its discussion of the First Amendment implications of the Pennsylvania informed consent statute, the Court did not use the term “ideological” in describing these state preferences, did not reach a conclusion as to whether they were “ideological” for constitutional purposes under the

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96. *Id.*

97. *Id.* at 1270.

98. *See, e.g.,* *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (“[W]here the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”); *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”). *See also* Corbin, *supra* note 73, at 1287 (explaining that mandates of ideological speech are treated with greater suspicion than mandates of factual speech); Nicole B. Casarez, *Don’t Tell Me What to Say: Compelled Speech and the First Amendment*, 63 MO. L. REV. 929, 948 (1998) (“The fact that the First Amendment prohibits the state from compelling speech of a religious, political, or ideological nature has been determined beyond question.”).

99. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992).

precedent in *Wooley v. Maynard*,<sup>100</sup> and did not discuss the constitutional implications of ideological speech mandates in the professional context.

Notably, the Third Circuit below had held that while the Pennsylvania informed consent statute did not compel ideological speech, if it had, it would have been subject to a higher standard of scrutiny.<sup>101</sup> But the Supreme Court itself did not address this issue on appeal, declining to provide further analysis of whether compelling physicians to speak ideological messages would be subject to the same level of First Amendment scrutiny as the ideological speech in *Wooley*. As Jennifer Keighley writes, “[w]hile the joint opinion’s undue burden analysis makes clear that the information in the state pamphlet was designed to encourage women to choose childbirth over abortion, [it] never addresses how the state’s ideological purpose, though permissible under the undue burden framework, interacted with physicians’ First Amendment rights.”<sup>102</sup> Thus, *Casey* should not be interpreted as permitting compelled ideological speech in the informed consent process.<sup>103</sup>

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100. *Id.* at 884 (citing *Wooley v. Maynard*, 430 U.S. at 713 (applying strict scrutiny)). *Wooley v. Maynard* involved a First Amendment challenge to a New Hampshire law making it a crime to obscure the words “Live Free or Die” on state license plates. *Wooley v. Maynard*, 430 U.S. 705. The Supreme Court found the law unconstitutional, holding that “where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.” *Id.* at 706–07.

101. *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 705–06 (3d Cir. 1991), *aff’d in part, rev’d in part*, 505 U.S. 833 (1992) (noting that under *Zauderer*, “[d]isclosure requirements are permissible so long as they are not a state attempt to prescribe what is ‘orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein,’” and concluding that none of the Pennsylvania informed consent requirements have this intent or effect).

102. Keighley, *supra* note 12, at 2356.

103. *Id.* at 2356; Robbins, *supra* note 48, at 175 (noting that the parts of *Akron and Thornburg* that address the constitutional implications of compelled ideological speech in the abortion context should still be considered good law); *Stuart v. Loomis*, 992 F. Supp. 2d 585, 588 (M.D.N.C. 2014) *aff’d sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (“The Supreme Court has never held that a state has the power to compel a health care provider to speak, in his or her own voice, the state’s ideological message in favor of carrying a pregnancy to term . . . .”); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (“*Casey* and *Gonzales* establish that, while the State cannot compel an individual simply to speak the State’s ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to

There are a few ways to explain the Supreme Court's silence in *Casey* about the First Amendment implications of ideological communications in the informed consent process. First, as recognized by Keighley,<sup>104</sup> the Pennsylvania informed consent law did not require physicians to convey the state's pro-childbirth message in their own words; it merely required physicians to offer patients the opportunity to receive this message as presented in a state pamphlet.<sup>105</sup> It is possible that the Court in *Casey* did not consider the requirement that physicians offer patients a state pamphlet to be compulsion to the same degree as *Wooley's* requirement that private automobiles display a state message on their license plate. Alternatively, perhaps the Court, despite referring to the state's motive of exposing women to "philosophic and social arguments of great weight" regarding abortion, agreed with the Third Circuit's assessment that the disclosures required by Pennsylvania were not ideological in nature (and so not subject to strict scrutiny under *Wooley*).<sup>106</sup> Or perhaps the Court simply blundered by referencing the philosophical nature of the state's message in its due process analysis while neglecting to address this consideration in its free speech analysis.

In any event, it seems clear that the Supreme Court's holding in *Casey* cannot be read to support the conclusion that compelling physicians to make ideological statements in the informed consent context should be held to a different level of scrutiny than compelled

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have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.”)

104. Keighley, *supra* note 12, at 2353.

105. The Pennsylvania law required physicians to provide patients directly with information about the nature of the abortion procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the fetus. Physicians were also required to make patients aware of the availability of state-published materials “describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.” *Casey*, 505 U.S. at 881.

106. See *Casey*, 947 F.2d at 705 (noting that the information required by Pennsylvania law “is not an attempt to prescribe an orthodoxy in matters of opinion”). See also *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (distinguishing between factual and ideological statements, and noting that the abortion informed consent requirements in question “do not fall under the rubric of compelling ‘ideological’ speech that triggers First Amendment strict scrutiny”).

ideological speech in any other contexts. Other Supreme Court opinions dealing with professional speech mandates support this interpretation. Just two years prior to *Casey*, for example, the Court in *Keller v. State Bar of California* held that the use of bar dues to finance “ideological or political activities to which [attorneys] were opposed” violated their free speech rights.<sup>107</sup> In so holding, it set forth a rule that while the bar may fund activities relevant to the goals of “regulating legal profession or improving quality of legal services,” it may not “fund activities of an ideological nature which fall outside of those areas of activity.”<sup>108</sup> Similarly, in *Zauderer*, the Court upheld an Ohio law requiring that attorney advertisements include information about how contingent-fee rates are calculated, noting that unlike in *West Virginia State Board of Education v. Barnette*, the Ohio law did not “attempt[] to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.’”<sup>109</sup>

Indeed, the Court has applied strict scrutiny to mandates of even purely factual speech in some commercial contexts, where that commercial speech is intertwined with fully protected speech, such as speech designed to advocate or inform.<sup>110</sup> Given that a mandate of

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107. *Keller v. State Bar of Cal.*, 496 U.S. 1, 4 (1990).

108. *Id.* at 13–14. While recognizing that the line between ideological and non-ideological speech is unclear, the Court found such a violation in *Keller*.

But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

*Id.* at 15–16. The Court did not specify the level of constitutional scrutiny that would apply to compulsory bar dues funding ideological speech unrelated to the regulation of the legal profession; it merely concluded that they would be per se unconstitutional. *Id.*

109. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). *See also* *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 469–70 (1997) (declining to apply strict scrutiny to laws requiring fruit growers to pay assessments for generic fruit advertising, on the grounds that the laws “do not compel the producers to endorse or to finance any political or ideological views”).

110. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (holding unconstitutional, under “exacting First Amendment scrutiny,” a law requiring that professional fundraisers disclose to potential donors the average percentage of gross receipts actually turned over to charities within the previous twelve months). *Pac. Gas & Elec. Co. v. Pub. Utilities*

ideological speech as part of the informed consent process necessarily goes beyond proposing a purely commercial transaction or engaging in professional practice, it would likewise be subject to strict scrutiny.

Thus, the best reading of the Supreme Court's compelled speech jurisprudence is that compelled ideological statements in the context of professional practice would be subject to strict scrutiny, just as in private contexts.<sup>111</sup> Were a state to adopt an informed consent law requiring physicians to make ideological statements to their patients, Supreme Court precedent suggests that the law would be upheld only if it were designed to achieve a compelling state interest and were narrowly tailored to achieve that interest. *Casey*'s silence on the issue does not change this conclusion.<sup>112</sup> Indeed, many lower courts addressing the issue of compelled ideological speech in commercial and professional contexts have concluded that such speech mandates must be analyzed using a heightened (though not always strict) level of scrutiny.<sup>113</sup>

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Comm'n of Cal., 475 U.S. 1 (1986) (holding that a newsletter "receives the full protection of the First Amendment" where its contents "range from energy-saving tips to stories about wildlife conservation," address "matters of public concern," and "extend well beyond speech that proposes a business transaction").

111. For a thoughtful analysis of both the normative and descriptive arguments in support of conclusion, see Keighley, *supra* note 12.

112. See, e.g., *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014), *cert. denied sub nom. Walker-McGill v. Stuart*, 135 S. Ct. 2838 (2015) ("The single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech to the extraordinary extent present here.").

113. See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942 (W.D. Tex. 2011), *vacated in part* 667 F.3d 570 (5th Cir. 2012) (applying strict scrutiny to an abortion informed consent law that required physicians to "say things and take expressive actions with which the physician may not ideologically agree, and which the physician may feel are medically unnecessary," because such speech was "inextricably intertwined with noncommercial speech"); *Stuart v. Camnitz*, 774 F.3d 238 (upholding district court's use of *Sorrell* intermediate test for commercial speech, rather than strict scrutiny, for compulsions of ideological speech in the abortion context); *Stuart v. Loomis*, 992 F. Supp. 2d 585, 599–600 (M.D.N.C.), *aff'd sub nom. Stuart v. Camnitz*, 774 F.3d 238, *cert. denied sub nom. Walker-McGill v. Stuart*, 135 S. Ct. 2838 (recognizing that "the state's express ideological interest" is relevant to the decision about the level of scrutiny to apply, ultimately applying heightened scrutiny as established by *Sorrell* to speech it described as "obviously not commercial" but requiring physicians to make statements "outside [the] prevailing practices" of medicine); *CTIA—The Wireless Ass'n v. City & Cnty. of San Francisco*, 827 F. Supp. 2d 1054, 1059 (N.D.

Given this doctrinal conclusion, however, there remains significant uncertainty as to what, precisely, qualifies as “ideological speech” for the purpose of the First Amendment.<sup>114</sup> The application of strict scrutiny to compulsions of ideological speech originated in *Wooley*, where the Court held unconstitutional a New Hampshire law making it a crime to obscure the words “Live Free or Die” on state license plates.<sup>115</sup> The Court described the law as one which “forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”<sup>116</sup> It held that the message communicated by the license plate was not “ideologically neutral” because it was intended by the state as being “an official view as to proper appreciation of history, state pride, and individualism.”<sup>117</sup>

Lower courts have struggled with how to apply this precedent, particularly in the context of abortion informed consent laws. Just as courts have taken a variety of approaches in interpreting the “factual and uncontroversial” requirement, their interpretation of what counts as “ideological” speech likewise varies. The Fourth Circuit in *Stuart v. Camnitz*, for example, held that a North Carolina statute that requires physicians to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions constitutes ideological speech prohibited under the First Amendment.<sup>118</sup> In its opinion, the court wrote that although the words the physician must speak are “factual,” the context of the speech demonstrates the words’ “moral or ideological implications.”<sup>119</sup> According to the court, the ultrasound requirement is intended to communicate “a particular

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Cal. 2011) (“Mandatory disclosures by businesses of government opinions and viewpoints . . . are subject to more exacting scrutiny.”).

114. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990).

115. *Wooley v. Maynard*, 430 U.S. 705, 706–07 (1977) (holding that “where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message”).

116. *Id.* at 715.

117. *Id.* at 717. Cf. *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 469–70 (1997) (holding that assessments to pay for generic advertising for advertising of California nectarines, plums, and peaches “do not compel [fruit] producers to endorse or to finance any political or ideological views.”).

118. *Stuart v. Camnitz*, 774 F.3d at 242.

119. *Id.* at 246.



opinion,” and “explicitly promotes a pro-life message by demanding the provision of facts that all fall on one side of the abortion debate—and does so shortly before the time of decision when the intended recipient is most vulnerable.”<sup>120</sup> This holding seems consistent with *Wooley*’s concern about compelling someone to speak an “official view as to proper appreciation” of certain values.

However, the Fifth Circuit, considering a similar ultrasound law, disagreed, focusing less on the context of the speech and more on the specific words used. In a footnote, the court noted that “ideological speech” as considered by *Wooley* is speech that “conveys a ‘point of view’” rather than communicates “factual information.”<sup>121</sup> The ultrasound law, according to the court, did not satisfy this test.

Though there may be questions at the margins, surely a photograph and description of its features constitute the purest conceivable expression of “factual information.” If the sonogram changes a woman’s mind about whether to have an abortion. . . . that is a function of the combination of her new knowledge and her own “ideology” (“values” is a better term), not of any “ideology” inherent in the information she has learned about the fetus.<sup>122</sup>

Unlike the Fourth Circuit, it analyzed the ideological nature of the statement solely by reference to the words stated, rather than the contextual understanding of those words.

The Eighth Circuit in *Rounds* similarly rejected a First Amendment challenge to another abortion informed consent law that petitioners argued compelled ideological speech. The South Dakota law at issue required physicians to tell a patient seeking an abortion that “she has an existing relationship” with an unborn human being that “enjoys protection under the United States Constitution and under the laws of South Dakota” and that “by having an abortion, her existing relationship and her existing constitutional rights with

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120. *Id.*

121. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577 n.4 (5th Cir. 2012).

122. *Id.*

regards to that relationship will be terminated.”<sup>123</sup> Planned Parenthood argued that this law compelled ideological speech because the speech carried inherent “moral and philosophical messages” that could be read to “make a point in the debate about the ethics of abortion.”<sup>124</sup> The Eighth Circuit, however, did not explicitly address the First Amendment implications of Planned Parenthood’s claims about the ideological nature of the compelled speech; it merely concluded that the speech mandate did not violate *Casey*’s undue burden test.<sup>125</sup>

Much like the question of what constitutes “factual and uncontroversial” speech, the question of what constitutes “ideological” speech is an open one. The greatest uncertainty arises when states require communication of factual information for ideological purposes, when the information presented is one-sided in order to emphasize the state’s preferred perspective, or when the factual information presented could reasonably be understood to have ideological implications or underpinnings. Courts addressing compelled speech challenges to informed consent laws will continue to struggle with this undetermined doctrine.

**FICTION:** A PHYSICIAN’S ABILITY TO RESPOND TO, OR DISASSOCIATE HIMSELF FROM, COMPELLED GOVERNMENT SPEECH CAN SAVE AN OTHERWISE UNCONSTITUTIONAL SPEECH MANDATE.

**FACT:** A PHYSICIAN’S ABILITY TO RESPOND TO, OR DISASSOCIATE HIMSELF FROM, COMPELLED GOVERNMENT SPEECH DOES NOT NEGATE OTHER CONSTITUTIONAL INFIRMITIES.

**OPEN QUESTION:** DOES A PHYSICIAN’S INABILITY TO DISASSOCIATE HIMSELF FROM A COMPELLED GOVERNMENT

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123. *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 668 (8th Cir. 2011), *vacated in part on reh’g en banc sub nom. by Planned Parenthood Minn., N.D., S.D. v. Rounds*, 662 F.3d 1072 (8th Cir. 2011) *and on reh’g en banc in part sub nom. by Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012).

124. *Id.* at 669.

125. *Id.*

MESSAGE RENDER AN OTHERWISE CONSTITUTIONAL SPEECH  
MANDATE UNCONSTITUTIONAL?

Defenders of compelled speech mandates often argue that such mandates are not unconstitutional as long as the objecting speaker has an opportunity to disassociate from the compelled speech or issue his own response. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, for example, the California Public Utilities Commission defended a rule requiring utility companies to include third-party newsletters in their billing envelopes by arguing that the third-party access requirement did not limit a utility's speech or prohibit it from expressing its own message in response.<sup>126</sup>

The appellants, however, argued that because the rule required them to provide access "only to those who disagree with [their] views and who are hostile to [their] interests," it would necessarily embroil them in a "controversy" they would rather avoid by forcing them to respond to the third party's hostile message.<sup>127</sup> The Court agreed, holding that a utility's ability to respond was not enough to protect the compelled speech law from First Amendment scrutiny.<sup>128</sup> "[T]here can be little doubt that appellant will feel compelled to respond to arguments and allegations made by [the third party]," the Court held, and such a "forced response is antithetical to the free discussion that the First Amendment seeks to foster."<sup>129</sup> It concluded that "the danger that appellant will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude," and that strict scrutiny would therefore apply.<sup>130</sup>

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126. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 4, 6 (1986).

127. *Id.* at 14.

128. *Id.* at 15–16.

129. *Id.* at 16 ("Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next."). *Cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (holding that shopping mall owners' First Amendment rights were not violated in part because the views of the speakers on the owners' property were not likely to be identified with those of the owner, and noting that the mall owners "are free to publicly disassociate themselves" from the views of speakers on their property).

130. *Pacific Gas*, 475 U.S. at 16.

The reasoning in *Pacific Gas* would likely apply equally in the context of physician speech mandates. If a state law compelling physicians to speak failed the *Zauderer* requirement of being purely factual and uncontroversial and rationally related to professional regulation, it could not be saved by the argument that physicians are permitted to disassociate themselves from or express disagreement with the message. Where a physician is required by law to communicate information with which he disagrees, he “may be forced either to appear to agree with [the compelled speech] or to respond,” even if he would prefer not to speak.<sup>131</sup>

The Eighth Circuit in *Rounds* recognized this point in 2006 when it upheld a district court’s preliminary injunction against South Dakota’s abortion informed consent law,<sup>132</sup> which required physicians to state that abortion “will terminate the life of a whole, separate, unique, living human being.”<sup>133</sup> The state had defended this law on the grounds that physicians were permitted to “disassociate themselves” from the message if they found it objectionable.<sup>134</sup> The court, however, concluded that the ability to disassociate oneself from an ideological message does not cure the constitutional infirmity, citing *Pacific Gas* for the proposition that “the injury which results from forcing an abortion provider to recite the state’s ideological objections to abortion would not be eliminated by simply allowing her to add her own views.”<sup>135</sup> This opinion was later vacated, however, and in 2008 the Eighth Circuit vacated the preliminary injunction on the grounds that the “human being” disclosure was a “truthful and non-misleading” statement.<sup>136</sup> The court declined to reach a decision on whether and when the ability to

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131. *Id.* See also *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 470–71 (1997) (citing *Pacific Gas* as standing for the proposition that the First Amendment prohibits forcing speakers “to respond to a hostile message when they ‘would prefer to remain silent’”).

132. *Planned Parenthood Minn. v. Rounds*, 467 F.3d 716, 725 (8th Cir. 2006), *reh’g en banc granted, opinion vacated* (8th Cir. 2007).

133. *Id.* at 719.

134. *Id.* at 725.

135. *Id.* The court noted, however, that the physician’s ability to disassociate himself from the state’s message might be constitutionally relevant if the mandated speech were not ideological—that is, if it were “generally neutral and accurate,” but “misleading as applied to a specific patient.” *Id.*

136. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736–37 (8th Cir. 2008).

disassociate might constitutionally relevant, because it concluded that the South Dakota statute did not mandate any ideological speech from which disassociation was necessary.<sup>137</sup> A dissenting opinion, however, restated the point made in the 2006 opinion, again citing *Pacific Gas* for the proposition that “[e]ven if the physician were able to disclaim sponsorship of the state’s message, the constitutional defects inherent in compelled ideological speech would not be cured.”<sup>138</sup>

The Second Circuit recognized this point as well in *Evergreen*, a constitutional challenge to crisis pregnancy center speech mandates.<sup>139</sup> While compelling the speech of non-profit organizations rather than medical professionals, the court, citing *Riley v. National Federation of the Blind of North Carolina, Inc.*, expressed concern that mandating disclosure of whether the centers provide abortion, emergency contraception, or prenatal care services “will change the way in which a pregnancy services center, if it so chooses, discusses [these controversial issues].”<sup>140</sup> Because “[t]he centers must be free to formulate their own address,” the court found the disclosure unconstitutional.<sup>141</sup>

Thus, a speaker’s ability to dissociate himself from a state-mandated message by expressing disagreement with it will not save an otherwise unconstitutional statute. But what about the opposite scenario? Imagine a state informed consent law that satisfies all of the relevant constitutional tests described above—it compels

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137. *Id.* at 737. In dicta, however, the court suggested that “the state could argue” that the ability to disassociate is constitutionally relevant when the compelled speech is ideological in nature. *Id.* at 736.

138. *Id.* at 746 (Murphy, J., dissenting).

139. *Evergreen Ass’n, Inc. v. City of N.Y.*, 740 F.3d 233, 249-50 (2d Cir. 2014), *cert. denied sub nom. Evergreen Ass’n, Inc. v. City of N.Y., N.Y.*, 135 S. Ct. 435 (2014), and *Pregnancy Care Ctr. of N.Y. v. City of N.Y., N.Y.*, 135 S. Ct. 435 (2014).

140. *Evergreen*, 740 F.3d at 249–50; *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). As in *Riley*, the Second Circuit in *Evergreen* applied the strictest scrutiny to the New York speech mandate on the grounds that the crisis pregnancy centers were engaged in both commercial and non-commercial speech.

141. *Evergreen*, 740 F.3d at 249–50. Note that while the “Services Disclosure” appears to require disclosure of purely factual information (whether the center provides certain medical services), the Second Circuit ultimately interpreted the Services Disclosure as a “mandated discussion of controversial political topics.” *Id.* at 250. See *supra* text accompanying notes 65–66.

physicians to communicate information that is rationally related to the practice of medicine, factual and uncontroversial, and non-ideological. Could a physician nevertheless make the case that the law is unconstitutional if it is not clear that the physician's speech is being controlled by the state? Numerous commentators have made this type of argument, claiming that additional constitutional concerns arise when the state "commandeers"<sup>142</sup> physicians to act as "mouthpieces"<sup>143</sup> or "puppets"<sup>144</sup> for the state's message.<sup>145</sup>

There is indeed something in the Supreme Court's First Amendment jurisprudence to support the point that listeners' confusion about the source of speech may implicate its constitutionality. In many compelled speech cases, the Court has carefully analyzed whether the speech is likely to be perceived by listeners as being controlled by the speaker, as opposed to by the state or a third party. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, for example, a group of LGBT individuals of Irish descent brought suit against the organizers of a St. Patrick's Day parade who refused to let them march.<sup>146</sup> In analyzing whether the requiring the organizers to include the LGBT group would violate the organizers' First Amendment rights, the Court considered the difference between speakers who are viewed as "conduits" for the speech of others, and those who are viewed as autonomous speakers themselves.<sup>147</sup> It noted that the LGBT group's participation in the parade "would likely be perceived as having resulted from [the organizers'] determination . . . that its message was worthy of

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142. Keighley, *supra* note 12, at 2381.

143. Gregory D. Curfman et al., *Physicians and the First Amendment*, 359 NEW ENG. J. MED. 2484 (2008).

144. Robbins, *supra* note 48.

145. Haupt, *supra* note 12, at 1257 (arguing that constitutional norms may be violated when a state "demands that physicians communicate certain claims to their patients in materials of [their] own design [to] effectively tr[y] to obscure authorship even though it is the state that retains effective control over the content of the message."); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008) [hereinafter Norton, *The Measure of Government Speech*] (in the context of government speech doctrine, noting the constitutional importance of establishing, both formally and functionally, when speech is coming from the state or a third party).

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

147. *Id.* at 575-77.

presentation and quite possibly of support as well.”<sup>148</sup> The Court contrasted this with speakers like cable broadcasters and shopping mall owners who, despite acting as hosts for third-party speech, likely would not be perceived as supporting those third-party messages.<sup>149</sup> It concluded that where “a speaker intimately connected with the communication advanced” is compelled to speak, where the communication is “perceived by” listeners to be part of a speaker’s message or otherwise identified with the speaker, “the speaker’s right to autonomy over the message is compromised.”<sup>150</sup> Two years later, in *Glickman v. Wileman Brothers & Elliott*, the Supreme Court reaffirmed this idea, summarizing its prior compelled speech jurisprudence as holding that constitutional concerns arise when the state requires speakers to “repeat an objectionable message out of their own mouths . . . use their own property to convey an antagonistic ideological message . . . force them to respond to a hostile message when they ‘would prefer to remain silent’ . . . or require them to be publicly identified or associated with another’s message.”<sup>151</sup>

Where informed consent mandates require physicians to communicate messages dictated by the state, there is a substantial risk that patient-listeners will not recognize the true origins of the speech.<sup>152</sup> As recognized by a dissenting opinion in *Rounds*, communications by physicians to patients “are, if anything, more likely to be attributed to the speaker than the well known slogan affixed to a state issued license plate in *Wooley* or the forced publication of third party speech in *Pacific Gas*,” because the context in which the statements are made is one “in which patients expect doctors to use their best and honest judgment.”<sup>153</sup> Robert Post notes that compelled commercial speech such as government-mandated

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148. *Id.* at 575 (analogizing to newspapers with editorial control, and the utilities in *Pacific Gas*).

149. *Id.* at 576–77.

150. *Id.* at 576–80.

151. *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 470–71 (1997).

152. Note, however, that some informed consent mandates clearly identify the source of the disclosed information, as in the case of laws requiring physicians to direct patients seeking abortions to state brochures or state websites for additional information.

153. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 747 (Murphy, J., dissenting).

labels and reports generally “do . . . not pose a problem of stealth or ventriloquism,” because it is obvious to consumers that the disclosure is coming from the state.<sup>154</sup> But when patients discuss the risks and benefits of proposed medical procedures with their physicians as part of the informed consent process, they are relying on their physicians’ medical expertise and do not anticipate that the statements their physicians are communicating are not the physicians’ own. Moreover, unlike in cases such as *Hurley*, *PruneYard*, *Rumsfeld*, and others, the objectionable message is being communicated directly by the physician-speaker, rather than the physician simply offering a forum for others to speak. Indeed, anecdotal evidence supports the fact that many health care providers subject to objectionable informed consent laws take great pains to disassociate themselves from state-mandated messages.<sup>155</sup>

Lack of clarity about the source of the message is problematic, in part, because it may lead patients to overestimate the persuasiveness and credibility of the message.<sup>156</sup> “Because health professionals may be seen as more credible than the government in this setting based on public perception of their expertise and objectivity, patients may have

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154. Post, *Compelled Commercial Speech*, *supra* note 39, at 918.

155. One pre-abortion ultrasound informed consent form from a Texas physician, currently circulating on various internet forums, includes the following language:

The Texas legislature, in its infinite wisdom, believes that neither you nor I are intelligent enough to carry on a conversation about how you might make an informed decision about how best to handle your current pregnancy. To be sure that they and their ideologues are part of our doctor patient relationship, they have mandated that you be forced to see and hear the ultrasound of your pregnancy, as well as be given a detailed description of the pregnancy’s development to this stage. By inserting themselves into our conversation, they have almost certainly violated our first amendment rights to free speech and intruded into the time-honored relationship you and I share at this critical time in our lives. It is, however, the current state law in Texas.

Cory Doctorow, *Texas Doctor’s Consent Form for Women Seeking Abortions*, BOINGBOING.NET (Aug. 28, 2015), [https://boingboing.net/2015/08/28/texas-doctors-consent-form-f.html?fk\\_bb](https://boingboing.net/2015/08/28/texas-doctors-consent-form-f.html?fk_bb).

156. Norton, *The Measure of Government Speech*, *supra* note 145, at 595–97 (citing Gia Lee and Lawrence Lessig’s research, noting that messages that appear to be influenced by the government or other powerful groups may be less effective than those communicated by actors perceived to be more independent); Corbin, *supra* note 73, at 1329 (“To start, confusion about who is speaking could cause the listener to overestimate the popularity of the government’s message, thereby increasing its persuasiveness. In addition, the distortion may be magnified due to the tendency to defer to respected authority figures such as doctors.”).



been misled into evaluating the counseling differently than they would have if the speakers had made clear the governmental source.”<sup>157</sup> Indeed, governments may choose to communicate their messages by way of private or professional speakers with the clear goal of taking advantage of the speakers’ perceived independence.<sup>158</sup>

Thus, the analysis might be different in cases where the source of the physician-communicated message is made obvious, or where the message is not communicated directly by the physician as speaker—for example, where a physician is merely required to present the patient with a state brochure, or direct the patient to a state website.<sup>159</sup> Informed consent mandates that include obvious statements or other cues informing the patient that the information communicated is required by law and may not represent the physician’s professional perspective are likely to be seen as preferable.<sup>160</sup>

However, even messages that are clearly identified as state-sponsored may be problematic when compelled in the specific context of medical care. Many commentators have argued that the intervention of a government message into a sphere that patients expect to be a locus of professional independence may jeopardize the trust inherent in the physician-patient relationship.<sup>161</sup> Robert Post discusses this concern in the context of subsidized speech, noting that while the state can traditionally compel viewpoint-based speech in managerial domains, the physician’s professional “obligation to make independent medical judgments sets limits to the managerial authority” of an employer who seeks to control the physician’s speech.<sup>162</sup> Under most circumstances, he writes, “patients expect the independent judgment of their physicians to trump inconsistent

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157. Norton, *The Measure of Government Speech*, *supra* note 145, at 629–30.

158. *Id.* at 595–96.

159. See Keighley, *supra* note 12, at 2377 (“A law that requires a physician to offer a state pamphlet to her patients does not infringe the physician’s constitutionally protected autonomy interests because the physician herself is not required to adopt the state’s ideological views, nor to represent these views as her own.”).

160. See Norton, *The Measure of Government Speech*, *supra* note 145, at 630–31 (discussing express cues for disassociation with a state-mandated message).

161. See, e.g., Robbins, *supra* note 48, at 192–93; Corbin, *supra* note 73, at 1329–30; Zick, *supra* note 10, at 1353, 1355.

162. Robert C. Post, *Subsidized Speech*, 106 *YALE L.J.* 151, 171–74 (1996).

managerial demands.”<sup>163</sup> Thus, even if a physician’s state-mandated message is prefaced by a disclaimer about the source of the message, such a disclaimer may, due the unique nature of the physician-patient relationship, be inadequate to fully disassociate the physician from the compelled speech in the patient’s eyes.

Thus, one could make the argument that state laws that rely on physicians as mouthpieces for the state’s messages (even if those messages are determined by a court to be factual and uncontroversial) violate the First Amendment. However, there are two reasons why it is unlikely that courts will adopt this line of reasoning. First, it is doubtful that most courts would agree with the factual conclusion that patients always consider physician speech to be the physician’s own medical judgments, even if that speech is prefaced with a disclaimer or clearly identified as state-mandated.<sup>164</sup> Second, as a policy matter, accepting this argument would broaden the scope of physicians’ First Amendment protection quite dramatically. If a physician’s inability to disassociate himself from state-mandated messages renders those messages potentially unconstitutional, then even factual and uncontroversial informed consent mandates would be at risk.

## CONCLUSION

Most state informed consent laws are uncontroversial. Physicians understand the necessity of providing patients with factual information about their medical options. But when state legislatures establish disclosure mandates that go beyond the common law requirements of informed consent, that require disclosure of inaccurate or one-sided information, or that mandate or prohibit speech on controversial topics, physicians will object. Unfortunately, because the Supreme Court’s jurisprudence on compelled professional speech is so limited, litigants have struggled to piece together convincing constitutional arguments from commercial

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163. *Id.* at 174.

164. *See Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (in the limited context of physicians practicing within Title X facilities, noting that “a doctor’s silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her”).

speech contexts, Fourteenth Amendment contexts, and every area in between.

While it is impossible to predict how the Supreme Court might rule in a modern compelled physician speech case, this Article offers a tentative framework by which the Court might analyze such a case based on past rulings. In order to pass constitutional muster, a state law compelling physician speech would have to be reasonably related to the regulation of the medical profession and would have to compel factual, uncontroversial, and non-ideological speech (although the definitions of those terms are clearly ambiguous and offer much room for interpretation). If the state speech mandate intersects with a patient's Fourteenth Amendment rights to medical self-determination or reproductive privacy, additional requirements will apply. And finally, it is possible—though unlikely, given how broadly this would expand physicians' First Amendment protections—that the Court might consider even otherwise-permissible speech mandates unconstitutional if patients are unable to distinguish between their physicians' own messages and the messages that are mandated by law.