

# Compelled Speech

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## Introduction

Speech compulsions, the Court has often held, are as constitutionally suspect as are speech restrictions: “[T]he First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”<sup>1</sup> In the Court, the doctrine dates back to the 1943 flag salute case,<sup>2</sup> which held that “involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.”<sup>3</sup>

In state courts, it dates back even earlier: The very first state statute struck down on free speech grounds—in 1894, by the Georgia Supreme Court—was a “service letter” statute under which employers were obligated to give dismissed employees a letter explaining the reason for the dismissal.<sup>4</sup> “Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative liberty of silence,” held the court.<sup>5</sup>

And the doctrine remains strong today: just this last Term, it was powerfully reaffirmed in *Janus v. American Federation of State, County & Municipal Employees, Council 31 (AFSCME)*<sup>6</sup> and *National Institute of Family & Life Advocates (NIFLA) v. Becerra*<sup>7</sup> and was relied on by Justice Thomas in his concurrence (joined by Justice Gorsuch) in *Masterpiece*

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1. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988).

2. *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

3. *Id.* at 633.

4. *See* *Wallace v. Ga., C. & N. Ry. Co.*, 22 S.E. 579, 579–80 (Ga. 1894); *see also* *Atchison, T. & S.F. Ry. Co. v. Brown*, 102 P. 459, 461 (Kan. 1909) (also holding unconstitutional a state statute obligating employers to provide written explanation for dismissal of employees); *St. Louis Sw. Ry. Co. of Tex. v. Griffin*, 171 S.W. 703, 705–06 (Tex. 1914) (same). *But see* *Cheek v. Prudential Ins. Co. of Am.*, 192 S.W. 387, 392–93 (Mo. 1916) (taking the opposite view), *aff’d on other grounds*, 259 U.S. 530, 543–48 (1922) (the last Supreme Court case holding that the Free Speech Clause is not incorporated against the states under the Fourteenth Amendment). The laws aim at the practice, familiar to readers of 18th and 19th century English and American novels, of dismissing an employee “without a character.” *See, e.g.*, 1 SAMUEL RICHARDSON, *PAMELA: OR, VIRTUE REWARDED* 38 (2d ed. 1741) (“I hope he will let good Mrs. Jervis give me a [c]haracter, for fear it should be thought I was turn’d away for [d]ishonesty.”) (emphasis omitted). Alleging suspected misconduct on a dismissed employee’s part would leave the employer open to a defamation lawsuit, but dismissing the employee without a character could implicitly convey the same message without a risk of liability. The service-letter statute aimed to prevent this and to require employers to provide a true statement of the reasons for dismissal, enforced by the statute on the one side and the risk of defamation liability for false statements on the other.

5. *Wallace*, 22 S.E. at 579.

6. 138 S. Ct. 2448, 2460, 2464, 2486 (2018).

7. 138 S. Ct. 2361, 2377–78 (2018).

*Cakeshop, Ltd. v. Colorado Civil Rights Commission*.<sup>8</sup>

Yet, however emphatically stated and deeply rooted the broad principle may be, its details are often hard to pin down. For instance:

1. *Janus* holds that the First Amendment generally bars compelling people to turn over money to a private organization that will use it for speech.<sup>9</sup> But *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*,<sup>10</sup> *Turner Broadcasting System, Inc. v. FCC*,<sup>11</sup> and *PruneYard Shopping Center v. Robins*<sup>12</sup> hold that compelling people to turn over use of their property to a private organization that will use it for speech is just fine.<sup>13</sup> What's the difference?

2. *PruneYard* upheld a requirement that large shopping malls let the public speak on their property, partly because “no specific message is dictated by the State to be displayed on appellants’ property. There consequently is no danger of governmental discrimination for or against a particular message.”<sup>14</sup> But *FAIR* upheld a requirement that law schools allow military recruiters to speak on their property, which did involve governmental discrimination for a particular message.<sup>15</sup>

3. *NIFLA* held that the government can’t require pregnancy crisis centers to inform patients about the availability of low-cost abortions.<sup>16</sup> But *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>17</sup> held that the government can require doctors who perform abortions to “inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the ‘probable gestational age of the unborn child.’”<sup>18</sup>

4. The plurality in *Pacific Gas & Electric Co. v. Public Utilities*

8. 138 S. Ct. 1719, 1740–48 (2018) (Thomas, J., concurring in part and concurring in the judgment).

9. *Janus*, 138 S. Ct. at 2486.

10. 547 U.S. 47 (2006).

11. 512 U.S. 622 (1994).

12. 447 U.S. 74 (1980).

13. See *infra* subpart I(B). I use “people” here generically to include institutions, and the Court has generally not focused in First Amendment cases on whether the objector is an individual (as in *PruneYard*, which was apparently owned by one man) or an institution (such as the universities in *FAIR*, the media businesses in *Turner* or *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the nonprofits in *NIFLA*, or the nonmedia business in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986)).

14. *PruneYard*, 447 U.S. at 87.

15. *FAIR*, 547 U.S. at 59–60. The statute in *FAIR* required law schools to host recruiters as a condition of getting federal funds, but the Court didn’t rely on the government’s power as subsidizer—it held that the requirement could have been “constitutionally imposed directly” by Congress as a categorical command rather than as a funding condition. *Id.*

16. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–76 (2018).

17. 505 U.S. 833 (1992).

18. *Id.* at 881, 884. The *NIFLA* opinions at least debated this potential tension; the first three tensions identified in the text have not been squarely confronted by the Court.

*Commission of California*<sup>19</sup> suggested that requiring someone to distribute another's speech may be unconstitutional when it pressures the distributor to respond to that speech.<sup>20</sup> Yet that pressure was likely present in *FAIR*, but the Court upheld the compelled hosting in that case.<sup>21</sup>

And, partly because of these internal tensions, the doctrine contains major uncertainties:

5. Does requiring people to create speech—such as when a commercial photographer is required to photograph same-sex weddings if she photographs opposite-sex weddings—constitute impermissible speech compulsion?<sup>22</sup>

6. May the government require, say, Twitter or Facebook to host user pages without discrimination based on political ideology (or religious ideology)?

7. When, if ever, may the government compel people to convey facts to the government—for instance, to answer census questions, to file tax returns, to give information on driver's license applications,<sup>23</sup> to report to the police certain crimes that they have observed, and the like—or to third parties?<sup>24</sup>

8. Is it constitutional for the law to give access rights to particular speakers and not to others? May states, for instance, mandate that private shopping malls let people gather signatures for ballot measures but not for other causes? May states mandate that homeowners' associations let unit owners display American flags in common areas without similarly requiring the associations to tolerate other symbols?<sup>25</sup>

In this Essay, I'll try to summarize the law, where it's settled, and identify the internal tensions, where they exist. Indeed, most sections will start with a (admittedly oversimplified) black-letter summary. I will take the existing Supreme Court precedents as given because I want to be helpful to lawyers, judges, and scholars who want to analyze particular controversies within the legal framework that the Court has established. But the analysis should also offer plenty to those who want to critique the framework or suggest that some parts of it need to be reversed.

In particular, I will suggest that the compelled speech doctrine actually contains two separate strands:

19. 475 U.S. 1 (1986).

20. *Id.* at 15–16.

21. See *infra* subpart I(B).

22. See discussion *infra* subpart II(E).

23. Note that this can't be distinguished on the grounds that the compelled speech in driver's license applications is a condition of getting a government benefit (the right to drive on publicly owned roads). *Wooley v. Maynard*, 430 U.S. 705 (1977), applied the compelled speech doctrine even though the requirement of having a state-motto-bearing license plate was also a condition of driving on public roads. *Id.* at 715–17.

24. See discussion *infra* subpart II(D).

25. See discussion *infra* subsection II(C)(4)(c).

1. It forbids speech compulsions that also restrict speech—for instance by compelling a newspaper editor or a parade organizer to include certain material, and thus restricting them from creating precisely the newspaper or parade that they want to create.
2. It also forbids some “pure speech compulsions,” which do not restrict speech but which unduly intrude on the compelled person’s autonomy.

The important questions under each strand tend to be different. In the first category, for instance, the contested question is often whether a particular aggregation of speech is what I call a “coherent speech product” (e.g., the floats in a parade) through which its organizer speaks, or an array of unrelated speech (e.g., the channels on a cable system) that is solely the speech of the separate speakers. In the second category, the contested question often turns on whether some compulsion is more like a compulsion to speak (presumptively unconstitutional) or more like a compulsion to host others’ speech (often constitutional).

And the restraints on government power often differ under the two strands as well: Compelling people to include facts in their coherent speech products (say, in their newspapers), thus altering the content of their speech, is generally unconstitutional. Pure speech compulsions that require people to reveal facts in a stand-alone way, on the other hand, may well be largely permissible. I will discuss these two categories in Parts I and II and then turn to two general exceptions to the protections offered under both strands—the exception for speech integral to conduct (Part III) and the special rules for commercial advertising (Part IV).

A terminological note: throughout, I will often speak of a compulsion as being “presumptively unconstitutional.” This presumption could be rebutted by a showing that the compulsion passes strict scrutiny,<sup>26</sup> or perhaps (in certain areas of free speech law) “exacting scrutiny” or a similar doctrine. Likewise, when the government is acting in a special role that lets it impose extra speech restrictions—as educator, employer, landlord, regulator of the airwaves, and the like—it may have some extra power to compel speech as well.<sup>27</sup>

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26. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

27. Thus, for instance, just as the government may restrict speech as part of a criminal sentence, or a probation condition, it may be able to compel speech in those contexts as well. See, e.g., *United States v. Clark*, 918 F.2d 843, 848 (9th Cir. 1990), *overruled on other grounds* by *United States v. Keys*, 133 F.3d 1282 (9th Cir. 1998); *People v. Corona*, No. D054887, 2010 WL 769150, at \*3–4 (Cal. Ct. App. Mar. 8, 2010); *State v. K.H.–H.*, 374 P.3d 1141, 1146 (Wash. 2016). Likewise, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), upheld the Fairness Doctrine for over-the-airwaves broadcasting, but this is because broadcasting speech is generally less protected by the First Amendment. See, e.g., *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 380, 402 (1984); *FCC v. Pacifica Found.*, 438 U.S. 726, 748–50 (1978). The government also doubtless had broad power to compel speech by its employees, see, for example *Slocum v. Fire & Police Comm’n of E.*

The question we'll discuss in this Essay will generally be: When does a government action become a speech compulsion subject to serious First Amendment scrutiny, usually akin to the scrutiny applied to similar speech restrictions? How that scrutiny should be applied is a matter left to other articles.

## I. Speech Compulsions as Speech Restrictions

Some speech compulsions restrict or deter some speech as well as compel other speech. This makes them into a form of speech restriction, subject to the normal rules that govern speech restrictions.

Government coercion of speakers is presumptively unconstitutional when it burdens certain speech, whether by:

(a) compelling speakers who say something to also carry other speech, thus imposing a form of tax on certain kinds of speech,

(b) compelling speakers to include certain material in their coherent speech product, thus barring them from distributing a speech product that contains just the content that they want it to contain, or

(c) compelling speakers to disclose certain things that they would be reluctant to disclose (such as their identities), thus deterring them from engaging in speech.

### A. *Content-Triggered Compulsions as Speech Restrictions*

**Government coercion of speakers is presumptively unconstitutional when it burdens certain speech by**

**(a) compelling speakers who say something to also carry other speech, thus imposing a form of tax on certain kinds of speech.**

**Precedents:**

- *Miami Herald Publishing Co. v. Tornillo*<sup>28</sup> (newspapers required to publish replies to criticisms of candidates).
- *Pacific Gas & Electric Co. v. Public Utilities Commission of California* (utilities required to carry materials written by groups that disagree with the utilities' positions).
- *Turner Broadcasting System, Inc. v. FCC* (characterizing *Miami Herald*).

Content-triggered compulsions compel someone to say, host, or fund

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Peoria, 290 N.E.2d 28, 33 (Ill. App. Ct. 1972) (holding that a Police Department's requirement that its officers wear an American flag emblem on their uniform did not violate their First Amendment rights), though perhaps not unlimited power, see for example, *Ops. of the Justices to the Governor*, 363 N.E.2d 251, 255 (Mass. 1977) (concluding that a bill requiring teachers to lead their public school classes in reciting the Pledge of Allegiance would violate their First Amendment rights).

28. 418 U.S. 241 (1974).

speech because that person has said something in the past. *Miami Herald*, in which the duty to provide reply space or time was “triggered by speech of [a] particular content,”<sup>29</sup> is the classic example. The compulsions “exact[] a penalty on the basis of the content of [the speaker’s past speech]”:<sup>30</sup> they make the triggering speech more expensive, and thus deter it, much as a content-triggered tax would.<sup>31</sup>

The plurality opinion in *Pacific Gas* was based partly on the same analysis. The Court read the Commission’s rules as requiring Pacific Gas to periodically turn over space in its mailing envelope “only to those who disagree with [its] views.”<sup>32</sup> As a result, Pacific Gas had to “contend with the fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views,” and this “‘might well [lead Pacific Gas to] conclude’ that . . . ‘the safe course is to avoid controversy.’”<sup>33</sup>

This principle, by the way, was recognized early in the history of American free speech law: In 1908, the Missouri Supreme Court struck down a statute that required any group that evaluated candidates for office to “state in full,” in each recommendation that it published, “on what facts they base[d] their . . . recommendation.”<sup>34</sup> The court stressed that the statute interfered with the right to speak about candidates because it required speakers to “prepare[] and pay[] for publishing” the extra material, and “[a]nything which makes the exercise of a right more expensive or less convenient, more difficult or less effective, impairs that right.”<sup>35</sup>

The court recognized that the law was a speech compulsion, and spoke about how the freedom of speech includes “the correlative liberty of silence.”<sup>36</sup> But it also recognized that this speech compulsion was itself a speech restriction.

#### *B. Interference with a Coherent Speech Product as a Speech Restriction*

#### **Government coercion of speakers is presumptively unconstitutional when it burdens speech by**

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29. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 654 (1994) (comparing *Pacific Gas* and *Miami Herald*).

30. *Miami Herald*, 418 U.S. at 256.

31. See *Turner*, 512 U.S. at 655 (distinguishing *Pacific Gas* and *Miami Herald* and alluding to the content-based penalty in *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988), as “solicitation of funds trigger[ing] [the] requirement to express [a] government-favored message”). But see *supra* note 27 and accompanying text (discussing *Red Lion*).

32. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 13–14 (1986) (plurality opinion).

33. *Id.* at 14 (quoting *Miami Herald*, 418 U.S. at 257).

34. *Ex parte Harrison*, 110 S.W. 709, 710–11 (Mo. 1908).

35. *Id.* at 710.

36. *Id.* at 711 (internal quotation marks omitted).

**(b) compelling speakers to include certain material in their coherent speech product, thus barring them from distributing a speech product that contains just the content that they want it to contain.**

**Precedents finding coherent speech products:**

- *Miami Herald Publishing Co. v. Tornillo* (newspapers).
- *McIntyre v. Ohio Elections Commission*<sup>37</sup> (leaflets).
- *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*<sup>38</sup> (parades).
- *Riley v. National Federation of the Blind of North Carolina, Inc.*<sup>39</sup> (fundraising pitches).
- *NIFLA v. Becerra* (information presented to visiting clients).

**Precedents finding absence of coherent speech products:**

- *PruneYard Shopping Center v. Robins* (shopping centers).
- *Turner Broadcasting System, Inc. v. FCC* (cable system).
- *Rumsfeld v. FAIR* (university offices during recruiting).

“[A]ll speech inherently involves choices of what to say and what to leave unsaid . . . .”<sup>40</sup> *The New Republic* and *National Review* are known as liberal and conservative magazines, respectively, precisely because they don’t publish opinions from the other side (except perhaps on rare occasions). If they did publish a wide range of opinions, then they’d be very different magazines. Likewise, many readers may value even a nonideological newspaper precisely because it excludes material that is likely to be false, poorly written, or filled with vulgarities.

Requiring speakers to include something within such speech products thus stops the speakers from creating the particular speech products they want to create. “Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.”<sup>41</sup> The Court has thus struck down speech compulsions as being speech restrictions when they required charitable fundraisers to include certain disclosures in their pitches,<sup>42</sup> parade organizers to include certain floats,<sup>43</sup> newspapers to include certain articles,<sup>44</sup>

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37. 514 U.S. 334 (1995).

38. 515 U.S. 557 (1995).

39. 487 U.S. 781 (1988).

40. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion).

41. *Riley*, 487 U.S. at 795.

42. *Id.*

43. Thus, in *Hurley*, requiring that a parade include a gay-themed float interfered with the ability of the “private speaker to shape its expression by speaking on one subject while remaining silent on another.” 515 U.S. at 574–75.

44. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974).

or leafletters to include their names.<sup>45</sup> And this is true whether the compulsion is to include opinions or facts.<sup>46</sup>

Moreover, such compulsions are treated as akin to content-based restrictions because they affect the content of speech, even if they are facially content neutral. The public accommodation law in *Hurley*, for instance, was content neutral,<sup>47</sup> but the Court stressed that “the state courts’ application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade”<sup>48</sup> and therefore applied a demanding form of scrutiny far beyond what is normally used for content-neutral restrictions.

This principle that compelling inclusion of certain speech affects the content of the broader speech product is clear enough for things that we normally talk about using a simple collective noun, such as “newspaper,” “parade,” or even “pitch” (such as a fundraising pitch). But *NIFLA* applied it more broadly, holding that even the aggregate of all the information that a woman gets from a pregnancy counseling clinic can itself be a single unit of “speech,” so that the government generally cannot require speakers to add extra communications to it.<sup>49</sup>

In *NIFLA*, a law required some such centers to notify patrons of the availability of “free or low-cost access to . . . abortion” (among other things) supported by the state.<sup>50</sup> The notice had to be “posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in”;<sup>51</sup> unlike the disclosure in *Riley*, it didn’t have to be included in any specific conversation. Still, the Court held that this was a speech compulsion that affected the content of the clinics’ speech. (The dissent did not disagree with the majority on this point.)

“[R]equiring [the clinics] to inform women how they can obtain state-subsidized abortions—at the same time [the clinics] try to dissuade women

45. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995). The Court concluded that: an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

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[T]he identity of the speaker is no different from other components of the document’s content that the author is free to include or exclude.

*Id.* at 342, 348.

46. *See Riley*, 487 U.S. at 797–98 (“[Cases such as *Barnette* and *Wooley*] cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of ‘fact’: either form of compulsion burdens protected speech.”); *see also NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (treating compulsion to communicate facts as presumptively unconstitutional); *McIntyre*, 514 U.S. at 342 (same).

47. *Hurley*, 515 U.S. at 572.

48. *Id.* at 572–73.

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

50. *Id.* at 2369.

51. *Id.*



from choosing that option— . . . plainly ‘alters the content’ of [the clinics’] speech.”<sup>52</sup> The clinics’ “speech” thus seemed to refer to the aggregate content of all the speech that the patrons received from the clinics, just as the *Hurley* parade organizers’ speech was the aggregate of all the speech that viewers would see in the parade. And this is a plausible position, precisely because people generally go to the clinics to receive speech: information and advice. The speech they get is the aggregate of all the communications that they receive on the clinic’s property.

But sometimes, the Court has held, requiring property owners to host or display certain content is *not* a speech restriction. Thus, in *PruneYard*, the Court upheld a requirement that a private shopping center let visitors gather signatures on its property; as a later case noted, “Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner’s exercise of his own right to speak . . . .”<sup>53</sup>

Likewise, in *Turner*, the Court upheld a “must-carry” rule requiring cable systems to carry certain channels that they would prefer not to carry; the Court concluded, among other things, that the law didn’t unconstitutionally compel the systems to speak.<sup>54</sup> “[T]he programming offered on various channels by a cable network,” the Court explained the next year in *Hurley*—unlike the more coherent speech product offered within a parade (or a newspaper)—“consist[s] of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience.”<sup>55</sup>

Similarly, in *FAIR*, the Court held that Congress could require law schools to allow military recruiters on their premises because such a requirement wouldn’t “limit[] what law schools may say nor require[] them to say anything.”<sup>56</sup> In *Hurley*, *Miami Herald*, and *Pacific Gas*, the Court reasoned, “the complaining speaker’s own message was affected by the speech it was forced to accommodate.”<sup>57</sup> But “[a] law school’s recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter’s message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.”<sup>58</sup> Allowing recruiters within the program thus “does not affect the law schools’ speech, because the schools

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52. *Id.* at 2371 (citing *Riley*).

53. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 12 (1986) (plurality opinion).

54. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653, 661–64, 668 (1994).

55. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 576 (1995).

56. *Rumsfeld v. FAIR*, 547 U.S. 47, 60 (2006).

57. *Id.* at 63.

58. *Id.* at 64.

are not speaking when they host interviews and recruiting receptions.”<sup>59</sup>

What counts as “individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience” and what counts as speech that “contribute[s] something to a common theme”<sup>60</sup> will often be clear.<sup>61</sup> But sometimes it won’t be:

- Is a bookstore selling individual, unrelated books, or creating a coherent speech product? (Imagine that someone sues the bookstore claiming that it discriminates against books written by authors of a particular race, sex, religion, sexual orientation, or the like.<sup>62</sup>)
- Is Twitter providing individual, unrelated accounts—so that the government might, for instance, require it not to block accounts based on their ideology—or creating a coherent speech product?<sup>63</sup>

Some of the Court’s decisions suggest that the answers should turn on whether users would perceive the compelled entity as having endorsed the view. In *Turner*, the Court stressed that, “[g]iven cable’s long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.”<sup>64</sup> “The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition [at a shopping center],” the Court held in *PruneYard*, “will not likely be identified with those of the owner.”<sup>65</sup> Though the law schools in *FAIR* argued that, if they allowed military recruiters, “they could be viewed as sending the message that they see nothing wrong with the military’s policies,” the Court rejected that argument, on the grounds that “[n]othing about recruiting suggests that law schools agree with any speech by recruiters.”<sup>66</sup>

59. *Id.*

60. *Hurley*, 515 U.S. at 576.

61. For instance, I have argued—in a white paper commissioned by Google—that requiring search engines to include certain material in their results (or barring them from excluding certain material) would interfere with their First Amendment right to create the search results that they want to display. See generally Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL’Y 883 (2012).

62. Say, for instance, that a bookstore refuses to sell books that it sees as “culturally appropriative” because they feature black characters but are written by whites, or that a bookstore has a special section for books by women or Muslims or Jews.

63. *Cf.* U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 741 (D.C. Cir. 2016) (upholding “net neutrality” rules that imposed a sort of common-carrier requirement on telecommunications companies, on the grounds that “such entities, insofar as they are subject to equal access mandates, merely facilitate the transmission of the speech of others rather than engage in speech in their own right”).

64. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994).

65. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

66. *Rumsfeld v. FAIR*, 547 U.S. 47, 64–65 (2006).

Yet the test can't quite be whether people perceive the entity as *agreeing* with all the speech it carries. After all, newspapers routinely deliberately publish op-eds expressing views contrary to their editorial policy. Nor can it be whether some people might perceive endorsement simply from the fact that the entities are tolerating the speech (though one occasionally hears such arguments from offended members of the public): at the time of the *PruneYard* decision, many people could have drawn such an inference from the presence of controversial leafletters, not knowing that the mall was newly legally required to allow them.

Rather, the inquiry seems to be: Is there a custom of the property owner selecting speakers based on the content of their speech, so that the presence of speakers is likely to reflect such a real selection rather than just the lack of a decision to exclude? Newspapers are highly selective about what they let in, even if they try to select a substantial range of op-ed commentary. Parades are usually selective in some measure, even if some are pretty broad-minded.

But shopping malls don't prescreen who may be present on their property (even if they on rare occasions ask someone to leave). Law schools do require recruiters to book rooms, but they will usually take any recruiter who shows up, regardless of the recruiter's message.<sup>67</sup> And while cable operators must be selective whenever there are more possible channels than there is room on the system, the Court stressed that they had historically not been selective as to the over-the-air broadcasters that the law in *Turner* newly compelled them to carry.<sup>68</sup>

If the property owner traditionally does select speakers based on content, then compelling the property owner to include speakers might, as the Court notes, lead some people to assume that it in some measure endorses those speakers (even if just endorsing their thoughtfulness without agreeing with their bottom lines, as with many newspapers and their op-ed columnists). At least, people may make this assumption for years, until the public becomes familiar with the compelled access rules and comes to realize that the speakers are allowed on the property by legal command and not because the owner endorses them.

And when the speaker is selecting based on content, it seems likely that it is indeed trying to create a coherent speech product. Conversely, when the speaker isn't selecting based on content, it's hard to see how the resulting aggregate of material will have much of a coherent message.

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67. They may occasionally select prospective employers based on, say, the size of the organization—for instance, having a separate recruiting fair for nonprofits, or for large firms—or based on the organization's practices, such as its nondiscrimination policies. But they generally don't select based on the prospective employer's ideology.

68. *Turner*, 512 U.S. at 655.

C. *Speech-Deterring Identification/Revelation Requirements*

**Government coercion of speakers is presumptively unconstitutional when it burdens speech by**

**(c) compelling speakers to disclose certain things that they would be reluctant to disclose (such as their identities), thus deterring them from engaging in speech.**

**Precedents:**

- *McIntyre v. Ohio Election Commission*.
- *Buckley v. American Constitutional Law Foundation, Inc.*<sup>69</sup>
- *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*.<sup>70</sup>

Compulsions that speakers identify themselves or reveal their past statements or associations may deter speech by requiring speakers to risk ostracism, job loss, unlawful government retaliation, or even violence. This was part of the Court’s rationale for striking down requirements that speakers identify themselves when arguing for or against ballot measures: “[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication,” the Court held, is protected by the First Amendment, partly because authors might otherwise be deterred by the risk of “economic or official retaliation” or “social ostracism.”<sup>71</sup>

As with the other compulsions we discuss, the presumption of unconstitutionality here can be rebutted under strict scrutiny (or, in some election cases, exacting scrutiny). That is why, for instance, *Citizens United v. FEC*<sup>72</sup> upheld the requirement that television ads that support or oppose candidates identify who is paying for the ad, at least in the absence of specific evidence that funders were facing “threats, harassment, or reprisals if their names were disclosed.”<sup>73</sup> But the presumption remains one of unconstitutionality, and—at least outside the campaign finance context—the presumption seems hard to overcome.

II. Pure Speech Compulsions

So far we have focused on speech compulsions that also affect “the

69. 525 U.S. 182 (1999).

70. 536 U.S. 150 (2002).

71. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995); *see also Watchtower*, 536 U.S. at 166 (quoting the *McIntyre* Court’s assertion that “[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation” or “by concern about social ostracism”); *Buckley*, 525 U.S. at 199–200 (explaining that the law compelled the speaker to identify himself or herself at the moment when his or her interest in anonymity was at its peak).

72. 558 U.S. 310 (2010).

73. *Id.* at 367–71.

complaining speaker’s own message,”<sup>74</sup> whether by selectively penalizing certain speech or by blocking speakers from creating the particular coherent speech product they want to create. But what about what one might call “pure speech compulsions”—compulsions to make or display or create a stand-alone statement, which only compel speech and don’t restrict it?

Such compulsions don’t directly take ideas out of the marketplace, interfere with the search for truth, or deny the public information relevant to democratic self-government. To be sure, some may see them as skewing the marketplace of ideas by selectively promoting the compelled message—but such skewing is likely no greater than that created by the government conveying the message itself, which is constitutionally permissible.

But the compulsions do interfere with a speaker’s autonomy and thus yield a rare opportunity for the Court to consider when speaker autonomy interests alone—apart from listener interests in hearing a rich debate—should suffice to invalidate government action. And the Court’s answer here has been that speaker autonomy interests do so suffice, at least when they are sufficiently implicated.

**Government coercion is presumptively unconstitutional**

**(a) when it compels people to speak things they do not want to speak, or**

**(b) when it compels people to fund speech they do not want to fund, unless**

**(i) the funding is distributed in a sufficiently neutral way, or**

**(ii) the funding goes to government speakers,**

**(c) but not when it merely compels people to host speech on their property, unless**

**(i) the hosted speakers are defined in a sufficiently neutral way,**

**or**

**(ii) the requirement is to host government speakers.**

**(d) There may be an exception for pure compulsions to state facts to the government, and possibly also for pure compulsions to state facts to third parties. (The Court has not made this clear, and lower courts are split.)**

*A. Compulsions to Speak*

**Government coercion is presumptively unconstitutional**

**(a) when it compels people to speak things they do not want to speak.**

**Precedents:**

- *West Virginia State Board of Education v. Barnette* (compelled

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74. *Rumsfeld v. FAIR*, 547 U.S. 47, 63 (2006).

flag salute and pledge of allegiance).

- *Wooley v. Maynard*<sup>75</sup> (compelled display of state motto on license plate).
- *Agency for International Development v. Alliance for Open Society International, Inc.*<sup>76</sup> (compelled statement of opposition to prostitution).

The Court’s very first compelled speech case, *Barnette*, made clear that pure speech compulsions are often unconstitutional, even when they don’t also function as speech restrictions; that case famously held that schoolchildren could not be required to pledge allegiance to the flag and to salute the flag.<sup>77</sup> “[C]ompulsion . . . to declare a belief”—compelled “affirmation of a belief and an attitude of mind”—unconstitutionally violated the “individual freedom of mind.”<sup>78</sup> The much more recent *Alliance for Open Society* echoes this as to organizations in rejecting a government requirement that organizations that want government HIV-prevention funds officially take a particular stand opposing prostitution.<sup>79</sup>

In *Wooley v. Maynard*, the Court also made clear that requiring people to display ideological messages on their property (there, “Live Free or Die,” the state motto) was similarly unconstitutional.<sup>80</sup> The government, the Court held, may not “require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.”<sup>81</sup>

The Court in these cases didn’t rest its holding on the theory that the speech compulsion would restrict the targets’ other speech (the way it did in the cases discussed in Part I). Nor did the Court rest its holding on the theory that observers would wrongly believe that the compelled parties endorsed the compelled speech.<sup>82</sup>

Indeed, it’s hard to imagine how an observer would have so believed as to, for instance, the Maynards, given that everyone knows that license plates are printed by the state (at the time, with no opportunity for customization). Rather, the Court’s view was that it was unconstitutional to force a person “to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable,” by being “require[d] . . . [to] use [his] private

75. 430 U.S. 705 (1977).

76. 133 S. Ct. 2321 (2013).

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

78. *Id.* at 631, 633, 637.

79. *All. for Open Soc’y*, 133 S. Ct. at 2327, 2332 (citing *Barnette*, 319 U.S. at 642).

80. *Wooley*, 430 U.S. at 713.

81. *Id.*

82. Justice Rehnquist’s dissent argued that the motto-display requirement was constitutional because observers wouldn’t perceive the Maynards as having endorsed the motto. *Id.* at 721–22 (Rehnquist, J., dissenting). But the majority viewed that as irrelevant.

property as a ‘mobile billboard’ for the State’s ideological message.”<sup>83</sup> That alone, even without any interference with the driver’s other speech, “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”<sup>84</sup>

*B. Compulsions to Pay Money for Speech*

**Government coercion is presumptively unconstitutional**

**(b) when it compels people to fund speech they do not want to fund, unless**

- (i) the funding is distributed in a sufficiently neutral way, or**
- (ii) the funding goes to government speakers.**

**Precedents:**

- *Elrod v. Burns*<sup>85</sup> (compelled contributions to political parties).
- *Abood v. Detroit Board of Education*<sup>86</sup> (compelled payments to unions used for political purposes).
- *Keller v. State Bar of California*<sup>87</sup> (compelled payments to state bars used for political purposes).
- *Janus v. AFSCME* (compelled payments to unions, including when used for collective bargaining purposes).

**Exceptions:**

- *Board of Regents of the University of Wisconsin System v. Southworth*<sup>88</sup> (requiring university students to pay fees that fund student groups on a viewpoint-neutral basis is fine).
- *Johanns v. Livestock Marketing Ass’n*<sup>89</sup> (requiring people to fund governmental speech is fine).

The Court has also taken the view that compelling the funding of speech is largely equivalent to compelling speech. Requiring employees to contribute to a party as a condition of public employment, for instance, “furthers the advancement of that party’s policies to the detriment of his party’s views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief.”<sup>90</sup> Obviously, compelling one to pay money to a party isn’t literally coercing belief or even compelling speech, but the Court has treated them as largely equivalent. The same, the Court held in *Abood*, was true of requiring employees to contribute to a union’s political

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83. *Id.* at 715 (majority opinion).

84. *Id.* (quoting *Barnette*, 319 U.S. at 642) (internal quotation marks omitted).

85. 427 U.S. 347 (1976).

86. 431 U.S. 209 (1977).

87. 496 U.S. 1 (1990).

88. 529 U.S. 217 (2000).

89. 544 U.S. 550 (2005).

90. *Elrod*, 427 U.S. at 355.

speech:

[C]ompell[ing people] to make . . . contributions for political purposes . . . infringe[s] . . . their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. . . . These principles prohibit a State from compelling any individual to affirm his belief in God, or to associate with a political party, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.<sup>91</sup>

And this ultimately led to *Janus*, where the Court held the same as to compelling employees to contribute to a union's other speech activities. "Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns" to compelling a person to speak.<sup>92</sup>

There are two important exceptions to this doctrine, but we will turn to them in the next section.

### C. *Compulsions to Host Ideas on Your Property*

#### **Government coercion is not presumptively unconstitutional**

#### **(c) when it merely requires people to host speech on their property,**

**(i) at least when the hosted speakers are defined in a sufficiently neutral way, or**

**(ii) the requirement is to host government speakers.**

#### **Precedents:**

- *PruneYard Shopping Center v. Robins* (shopping centers).
- *Turner Broadcasting System, Inc. v. FCC* (cable system).
- *Rumsfeld v. FAIR* (law school rooms during recruiting).

1. *The Cases.*—The Court, then, has broadly condemned requirements that people utter speech, display speech, or pay for others'

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<sup>91</sup> *Abood*, 431 U.S. at 234–35 (citations omitted); *see also Keller*, 496 U.S. at 9–10 (explaining the unconstitutionality of compelling individuals to make financial contributions for political purposes).

<sup>92</sup> *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018); *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012) ("Closely related to compelled speech and compelled association is compelled funding of the speech of other private speakers or groups."); *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) ("Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, or from compelling certain individuals to pay subsidies for speech to which they object." (citations omitted)).



speech. But it has also, three times, upheld laws that require people to host speech on their property.

Most recently, in *FAIR*, the Court upheld the requirement that law schools let military recruiters speak on campus.<sup>93</sup> *Wooley*, the Court held in *FAIR*, involved “the government . . . telling people what they must say” by requiring “an individual . . . [to] personally speak the government’s message.”<sup>94</sup> The recruiter-access requirement, on the other hand, merely “force[d]” law schools “to host or accommodate another speaker’s message.”<sup>95</sup>

Such requirements to “host or accommodate,” the Court held, are unconstitutional only if “the complaining speaker’s own message was affected by the speech it was forced to accommodate”<sup>96</sup> (as in *Hurley*, *Miami Herald*, or *Pacific Gas*, discussed in subpart I(B)). Requirements to “personally speak,” on the other hand, can be unconstitutional even apart from that, as in *Barnette* and *Wooley*; likewise, requirements to personally support others’ speech through payment can be unconstitutional even if they don’t affect the compelled person’s own speech, as in *Abood*, *Keller*, and *Janus*.

Two other cases, *Turner* and *PruneYard*, could be fit within this mold as well. Recall that in *Turner*, the Court upheld a law requiring cable-system operators to carry over-the-air broadcasters; the Court later characterized the law as merely requiring the operators to be a “conduit” for the broadcasters.<sup>97</sup> That too might have been the Court’s attempt to place the obligation on the “host or accommodate” rather than “speak” side of the line.

And in *PruneYard*, exactly the same Justices who decided *Wooley* held that a state could require shopping malls to allow leafletters on their property. Such a mandate, the Court held, simply required the owners to tolerate visiting “members of the public”—to whom the property was “open to . . . come and go as they please”—to “express[.]” their own “views.”<sup>98</sup> If requiring law schools to let recruiters speak on their property is seen as merely a requirement “to host or accommodate,” the same could be said of requiring large malls to let visitors leaflet on their property.

The problem, though, is that these three “compelled hosting” cases, as we might call them, aren’t easy to reconcile with the compelled speech cases (such as *Wooley*) and the compelled funding cases (such as *Abood* and *Janus*).

*2. The Tension with the Compelled Speech Cases.*—First, let’s compare *FAIR*

93. *Rumsfeld v. FAIR*, 547 U.S. 47, 70 (2006).

94. *Id.* at 61, 63.

95. *Id.* at 63.

96. *Id.*

97. *See supra* subpart I(B).

98. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

and *Wooley*. In both, the government sought access to someone's property (offices or cars) in order to convey its own message (join the military or militantly support freedom). In both, the speech would pretty clearly be seen by observers as the government's.

*FAIR* described *Wooley* as applying “the principle that freedom of speech prohibits the government from telling people what they must say,” and involving “an individual [being required to] personally speak the government's message.”<sup>99</sup> But of course the Maynards weren't literally being required to “say” or “personally speak” anything—they just had to have the message posted on their car.

The *Wooley* Court condemned the law as “requir[ing] that appellees use their private property as a ‘mobile billboard’ for the State's ideological message . . . .”<sup>100</sup> But the statute in *FAIR* likewise required that the law schools use their private property as a platform for the State's ideological message.

I think the best response, though one I am still skeptical about, would be that having to host *speakers* on one's physical property is different than having to post *speech* on one's physical property. Perhaps the presence of third parties who actually convey the speech somehow breaks the chain of causation, so that the symbolism stops being one of “compelled speech” and becomes “compelled accommodation of the speech of others,” which should be viewed as a different matter.

That still requires explaining *Turner*, in which a cable operator was indeed required to convey others' speech. But perhaps *Turner* can be bracketed as a separate kind of case, which turned on preventing abuse of government-provided monopoly power (part of the argument given in *Turner* itself, and then elaborated in *Hurley*).<sup>101</sup>

3. *The Tension with the Compelled Funding Cases.*—Yet even if *FAIR* can be reconciled with *Wooley*, how to reconcile *FAIR* with *Abood*, *Keller*, and *Janus*? If having to turn over your money to speakers who will then use it to speak is an impermissible compulsion, why should it be constitutional to have to turn over (even temporarily) your real estate to speakers who will then use it to speak? Here too, I think there is a doctrinally viable response, though here too I am skeptical about whether it's persuasive.

*Turner* and *PruneYard* both stressed that the obligation to host was

99. *FAIR*, 547 U.S. at 61, 63.

100. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

101. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656–57 (1994) (noting the “potential for abuse” posed by a cable operator being able to “silence the voice of competing speakers with a mere flick of the switch”); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 577–78 (1995) (“This power gives rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed.”).

content-neutral *as to its beneficiaries* (and not just as to those burdened by the obligation). “[U]nlike the access rules struck down in [*Miami Herald* and *Pacific Gas*], the must-carry rules [imposed on Turner] are content neutral in application. . . . [T]hey confer benefits upon all full-power, local broadcasters, whatever the content of their programming.”<sup>102</sup> “[N]o specific message is dictated by the State to be displayed on [PruneYard’s] property. There consequently is no danger of governmental discrimination for or against a particular message.”<sup>103</sup> And *Pacific Gas* in turn distinguished *PruneYard* on the same grounds: “The [Public Utilities Commission] order does not simply award access to the public at large; rather, it discriminates on the basis of the viewpoints of the selected speakers. . . . Access to the envelopes thus is not content neutral.”<sup>104</sup>

Now this cannot explain *FAIR*, because there the law conferred benefits solely on one speaker—the military—precisely because the content of its speech consisted of military recruiting. Compelled hosting of speech, after *PruneYard*, *Turner*, and *FAIR*, now seems to be constitutional either if it benefits all its beneficiary speakers without regard to the content of their speech, or if it selectively benefits just the government as speaker.

And it turns out that the compelled funding cases draw a similar line:

1. Compelling people to fund particular private speakers using their property (*Janus*) is generally unconstitutional. So is compelling people to host particular private speakers or their speech on their property (*Pacific Gas*’s discussion of *PruneYard*).
2. But compelling people to pay money that is neutrally distributed to a wide range of speakers is constitutional: in *Southworth*, the Court unanimously upheld a university rule requiring students to pay a separate fee that would be used to fund student group speech, largely because the funding would be allocated in a viewpoint-neutral way.<sup>105</sup> Compelling people to host on their property a wide range of speakers, defined in a content-neutral way, is likewise constitutional.
3. Compelling people to pay money that supports government speech is also allowed: *Livestock Marketing* so held as to fees used to fund generic government advertising supporting agricultural products (such as beef).<sup>106</sup> And more broadly, tax money is of course

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102. *Turner*, 512 U.S. at 655.

103. *PruneYard*, 447 U.S. at 87.

104. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 12–13 (1986) (plurality opinion).

105. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000). Because the compulsion took place within a government funding program, which was treated as akin to a “limited public forum,” the Court required viewpoint neutrality rather than content neutrality. *Id.* at 234.

106. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559–60 (2005).

routinely taken to pay for government actions, which include government speech. Compelling people to host government speakers on their property is constitutional as well (*FAIR*).

This favorable treatment of preferential access for government speech also tracks how speech restrictions in “traditional public fora,” such as public streets, sidewalks, or parks, operate:

1. Allowing only particular speakers, based on the content of their speech, to use public fora—for instance, banning picketing outside schools or homes but exempting unions or consumer advocacy groups—is generally unconstitutional.<sup>107</sup>
2. Limiting access to public fora on content-neutral grounds (e.g., no residential picketing for anyone) is often constitutional.
3. Giving the government special rights of access to public fora is often likewise constitutional—for instance, the government may provide that it gets to put up monuments in parks or signs on streets but that others can’t do the same.<sup>108</sup>

If one had to step back and justify all these cases, one might say something like this:

The government can’t compel you to alter your speech (see Part I), actually say things, or display things in a way that is close enough to speaking.

But when it comes to access to your property (whether money or real estate), the government has considerable power to use, permanently or temporarily, that property. Once it does that, it can either turn it over for public access on a content-neutral basis (*Southworth*, *PruneYard*, *Turner*) or use it itself for its own speech, which will naturally be speech of the government’s chosen content (*Livestock Marketing*, *FAIR*)—just as public parks, streets, and sidewalks are available to the public on a content-neutral basis, but the government also has special access to them for its own speech.

The government can’t, though, give particular speakers access to your property for their speech, whether by requiring government employees to fund unions or state bars (*Janus*, *Keller*<sup>109</sup>) or requiring businesses to deliver

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107. The Court has, for instance, struck down restrictions on picketing or demonstrating when there has been an exception for union speech. *Carey v. Brown*, 447 U.S. 455, 457, 471 (1980); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 97–98 (1972).

108. *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009); *see also* *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2233 (2015) (Alito, J., concurring) (“In addition to regulating signs put up by private actors [in content-neutral ways], government entities may also erect their own signs consistent with the principles that allow governmental speech.”).

109. The Court treated the state bar in *Keller* as not quite a government speaker—at least not a government speaker in the sense that the Department of Agriculture in *Livestock Marketing* or the military in *FAIR* were government speakers. I think the Court may have erred there, but that was how it reasoned. For more on this, see William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. (forthcoming 2018).

the speech of third parties (*Pacific Gas*). Likewise, it can't give particular speakers special access to its public-forum property.

I think there is much that can be said against this rule, both as to compelled funding and compelled hosting. If anything, selectively promoting the government's speech on private property should raise more First Amendment problems than selectively promoting a consumer-advocacy group's speech on private property (as in *Pacific Gas*). And certainly when it comes to compelled display (as in *Wooley*) rather than compelled hosting (as in *FAIR*), the Court rejected the law requiring drivers to display a government-created motto, without viewing the motto's governmental origin as a plus.

Indeed, Will Baude and I have criticized *Janus* and *Abood* on the grounds that they erred in treating compelled funding of private speech as unconstitutional (or, in *Abood*, partly constitutional) when compelled funding of government speech is routine.<sup>110</sup> Likewise, *FAIR* may be wrong in allowing the government to force private property owners to host its speech.<sup>111</sup>

Yet the Justices unanimously disagreed with us in *Abood*, and *FAIR* was unanimous as well. Whatever my misgivings about it, the cases do seem to support greater government power to compel subsidy or hosting of government speech, even when compelled subsidy or hosting of private speech is unconstitutional. And so long as these cases are the law, I think the best way of fitting them with the other precedents is the one laid out above.

4. *Applications of the Content-Neutral Beneficiary Selection Requirement.*—If I am right that *PruneYard* and *Turner* continue to require that nongovernmental beneficiaries of compelled hosting be defined in a content-neutral way, then this may invalidate certain kinds of compelled hosting rules.

a. *Laws Allowing Union Picketing on Certain Private Property.*—Some states allow union picketing (but not picketing on other issues) on private property, such as a privately owned sidewalk in front of a store. The California Supreme Court said this is constitutional, but the D.C. Circuit said (I think correctly) that it's not.<sup>112</sup>

110. *Id.*

111. See Dale Carpenter, *Unanimously Wrong*, CATO SUP. CT. REV., 2005–2006, at 217. Perhaps the Solomon Amendment might have been properly upheld as a permissible condition on receiving government funds, on the theory that the government is entitled to use its funds to essentially rent space. But the Court chose not to rely on that argument, and instead concluded that Congress could simply demand access to private property, without using a funding condition. *Rumsfeld v. FAIR*, 547 U.S. 47, 59–60 (2006).

112. Compare *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 290 P.3d 1116, 1127–29 (Cal. 2012), with *Walmart Foods v. NLRB*, 354 F.3d 870, 876 (D.C. Cir. 2004). This content discrimination doesn't arise in California law for large shopping centers, since California law requires such centers to allow all speakers (that's the rule upheld in *PruneYard*). But

The government may not selectively allow only labor picketing on public sidewalks, because that is unconstitutional content discrimination; the Court has expressly held this in *Police Department of Chicago v. Mosley*<sup>113</sup> and *Carey v. Brown*.<sup>114</sup> Indeed, even when a city can ban all picketing, for instance in front of people’s homes,<sup>115</sup> it cannot selectively exempt union picketing. It follows, I think, that the government likewise may not selectively allow only labor picketing on privately owned sidewalks. Such selective treatment would turn the constitutionally permissible content-neutral trespass law (under which a property owner could eject all picketers) into an unconstitutional content-based rule.

Of course, private property isn’t a “traditional public forum” in the sense that public sidewalks are—but governmental regulation of speech on private property is just as subject to the prohibition of content discrimination as is governmental regulation of speech in traditional public fora.<sup>116</sup> The government has some extra power to control speech on nonpublic forum *government* property, but that stems from the government’s special power as landlord.<sup>117</sup> When it comes to speech on private property, the government has no such extra power.

And *PruneYard*, *Pacific Gas*, and *Turner* reinforce that. Just as speech restrictions with content-based exemptions are generally impermissible, so compulsory hosting rules, with the beneficiaries chosen based on the content of their speech, are generally impermissible as well.

*b. Laws Allowing Initiative and Referendum Signature Gathering on Some Property.*—Some states require shopping malls to let visitors gather initiative and referendum signatures but don’t similarly require malls to allow other speech.<sup>118</sup> Such a requirement is viewpoint-neutral, but it is still content-based, as *Reed v. Town of Gilbert*<sup>119</sup> shows.<sup>120</sup> It too would likely be

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California law doesn’t require stand-alone stores to allow all speakers on their property; it only requires them to allow union picketers. See *Ralphs Grocery*, 290 P.3d at 1120–21 (explaining that the areas outside stores’ entrances and exits are not public forums).

113. 408 U.S. 92, 94 (1972) (holding that the government couldn’t ban picketing outside schools but exempt labor picketing).

114. 447 U.S. 455, 457, 471 (1980) (holding that the government couldn’t ban residential picketing but exempt labor picketing).

115. *Frisby v. Schultz*, 487 U.S. 474, 476, 488 (1988).

116. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (holding that restrictions on signs displayed on private property must be content neutral).

117. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

118. *Batchelder v. Allied Stores Int’l, Inc.*, 445 N.E.2d 590, 595 (Mass. 1983); *Walmart, Inc. v. Progressive Campaigns, Inc.*, 989 P.2d 524, 529–30 (Wash. 1999). Oregon also had a similar rule, but then overruled it. *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 243 (Or. 2000), *overruling* *Lloyd Corp. v. Whiffen*, 849 P.2d 446 (Or. 1993).

119. 135 S. Ct. 2218 (2015).

120. *Id.* at 2227 (concluding that the distinction between “political” speech and other speech is content-based); *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (holding that a regulation is

unconstitutional, just as a rule preferring initiative/referendum-related signature gathering over other signature gathering on public sidewalks would be unconstitutional.

*c. Laws Allowing People to Fly the American Flag on Property Controlled by Landlords or Condominium Owners' Associations.*—Some states specially protect tenants' or condominium owners' rights to fly the American flag. Most such laws are limited to display on the tenant's or owner's exclusively controlled property, so they don't raise compulsions-to-host problems. But New Hampshire law expressly applies to flags flown partly on common property:

[N]otwithstanding any provision in the condominium instruments to the contrary, the unit owners' association shall not prohibit the outdoor display of the United States flag . . . . The association may adopt reasonable rules regarding the size of the flag and the manner in which the flag is displayed. When a flag is flown from the unit owner's balcony or deck, from a bracket, the flag may extend over the vertical line of the unit owner's outboard deck line, which would put the flag into the common area, versus the unit owner's private space.<sup>121</sup>

This too seems impermissibly content-based and thus unconstitutional under *PruneYard* and *Turner*. And the flag would be the speech of the unit owner, not of the government, so *FAIR* would not apply.

#### *D. Compulsions to Convey Facts*

**(d) There may be an exception for pure compulsions to state facts to the government, and possibly also for pure compulsions to state facts to third parties. (The Court has not made this clear, and lower courts are split.)**

“[C]ompelled statements of ‘fact’” “burden[] protected speech” as much as do “compelled statements of opinion.”<sup>122</sup> *Riley* held this as to speech compulsions that function as speech restrictions, and *FAIR* seemed to approve this principle even as to pure speech compulsions: “As *FAIR* points out [citing *Riley*], these compelled statements of fact (‘The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.’), like compelled statements of opinion, are subject to First Amendment scrutiny.”<sup>123</sup>

Yet the *FAIR* opinion immediately followed this by saying:

This sort of recruiting assistance, however, is a far cry from the

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content-based if “enforcement authorities” must “‘examine the content of the message that is conveyed to determine whether’ a violation has occurred”) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)).

121. N.H. REV. STAT. ANN. § 356-B:47-a (2017).

122 *Riley*, 487 U.S. at 782.

123. *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006).

compelled speech in *Barnette* and *Wooley*. The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only “compelled” if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse. . . .

Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to display the motto “Live Free or Die,” and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.<sup>124</sup>

This suggests that perhaps pure compulsions to convey facts are generally permissible, unlike pure compulsions to convey ideas (or, as in *Riley*, compulsions that interfere with the creation of a coherent speech product). And *Riley* itself seemed to view required disclosures of facts to the government as presumptively constitutional: it reasoned that “as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file,” a “procedure [that] would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation.”<sup>125</sup> This reasoning presupposes that there is no First Amendment problem with requiring fundraisers to convey such factual financial disclosures to the state.

And the constitutionality of such pure factual compulsions is particularly important because we are all routinely required to state various facts to the government. We have to tell federal and state income tax authorities how much money we make. We may have to register for the draft. We may have to answer census forms. We may have to report to the police certain crimes we witness. The *Maynards* were required to display a motto on their car as a condition of driving it on public streets, but surely at least one of them was also required to convey a good deal of information to the government to get a license to drive on those streets.

The list can go on. Even if these requirements serve compelling government interests, I doubt that all are the least burdensome means of serving those interests. If they are treated as presumptively unconstitutional speech compulsions, then they would likely need to be narrowed considerably and perhaps at times struck down altogether.

The tension within the *FAIR* opinion is echoed by the tension in lower court cases dealing with such pure compulsions of factual statements. For

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<sup>124</sup> *Id.*

<sup>125</sup> *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988); *see also* *Famine Relief Fund v. West Virginia*, 905 F.2d 747, 752 (4th Cir. 1990) (expressly upholding some such disclosure requirements).



instance, two courts have upheld statutes requiring people to report certain crimes to law enforcement. (These cases involved required reporting of suspected child abuse, but the logic would extend to laws requiring witnesses to report other crimes as well.<sup>126</sup>) Such a law, the courts reasoned, “does not compel the dissemination of an ‘ideological point of view,’ but only mandates the reporting of information—a requirement not altogether dissimilar from that imposed by the Internal Revenue Code.”<sup>127</sup> Another court has upheld such a statute under strict scrutiny.<sup>128</sup>

But the Second Circuit has recently held that prison guards’ demanding that an inmate report crimes by fellow inmates was an unconstitutional speech compulsion.<sup>129</sup> The court treated *Barnette*, on which it relied extensively, as fully applicable to such obligations. And the logic of the decision suggests that statutes requiring people to report crimes are likewise unconstitutional.<sup>130</sup>

We are also often required to state facts to third parties. Some such requirements can be justified as integral to regulations of conduct (Part III) or as compulsions of statements in commercial speech (Part IV). But others are hard to fit within those categories. The California Supreme Court recently suggested that such requirements are generally constitutional, upholding a law requiring prescription drug claims processors to compile certain statistical data and send it to their customers:

Unlike the disclosure requirement at issue in *Riley*, [the California law] involves a compelled statement of facts that is not temporally, tangibly, or otherwise linked to other fully protected speech. *Riley* did

126. See Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105, 105 n.2 (1999) (citing various state statutes that impose a general duty to report sufficiently serious crimes that one has witnessed).

127. *State v. Grover*, 437 N.W.2d 60, 64 (Minn. 1989); *White v. State*, 50 S.W.3d 31, 46 (Tex. App. 2001) (quoting *Grover*, 437 N.W.2d at 34).

128. *People v. Hodges*, 13 Cal. Rptr. 2d 412, 420 (Cal. App. Dep’t Super. Ct. 1992). Courts have upheld other laws requiring people to convey information to the government. See, e.g., *State v. Larson*, No. A10-1562, 2011 WL 2672239, at \*1–2 (Minn. Ct. App. July 11, 2011) (upholding a law that required certain convicts who are being released from prison to give their intended addresses to law enforcement); *State v. Hill*, No. CA-993, 1992 WL 29184, at \*1–2 (Ohio Ct. App. Feb. 6, 1992) (upholding a law that required people who get traffic tickets to provide their social security numbers). But see *People v. Quiroga*, 20 Cal. Rptr. 2d 446, 450 n.2 (Cal. Ct. App. 1993) (suggesting that a person’s “refusal to identify himself [to the police] or to answer questions” may be constitutionally protected by “the First Amendment protection against compelled speech recognized in such cases as [*Wooley* and *Barnette*]”).

129. *Burns v. Martuscello*, 890 F.3d 77, 88–89 (2d Cir. 2018).

130. Eugene Volokh, *Do Laws Requiring People to Report Crimes Violate the First Amendment?*, VOLOKH CONSPIRACY (Sept. 26, 2018), <http://reason.com/volokh/2018/09/26/do-laws-requiring-people-to-report-crime> [<https://perma.cc/VPL4-25GZ>]; see also *Burns*, 890 F.3d at 91 (“[T]he speech that we recognize today as protected by the First Amendment fits well within a broader frame of constitutional protection from the government’s ability to compel participation in investigative measures.”).

not hold that such compelled speech is subject to heightened scrutiny. . . . Unlike the professional fundraisers in *Riley*, prescription drug claims processors can satisfy the statutory mandate independently of any other speech they wish to undertake. Although defendants object to being *compelled* to transmit the study reports to their clients, the fact of compulsion alone, which exists in equal measure when government requires a public disclosure [as in the *Riley* compelled disclosures to the government], is not sufficient to trigger the “exacting” scrutiny applied in *Riley*.<sup>131</sup>

On the other hand, a recent federal district court decision denied a motion to dismiss a challenge to a law requiring sex offenders to have “CRIMINAL SEX OFFENDER” written on their driver’s licenses, because this would in practice require them to convey this information to anyone who asks them for identification, such as “cashiers and tellers at banks, restaurants, gas stations, grocery stores, and movie theaters.”<sup>132</sup> “[T]he Supreme Court,” the court reasoned, “long ago rejected the distinction between ideological and factual messages in the compelled-speech arena.”<sup>133</sup> Another court has similarly struck down an ordinance that “compel[led] sex offenders to speak [by] mandating that they post a sign [during Halloween] that there is ‘no candy or treats at this residence.’”<sup>134</sup>

#### E. *Compulsions to Create Speech*<sup>135</sup>

##### **No black letter law.**

The Court has not yet decided how to classify compulsions to create speech: May a wedding photographer be required to create photographs of same-sex weddings?<sup>136</sup> May a freelance writer be required to write press releases for the Church of Scientology?<sup>137</sup> May a calligrapher be required to

131. *Beeman v. Anthem Prescription Mgmt., LLC*, 315 P.3d 71, 86 (Cal. 2013).

132. *Doe v. Marshall*, No. 2:15-CV-606-WKW, 2018 WL 1321034, at \*5, \*12–13 (M.D. Ala. Mar. 14, 2018).

133. *Id. But see Doe v. Kerry*, No. 16-cv-0654-PJH, 2016 WL 5339804, at \*18 (N.D. Cal. Sept. 23, 2016) (upholding a similar required notation on passports).

134. *Doe v. City of Simi Valley*, No. CV 12-8377 PA (VBKX), 2012 WL 12507598, at \*7, \*9 (C.D. Cal. Oct. 29, 2012).

135. Parts of this section were adapted from Brief for the Cato Institute et al. as Amici Curiae Supporting Petitioner, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (No. 33,687) (filed by me on behalf of Cato, Dale Carpenter, and myself).

136. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013) (answering “yes”).

137. *Cf. Lexington Fayette Urban Cty. Human Rights Comm’n v. Hands On Originals, Inc.*, No. 2015-CA-000745-MR, 2017 WL 2211381, at \*6–7 (Ky. Ct. App. May 12, 2017) (dealing with a related First Amendment question but not resolving it). If a freelance wedding photographer who promotes her services to the public is treated under a state law as a public accommodation, and thus barred from discriminating based on sexual orientation—which is what the New Mexico Supreme Court held in *Elane Photography*—a freelance writer who promotes her services to the public would equally be a public accommodation barred from discriminating based on religion.

create invitations for an event promoting a white supremacist organization or the Socialist Party?<sup>138</sup>

This issue was of course implicated in *Masterpiece Cakeshop* but not decided; and in that case, it was partly overshadowed by the question whether a wedding cake really is sufficiently expressive. But photographs, videos,<sup>139</sup> handwritten invitations, and press releases are indubitably speech, and cases involving them continue to arise.

I think that compelled personal creation of speech is constitutionally tantamount to compelled utterance or display of speech. The First Amendment equally protects creating speech and disseminating speech, including when the creating is done for money.<sup>140</sup> Just as the government can't require the Maynards to "use their private property as a 'mobile billboard'" for a particular message,<sup>141</sup> neither can it require people to use their personal labor to create a particular message.

To be sure, neither compelled creation nor compelled dissemination is likely to lead people to believe that the compelled person endorses the message (no such misperception was likely in *Wooley*, for instance). But both compelled creation and compelled dissemination still involve people being required "to foster . . . concepts" with which they disagree and "to be an instrument for fostering public adherence" to a view that they disapprove of—*Wooley* tells us that this is unconstitutional.<sup>142</sup>

If anything, requiring someone to actively create speech is even more of an imposition on a person's "intellect and spirit" than is requiring the person to engage in "the passive act of carrying the state motto on a license plate."<sup>143</sup> Creating expression—whether writing (even just writing a press release), painting, singing, acting, or photographing an event—involves innumerable intellectual and artistic decisions.<sup>144</sup> It also, for many creators who want to be

138. See *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 441 (Ariz. Ct. App. 2018) (reasoning suggesting the answer is "yes"), *review continued* (Oct. 31, 2018). Some jurisdictions ban discrimination in public accommodations based on party affiliation, e.g., D.C. CODE § 2–1411.02 (2001); V.I. CODE ANN. tit. 10, § 64(3) (2018), and some even based on political beliefs, e.g., SEATTLE, WASH. MUN. CODE §§ 14.06.020(L), .030(B).

139. See *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, 1097 (D. Minn. 2017) (holding that a videographer could be compelled to videorecord a same-sex wedding).

140. See, e.g., *United States v. Stevens*, 559 U.S. 460, 466–70 (2010) (striking down a restriction on the commercial creation and distribution of material depicting animal cruelty, with no distinction between the ban on creation and the ban on distribution); *Citizens United v. FEC*, 558 U.S. 310, 372 (2010) (Roberts, C.J., concurring) ("The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech." (internal quotation marks omitted)); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 123 (1991) (holding that an author who writes for money is fully protected by the First Amendment).

141. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

142. *Id.* at 714–15.

143. *Id.* at 715.

144. The taking of wedding photographs, like the writing of a press release or the creation of a

emotionally honest in their work, requires sympathy with the intellectual or emotional message that the expression conveys, or at least absence of disagreement with such a message. Wedding photographers, for instance, are hired to create images that convey the idea that the wedding is a beautiful, praiseworthy, even holy event.

This is quite far from the compelled hosting cases, such as *FAIR*. *FAIR*, recall, concluded that:

Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.<sup>145</sup>

But forcing a Jehovah's Witness to sympathetically and artistically photograph an event that had the theme "Live Free or Die," or to create and print "Live Free or Die" posters, would be quite close to what happened in *Wooley* and quite far from what happened in *FAIR*. Likewise, forcing a gay-rights supporter to create a flattering video of military recruiters in the era of Don't Ask Don't Tell would be much closer to *Wooley* than to *FAIR*, and the same is true for forcing creators to create expression positively depicting same-sex weddings.

#### *F. Compulsions to Host as Unconstitutional Pressure to Respond*

##### **No black letter law.**

In *Pacific Gas*, the plurality concluded that compulsions to host can become a sort of compulsion to speak because they tend to pressure the hosts to respond to the guests' speech. Recall that the Public Utilities Commission required PG&E to periodically turn over space in its mailing envelopes to a ratepayer advocacy group, TURN (Toward Utility Rate Normalization). This, the plurality held, was unconstitutional:

The Commission's access order . . . impermissibly requires appellant to associate with speech with which appellant may disagree. The order on its face leaves TURN free to use the billing envelopes to discuss any issues it chooses. Should TURN choose, for example, to urge appellant's customers to vote for a particular slate of legislative

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dramatic or musical performance, involves many hours of effort and a large range of expressive decisions—about lighting and posing, about selecting which of the hundreds or thousands of shots to include in the final work product, and about editing the shots (for instance, by cropping and by altering the color). *See, e.g., Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 60 (1884) (concluding that photographs are protected expression for copyright purposes because they embody the photographer's creative choices); *Schrock v. Learning Curve Int'l, Inc.*, 586 F.3d 513, 519–20 (7th Cir. 2009) (same); *L.A. News Serv. v. Tullo*, 973 F.2d 791, 793–94 (9th Cir. 1992) (reaching similar conclusions in the context of videotapes).

145. *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006).

candidates, or to argue in favor of legislation that could seriously affect the utility business, appellant may be forced either to appear to agree with TURN's views or to respond. This pressure to respond "is particularly apparent when the owner has taken a position opposed to the view being expressed on his property." Especially since TURN has been given access in part to create a multiplicity of views in the envelopes, there can be little doubt that appellant will feel compelled to respond to arguments and allegations made by TURN in its messages to appellant's customers.<sup>146</sup>

Nor was the plurality concerned just about the risk that PG&E would be wrongly assumed to *endorse* the message:

The presence of a disclaimer on TURN's messages does not suffice to eliminate the impermissible pressure on appellant to respond to TURN's speech. The disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant. It does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN's message.<sup>147</sup>

*Turner* likewise characterized the law in *Miami Herald* as posing a similar problem: "[B]y affording mandatory access to speakers with which the newspaper disagreed, the law induced the newspaper to respond to the candidates' replies when it might have preferred to remain silent."<sup>148</sup>

But the trouble with this argument is that the same pressure to respond would likely have been present in *PruneYard* and *FAIR*, and possibly in *Turner*.<sup>149</sup> A shopping mall owner might well feel the need to respond to visitor messages that it disagrees with (for instance, messages that criticize the mall or its stores), or even to messages that patrons find offensive enough.

146. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 15–16 (1986) (plurality opinion) (citations omitted).

147. *Id.* at 15 n.11 (citations omitted).

148. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 654 (1994).

149. *Turner* distinguished *Pacific Gas* on the grounds that, appellants do not suggest, nor do we think it the case, that must-carry will force cable operators to alter their own messages to respond to the broadcast programming they are required to carry. Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.

*Id.* at 655 (citation omitted). But, to borrow the *Pacific Gas* plurality's language:

The [long history of cable serving as a conduit] serves only to avoid giving readers the mistaken impression that [the broadcaster's] words are really those of [the cable system]. It does nothing to reduce the risk that [the cable system] will be forced to respond when there is strong disagreement with the substance of [the broadcaster's] message.

*Pacific Gas*, 475 U.S. at 15 n.11.

That response might sometimes simply be a disclaimer by the shopping center owner stressing that it doesn't approve of the visitors' speech—indeed, *PruneYard* itself expressly mentioned the possibility of such a response as a reason to *uphold* the compelled hosting rule:

As far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.<sup>150</sup>

But in any event such a disclaimer would be an example of the shopping mall owner being “forced to respond,” in the words of *Pacific Gas*.

This pressure to respond was even more likely in *FAIR*. Recall that the law schools there were deeply committed to antidiscrimination policies that barred recruiters who discriminate based on sexual orientation; that commitment would normally have led them to exclude military recruiters “because they object to the policy Congress has adopted with respect to homosexuals in the military.”<sup>151</sup> Yet the Court held that law schools could be compelled to let recruiters speak on campus, and indeed to circulate factual information about where and when the recruiters were meeting students.<sup>152</sup>

Surely there the law schools might well have felt “pressure to respond” to the recruiters’ speech, to make clear to students that the schools weren’t abandoning their commitment to employer nondiscrimination based on sexual orientation. Just as *Pacific Gas* might have felt “forced either to appear to agree with TURN’s views [on controversial subjects] or to respond,”<sup>153</sup> so too the law schools might have felt forced either to appear to agree with the military’s Don’t Ask, Don’t Tell policy—or at least to think that the policy is no big deal—or to respond.

And, as in *PruneYard*, the Court stressed the possibility of the law schools’ responding as a means of dispelling any misconception on the students’ part: the schools “remained free to disassociate [themselves] from [the military’s] views,” and “nothing in the Solomon Amendment restrict[ed] what the law schools may say about the military’s policies.”<sup>154</sup> Such disassociation is indeed possible—but if law schools were likely to feel pressured to say things disassociating themselves this way (as I think seems likely), that would be the very “pressure to respond” that *Pacific Gas* seemed to condemn.

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150. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

151. *Rumsfeld v. FAIR*, 547 U.S. 47, 52 (2006).

152. *Id.* at 61–62.

153. *Pacific Gas*, 475 U.S. at 15.

154. *FAIR*, 547 U.S. at 65.

Nor has the Court ever fully explained how *Pacific Gas* fits with the compelled hosting cases. The *Pacific Gas* plurality distinguished *PruneYard* on three grounds:

1. The beneficiaries of the compelled hosting in *PruneYard* were selected on a content-neutral basis.<sup>155</sup>
2. The property owner in *PruneYard* was required to host people only in “the open area of the shopping center into which the general public was invited,” which was “peculiarly public in nature.”<sup>156</sup>
3. The owner in *PruneYard* “did not even allege that he objected to the content of the pamphlets.”<sup>157</sup>

But the first two grounds seem unrelated to whether the compelled hosting would create pressure to respond, and the third ground focuses on an item that the *PruneYard* majority (as opposed to the two-Justice concurrence) never relied on.

Moreover, all three bases for distinguishing *PruneYard* are unavailable as to the Court’s later decision in *FAIR*: The compelled hosting there benefited only military recruiters; the school had to provide them space in offices, to which “the general public” was generally not invited; and the school did object to the content of the recruiting because it was recruiting by an institution that discriminated based on sexual orientation. Yet *FAIR* says nothing at all about the *Pacific Gas* “pressure to respond” argument.

My sense is that the *Pacific Gas* “pressure to respond” position is hard to reconcile with the other cases, and it is of course just a plurality view and thus not really binding precedent. No lower court cases have relied on it to strike down a government action,<sup>158</sup> except in two decisions that were reversed by higher courts,<sup>159</sup> and in one case right after *Pacific Gas* that was virtually indistinguishable on the facts from *Pacific Gas*.<sup>160</sup>

The result in *Pacific Gas* may have been justifiable on the grounds that the law offered access only to certain speakers, or offered access that was in part triggered by *Pacific Gas*’s speech, or otherwise interfered with *Pacific*

155. *Pacific Gas*, 475 U.S. at 12.

156. *Id.* at 12 n.8.

157. *Id.* at 12.

158. So I gather from reading the cases found using the Westlaw query (“475 u.s. 1” “475 u.s. 1” “106 S.Ct. 903” “106 S. Ct. 903”) & ((pressur! obligat! compel! requir!) +5 respon!).

159. One was the lower court decision *FAIR v. Rumsfeld*, 390 F.3d 219, 241 (3d Cir. 2004), which was reversed by *Rumsfeld v. FAIR*, 547 U.S. 47, 70 (2006). The other was *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478, 1496 (W.D. Wis. 1988), a compulsory funding case that was reversed by *Levine v. Heffernan*, 864 F.2d 457, 463 (7th Cir. 1988) (nowhere mentioning *Pacific Gas*).

160. *Light Co. v. Citizens Util. Bd.*, 827 F.2d 1169, 1171, 1174 (7th Cir. 1987) (relying on *Pacific Gas* to strike down a statute that required utilities to include consumer advocacy group speech in their billing envelopes, and that was thus “in all material respects, constitutionally indistinguishable from the CPUC order struck down by the Court in *Pacific Gas*”).

Gas’s speech (for instance, by decreasing the amount of space that Pacific Gas could use for its own messages).<sup>161</sup> But the “pressure to respond” argument does not seem adequate as an independent basis to strike down speech restrictions, and indeed *PruneYard*, *Turner*, and *FAIR* appear inconsistent with it.

### III. Speech Connected to Nonspeech Conduct

**When people engage in nonspeech conduct (whether voluntary or compelled), the government may compel them to provide information**

- **describing the nature of, consequences of, or alternatives to the conduct,**
- **of the sort normally provided by the people with regard to similar conduct.**

**Precedents:**

- *NIFLA v. Becerra* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (information about the consequences of a medical procedure that a doctor is about to perform, and the alternatives to the procedure).
- *Rumsfeld v. FAIR* (information about military recruiters, when a law school that is compelled to host the recruiters relays similar information about other recruiters).

One of the most important but most opaque First Amendment exceptions has to do with speech “integral to conduct.” The Court has invoked this exception in justifying restrictions on solicitations of crime, threats of crime, fighting words, conspiracy, and more. I have discussed this exception at length in a different article,<sup>162</sup> and I won’t repeat that analysis here. Rather, I want to focus on the two cases in which it has been used to justify certain kinds of speech compulsion.

Let’s begin with the most recent case, *NIFLA*, and the case that it distinguished, *Casey*. In *NIFLA*, the Court struck down a requirement that certain clinics that primarily serve pregnant women inform patients that (among other things) the state offered free or low-cost abortions.<sup>163</sup> But in *Casey*, the Court had upheld a requirement that abortion providers inform patients of certain information that might dissuade them from getting abortions.<sup>164</sup>

161. *Pacific Gas*, 475 U.S. at 23–24, 24 n.3 (Marshall, J., concurring in the judgment).

162. See generally Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981 (2016).

163. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371, 2376 (2018).

164. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884–85 (1992) (opinion of O’Connor, Kennedy & Souter, JJ.). The law required the doctor to “inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the ‘probable gestational age



*NIFLA* distinguished *Casey* on the grounds that *Casey* involved a “regulation[] of professional conduct that incidentally burden[s] speech”—an “informed-consent requirement” imposed before a doctor could “perform an operation.”<sup>165</sup> But the law struck down in *NIFLA*, the Court concluded, “is not tied to a procedure at all,” and “applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed.”<sup>166</sup> And indeed the *NIFLA* law applied even when a clinic would merely “offer[] counseling about[] contraception or contraceptive methods,” or “pregnancy options counseling,” rather than any medical procedure.<sup>167</sup>

The dissent disagreed with the majority’s analysis here, arguing that such compelled disclosures of information should be allowed not just when a doctor is about to perform a procedure but whenever the patient is seeking help in contemplation of a procedure. The women who go to a clinic for “pregnancy options counseling,” for instance, are contemplating possible childbirth, which is itself a medical procedure.<sup>168</sup>

But the majority’s view seemed to be that speech compulsions are allowed only when they discuss the particular procedure that the speaker was planning to perform, or alternatives to that procedure. Presumably, some requirements to inform a pregnant woman about the availability of abortion would be constitutional under the majority’s view—say, a requirement that doctors who perform surgery aimed at saving a fetus alert the woman to risks of the surgery and inform her of the option of a therapeutic abortion.<sup>169</sup> Likewise, a requirement that doctors prescribing birth-control pills inform women about the availability of IUDs would be constitutional, even if the doctor believes that IUDs are abortifacients (because they can sometimes prevent implantation of a fertilized egg).<sup>170</sup> But the majority limits such

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of the unborn child,”” and to “inform the woman of the availability of printed materials published by the State 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.” *Id.* at 881.

165. *NIFLA*, 138 S. Ct. at 2373.

166. *Id.*

167. *Id.* at 2369.

168. *Id.* at 2386 (Breyer, J., dissenting).

169. Even late-term therapeutic abortions are legal when necessary to protect the woman’s life or health. *Casey*, 505 U.S. at 846. And sometimes women do face the decision whether to try to save the fetus’s life at some risk to themselves.

170. Whether such blocking of implantation should qualify as an abortion is a hotly contested question, even among those who generally oppose abortion. Compare, e.g., Alexandra DeSanctis, *Yes, Some Contraceptives Are Abortifacients*, NAT’L REV. (Nov. 4, 2016), <https://www.nationalreview.com/2016/11/contraception-birth-control-abortion-abortifacients-ella-plan-b-iud-embryo-life/> [<https://perma.cc/Z57Z-BQMN>] (arguing that contraceptives are not “fail-safe means of preventing conception” and that they can “go on to kill conceived embryos”), with Jamie Manson, *What an Abortifacient Is—and What It Isn’t*, NAT’L CATH. REP. (Feb. 20, 2012),

compulsions to disclosures related closely to a particular act that a person is about to inform.<sup>171</sup> Some lower courts (after *Casey* but before *NIFLA*) have also held that the permissible compulsions must be limited to factual, truthful, nonmisleading information, though the courts differ on how to apply this.<sup>172</sup>

This principle is likely not limited to professional-client relationships, but would apply to disclosures of risks of physical conduct generally. Many state courts, for instance, have upheld statutes requiring people with HIV to disclose this before having sex with anyone. Some of those courts have reasoned that such requirements pass strict scrutiny,<sup>173</sup> but others have held that it is a permissible compulsion of speech incidental to conduct,<sup>174</sup> following *NIFLA*, the latter view would likely be the more standard one.

The other speech-compulsion-incident-to-conduct case is *FAIR*. So far, we have discussed *FAIR*'s upholding the requirement that law schools allow military interviewers onto campus. But *FAIR* also upheld another provision, which expressly required law schools to themselves convey the same information about military recruiters as they do as about other recruiters, for instance to “send e-mails and post notices,” such as “The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.”<sup>175</sup> This is not just a compulsion to host—it is a compulsion to speak (especially given that the

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<https://www.ncronline.org/blogs/grace-margins/what-abortionifacient-and-what-it-isnt> [https://perma.cc/WS66-E57K] (arguing that contraceptives should not be viewed as abortifacients). Those who believe that IUDs are indeed abortifacients may get religious exemptions—under statutes such as the Religious Freedom Restoration Act (RFRA)—from requirements that they participate in the distribution of such devices. *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014). But that is a separate matter from whether the First Amendment itself bars people from being compelled to inform patients of the availability of IUDs.

171. Some, including the *NIFLA* dissenters, have argued that the majority's distinction of *Casey* stems simply from discrimination in favor of anti-abortion speakers. *See NIFLA*, 138 S. Ct. at 2385, 2388 (Breyer, J., dissenting). Likewise, Justice Scalia's dissents in some earlier cases have argued that the majority in those cases was discriminating against anti-abortion speakers. *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 753–54 (2000) (Scalia, J., dissenting). I don't want to speculate about what was in the majority's hearts, just like judges and lawyers facing these cases can't rest on such speculation; I am simply trying here to reconcile the reasoning of *NIFLA* and *Casey*, necessarily taking those opinions at face value.

172. *See, e.g.*, *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577–78 (5th Cir. 2012) (upholding the disclosure requirement and characterizing “required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions”—as well as a woman's consent form—to be the “epitome of truthful, non-misleading information”); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (en banc) (concluding that the state “can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant” to patients' abortion decisions).

173. *State v. Musser*, 721 N.W.2d 734, 744 (Iowa 2006); *State v. Gamberella*, 633 So. 2d 595, 604 (La. Ct. App. 1993) (same, under the Louisiana Constitution's express right to privacy).

174. *State v. S.F.*, 483 S.W.3d 385, 388 (Mo. 2016); *State v. Batista*, 91 N.E.3d 724, 728–29 (Ohio 2017); *see also* *People v. Russell*, 630 N.E.2d 794, 796 (Ill. 1994) (“Neither the statute nor the cases before us have even the slightest connection with free speech. . . . We are here concerned only with the specific conduct of these defendants and the application of the statute to them.”).

175. *Rumsfeld v. FAIR*, 547 U.S. 47, 61–62 (2006).

Court views compulsion to display a motto as a compulsion to speak).

Yet this compulsion, the Court held, was constitutional because it was “plainly incidental” to the law’s “regulation of conduct,” which is to say the law’s requirement that the recruiters be allowed on campus.<sup>176</sup> Once that requirement was upheld (on the grounds that it compelled only hosting and didn’t compel speaking), the compulsion of speech incidental to such hosting—defined based on the university’s own choices about what speech it “provides . . . for other recruiters”<sup>177</sup>—was constitutional.

And this is a necessary feature of any laws that mandate access to private institutions, whether they ban race discrimination, ban discrimination against the military, or require that certain businesses be common carriers open to all. If the state requires innkeepers to rent rooms to all would-be guests—just as a public accommodation provision, even apart from any specific ban on discrimination based on race, religion, sex, and the like<sup>178</sup>—then it must be able to require them to give the guests the information needed for the guests to use the service (such as what room number they have been assigned).

Nor is this just an application of strict scrutiny. The access requirement is constitutional even if maintaining inns as public accommodations isn’t seen as necessary to a compelling interest—just as the Court didn’t find in *FAIR* that allowing military recruiters on campus was necessary to a compelling interest. Likewise, under *FAIR*, the requirement of such speech incidental to the compelled access is constitutional.

#### IV. Commercial Advertising

**The government may compel commercial advertisers to include government-mandated**

- 1. “purely factual**
- 2. and uncontroversial information**
- 3. about [their goods or services].”<sup>179</sup>**

**Precedents:**

- *Zauderer v. Office of Disciplinary Counsel*<sup>180</sup> (information about legal fee arrangements), as interpreted by *NIFLA*.
- *Milavetz, Gallop & Milavetz, P.A. v. United States*<sup>181</sup> (notice that certain debt relief agencies accomplish their goals through helping clients file for bankruptcy).

176. *Id.* at 62.

177. *Id.*

178. *See, e.g.*, GA. CODE ANN. § 43-21-3 (2016) (“An innkeeper who advertises himself as such is bound to receive as guests, so far as he can accommodate them, all persons of good character who desire accommodation and who are willing to comply with his rules.”).

179. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

180. 471 U.S. 626 (1985).

181. 559 U.S. 229 (2010).

The Court has long recognized that compelled disclaimers in commercial advertising are much less constitutionally suspect than compelled disclaimers in other speech. Indeed, it has touted the value of such disclaimers as a constitutionally valid alternative to outright restrictions on commercial advertising.

In *Zauderer*, the Court concluded that requiring “factual and uncontroversial information about the terms under which [a lawyer’s] services will be available” is thus constitutional:

[T]he interests at stake in this case are not of the same order as those discussed in *Wooley*, [*Miami Herald*], and *Barnette*. Ohio has not attempted to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, “warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.”<sup>182</sup>

This logic applies equally to all goods and services and not just legal services.

And in *NIFLA*, the Court strongly suggested that, to make this exception apply, it is not just sufficient but necessary that the disclaimer be “purely factual and uncontroversial information” about the advertiser’s goods.<sup>183</sup> The requirement that pregnancy clinics post information about state-supported abortions, the Court held, couldn’t be justified under *Zauderer*: the notice wasn’t “uncontroversial” and wasn’t limited to disclosing information about the services that the clinics provide.<sup>184</sup> If the notice were to be upheld, it would have to be under heightened scrutiny, not under *Zauderer*. (Two decades earlier, the unanimous decision in *Hurley* seemed to take the same

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182. *Zauderer*, 471 U.S. at 651 (citations omitted).

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

184. *Id.*; see also *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 263–64 (2d Cir. 2014) (limiting *Zauderer* to compelled disclosures about the speakers’ own goods or services).

view.<sup>185)</sup>

Some lower courts also suggest that *Zauderer* applies only to disclosures that are aimed at preventing consumer deception.<sup>186</sup> Others disagree and would read *Zauderer* as broadly allowing other compelled disclosures aimed simply at providing more information to consumers (such as requiring sellers to indicate where their products come from).<sup>187</sup>

## V. Conclusion

Back in 2001, the first edition of my First Amendment casebook included an epigraph at the start of its Compelled Speech chapter: “[A]ny Anglo-American lawyer must cope with a sneaking feeling that there is no such thing as first principles, just one damned case after another.”<sup>188</sup>

This sneaking feeling has grown since, when it comes to some aspects of compelled speech doctrine. Many aspects of the cases fit well together—but some, more so than in many other corners of First Amendment law, seem hard to wrestle into a fully coherent pattern. Perhaps they aren’t fully reconcilable. Perhaps some stem from Justices being unwilling to fully follow past cases, but also unwilling to overrule them. Perhaps others stem from Justices’ unspoken hostility or sympathy to the viewpoints of particular speakers. Or perhaps some stem just from mistakes or inattention.

But lower court judges, lawyers, and even academics seeking to work within the system—99.9% of all legal professionals, excluding only Supreme Court Justices and academics and lawyers trying to influence Supreme Court Justices—must try to apply the law as best they can. To do that, they have to identify what principles do appear in the cases and reconcile cases even when they are hard to fit together. I hope this Essay can offer some help with that process.

185. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995) (“Although the State may at times ‘prescribe what shall be orthodox in commercial advertising’ by requiring the dissemination of ‘purely factual and uncontroversial information,’ outside that context it may not compel affirmance of a belief with which the speaker disagrees.”) (citation omitted).

186. *See, e.g., Dwyer v. Cappell*, 762 F.3d 275, 282–85 (3d Cir. 2014); *see also Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (quoting *Zauderer* as authorizing disclaimers aimed at preventing deception, but not analyzing this further); *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005) (same).

187. *See, e.g., Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014) (en banc); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (opinion for the court by Stranch, J.); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001).

188. Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1160–61 (2000). This is likely borrowed indirectly from ARNOLD J. TOYNBEE, 9 A STUDY OF HISTORY 195 (1954), which was criticizing the view that “[l]ife is just one damned thing after another”—a paraphrase of historian H.A.L. Fisher’s line, “Men wiser and more learned than I have discerned in history a plot, a rhythm, a predetermined pattern. These harmonies are concealed from me. I can see only one emergency following upon another as wave follows upon wave . . .” 1 H.A.L. FISHER, A HISTORY OF EUROPE, at v (1935).