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Viewpoint Compulsions

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I. INTRODUCTION

Under the Supreme Court's First Amendment jurisprudence, laws that abridge the freedom of speech on the basis of the content of the speech "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[1] Laws abridging speech are content-based if they regulate speech based on "the topic discussed or the idea or message expressed."[2]

Thus, a law is content-based if it either restricts or compels speech based on its subject matter. In other words, content discrimination "is a spacious concept that embraces whole subjects of discourse regardless of the 'viewpoint' expressed."[3] For example, a law prohibiting all speech on the subject of abortion would be content-based and thus presumptively unconstitutional.[4] In the case of compelled speech, a content-based mandate might be one in which the law requires a speaker to express an opinion—any opinion—on a particular subject. For example, the law might compel a speaker to say something—anything she wishes—about abortion, income inequality, or same-sex marriage. That law is a content-based speech compulsion and is therefore presumptively unconstitutional, unless the government can demonstrate it is narrowly tailored and serves a compelling state interest.[5]

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† Sherman S. Welpton, Jr. Professor of Law & Warren R. Wise Professor of Law, University of Nebraska College of Law.

1. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). Thus, under the Free Speech Clause, government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (quoting Police Dept. of Chicago *v.* Mosley, 408 U.S. 92, 95 (1972)).

2. *Id.*

3. Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L. Q. 99, 101 (1996).

4. *See id.* Such a general ban on the entire subject of abortion would apply to pro-life, pro-choice, and all other perspectives on abortion. It would be content-based, but viewpoint-neutral.

5. *See Reed*, 576 U.S. at 163; *see also* Richard F. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, 99 NEB. L. REV. 58, at 72–73 (2020). Obviously, in the case of compelled speech, the typical case involves speech mandates that tend to compel more particularized expression about certain subjects. *See id*. (discussing law mandating wedding videography celebrating same-sex weddings).

Although a content-based restriction of speech is a grievous First Amendment violation, viewpoint-based discrimination by government is a "more blatant" and "egregious form of content discrimination."[6] Viewpoint-based abridgements of speech are laws that restrict or compel speech based upon a particular ideological position on a particular subject. If the subject is abortion and the law forbids speech critical of a constitutional right to abortion, the restriction is viewpoint-based. In the case of compelled speech, if the subject is same-sex marriage and the speech mandate is to depict same-sex marriage in a positive light, the requirement is viewpoint-based.[7]

The Court has never upheld a law imposing a viewpoint-based restriction on free speech.[8] Indeed, in the words of Justice Alito: "Viewpoint discrimination is poison to a free society."[9] Thus, although the Court has never clearly said so, "as a practical matter, there is a per se rule against viewpoint discrimination."[10] The idea justifying this view is that in a free society it is never appropriate for government to restrict speech on the basis of viewpoint or enact viewpoint-based speech compulsions. Viewpoint discrimination "is so inconsistent with First Amendment values that it would not even qualify as [rationally related to] a legitimate [governmental] interest capable of satisfying the lowest level of judicial scrutiny."[11] Moreover, when government compels citizens to express unwanted viewpoints, it is an even worse offense against the First Amendment. This is because government treats the compelled speaker not as a rational human being with thoughts of his own, but rather like a ventriloquist's dummy; the compelled speaker's lips move, but the words are those of the government or of a third party empowered by the government.

The purpose of this Article is first to explain in some length why viewpoint-based restrictions on speech are damaging and viewpoint-based

6. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

7. *See* Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, *supra* note 5, at 78. "Justice Kennedy has defined the test for viewpoint discrimination as 'whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.'" *Id.* at n.140; Matal v. Tam, 137 S. Ct. 1744, 1766 (2017) (holding that racially disparaging trademarks are protected by the Free Speech Clause) (Kennedy, J., concurring in part and concurring in the judgment).

8. *See* Lackland H. Bloom Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. REV. F. 20, 35 (2019).

9. Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring); *see* Bloom, *supra* note 8, at 36 ("In *Iancu*, Justice Kagan assumed that proof of viewpoint discrimination resulted in automatic invalidation of the law.").

10. Bloom, *supra* note 8, at 35.

11. *Id.* at 36. Or, as Justice Brennan once put it: "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

speech compulsions are even more harmful. The Article will then demonstrate that every one of the Supreme Court's major compelled speech decisions involves viewpoint-based compulsions of speech on matters of political, religious, ideological, social, or moral concern. Finally, the Article will conclude by showing that the Court's no-compelled-speech doctrine is more relevant than ever, and that it safeguards the heart and soul of the First Amendment by protecting the free marketplace of ideas, as well as human dignity and autonomy, from authoritarian speech mandates issued by government.

II. WHY VIEWPOINT COMPULSIONS ARE MORE POISONOUS TO FREEDOM OF SPEECH THAN VIEWPOINT RESTRICTIONS

So why exactly are viewpoint-based restrictions on speech so dangerous, and why is it an even greater poison to freedom of speech when the government uses its regulatory power to compel private speakers to express viewpoints that they believe are untrue, immoral, or otherwise objectionable? Basically, there are two chief justifications for the Court's jurisprudence surrounding viewpoint abridgements of speech.

First, the Court characterizes viewpoint restrictions as a serious distortion in the marketplace of ideas. Second, the Court is deeply concerned with speaker autonomy—the right of the speaker to be the author of his own expression with the right to say that which he wishes to say and to refuse to say that which he does not wish to say.[12]

A. Viewpoint Compulsions Seriously Distort the Marketplace of Private Expression[13]

One important purpose of protecting freedom of expression from content- or viewpoint-based abridgements, in the words of Justice Brennan in *New York Times v. Sullivan*,[14] is the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[15] According to Professor Akil Reed Amar: "[T]he Freedom of Speech Clause was designed, at a minimum, to safeguard the

12. Or, as Alexander Solzhenitsyn once put it, "let us refuse to say that which we do not think." Alexander Solzhenitsyn, *Live Not by Lies*, 2 INDEX ON CENSORSHIP 203, 204 (2004), https://journals.sagepub.com/doi/pdf/10.1080/03064220408537357 [https://perma.cc/FF7X-82KD].

13. Private expression is the speech of private individuals in the marketplace of ideas. Government may speak itself in the marketplace of ideas (government speech), but government may not restrict the speech of private speakers in the marketplace of ideas (private expression).

14. N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

15. *Id*. at 270. *Sullivan* is a truly landmark and canonical First Amendment decision. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning" of the First Amendment*, 1964 SUP. CT. REV. 191, 213 (1964). As Kalven puts it, freedom of speech must "be overprotected in order to assure that it is not underprotected." *Id.*

necessary preconditions of collective, democratic self-government. In order to vote and deliberate on public policy, citizens must be free to exchange political opinions and information with each other."[16] In the Court's first viewpoint compulsion case, *West Virginia State Board of Education v. Barnette*,[17] Justice Jackson made the same point even more eloquently:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[18]

Although viewpoint-based restrictions distort the marketplace of ideas by screening out disfavored viewpoints, viewpoint compulsions are an even greater threat to the marketplace of ideas because government is commandeering private speakers to express those views preferred by the government. If viewpoint restrictions give off the scent of authoritarian control of the marketplace of ideas, viewpoint compulsions give off the noisome vapors of totalitarianism. As Professor Robert George of Princeton University has expressed it so powerfully: "Ordinary authoritarians are content to forbid people from saying things they know or believe to be true. Totalitarians insist on forcing people to say things they know or believe to be untrue."[19] And, as Justice Jackson observed in *Barnette*, there are all too many "village tyrants" imposing viewpoint compulsions of speech and thereby distorting the marketplace of individual expression by prescribing ideological, cultural, or political orthodoxy.[20]

Justice Kennedy, one of the great defenders of free speech during his lengthy service on the Court, understood this better than anyone. *National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*")[21] involved a case in which a California law required pro-life crisis pregnancy centers to notify their clients that the state provides free or subsidized abortions to women seeking abortions.[22] In his concurring opinion, Justice Kennedy described this speech compulsion as a viewpoint-based "example of the serious threat presented when government seeks to impose its own message

16. Akil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 141 (1992).

17. West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943).

18. *Id.* at 642. For my earlier work on the Court's compelled speech jurisprudence, see Richard F. Duncan, *Defense Against the Dark Arts: Justice Jackson, Justice Kennedy and the No Compelled Speech Doctrine*, 32 REGENT LAW REV. 265 (2020).

19. Kristen Waggoner, *'Equality Act' Would Turn Back the Clock for Women*, HILL (Mar. 16, 2019, 3:00 PM), https://thehill.com/opinion/civil-rights/434155-equality-act-would-turn-back-the-clock-for-women [https://perma.cc/5CK7-DMWL] (quoting Professor Robert P. George).

20. *Barnette*, 319 U.S. at 638.

21. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) [hereinafter *NIFLA*].

22. *Id.* at 2368.

in place of individual speech, thought and expression."[23] Rather than embracing the law as a progressive attempt to promote greater healthcare for women, Justice Kennedy denounced the viewpoint compulsion as a deplorable attempt by "authoritarian government" to distort the free marketplace of expression, thought, and belief.[24]

Not everyone agrees with Justice Kennedy's powerful arguments about the evils of compelled speech. Dean Vikram Amar and Professor Alan Brownstein argue that rules treating content- and viewpoint-based restrictions of speech as First Amendment evils should not be applied to speech compulsions, because the Court's concerns about protecting a free marketplace of individual expression from governmental interference and distortion do not apply to laws compelling speech.[25] They explain their conclusion as follows:

> [T]he debate-distorting concerns discussed . . . in the realm of content-discriminatory speech regulations, however, do not apply to the great majority of compelled speech cases, largely because the speakers' ability to communicate their own messages (alongside the messages they are being required to convey by the government) are generally neither chilled nor silenced. Compelling private actors to communicate does not diminish the scope of the marketplace of ideas. Indeed, it may actually expand it.[26]

To the contrary, speech compulsions typically result in more distortion of the marketplace of ideas. Distortion results when government forbids certain subjects or viewpoints from being expressed by private speakers; however, the distortion is even greater when the government mandates that private speakers must express unwanted points of view, because it makes viewpoints held by politically powerful groups appear more widely held than they actually are.

Moreover, the distortion is exacerbated, not lessened, when a private speaker is first compelled to express an idea he believes is untrue and then feels obliged to communicate his own viewpoint "alongside" the compelled message. Imagine a speaker, call him John Q. Public, who wishes to remain silent about whether one should "live free or die."[27] He must first say, "live free or die" to comply with the law, and then he must respond to the compelled message—the one he believes to be untrue—with his actual viewpoint, perhaps that life is more important than liberty. The marketplace of

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

24. *Id.*

25. Vikram David Amar & Alan Brownstein, *Towards a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 11 (2020).

26. *Id.*

27. *See* Wooley v. Maynard, 430 U.S. 705, 705 (1977) (explaining the New Hampshire state law requiring the state motto, "Live Free or Die," to be displayed on license plates).

ideas is twice distorted. First, by a compelled message that would never have been spoken by Mr. Public, and then by the counterpoint that he is effectively compelled to utter in order to correct the public record. Private speech is twice compelled—once by law and second as a result of the first compulsion. The free marketplace of private expression is thus doubly distorted by governmental interference with private speakers.

Debate distortion results whenever government contracts or expands the scope of individual speech. Private speakers—not the government—should determine both the quantity and the content of speech in the marketplace of ideas. When government attempts either to restrict or compel expression on the basis of content or (even more egregiously) viewpoint, it distorts the marketplace of ideas and harms both speakers and the willing audience for their expression.

Government, of course, is free to engage in government speech on any issue it wishes. However, the purpose of the First Amendment is to protect the marketplace of private expression from laws restricting, compelling, or otherwise abridging freedom of speech.[28] Importantly, when the government enacts or enforces viewpoint compulsions, it acts tyrannically and strikes at the heart of the First Amendment.[29] Viewpoint compulsions are First Amendment evils because they seriously distort the marketplace of ideas and beliefs by commandeering free men and women as messengers of the government's version of political, cultural, or ideological truth.

B. Viewpoint Compulsions Undermine the Human Dignity of the Compelled Speaker

If viewpoint compulsions distort the free marketplace of ideas by exercising tyrannical control over both speakers and the willing audience for free expression, they are also a fundamental threat to human dignity, because they treat the compelled speaker merely as a means to a governmental end. Freedom of thought, belief, and speech are fundamental to the dignity of the human person. When the law strikes at free speech, it hits human

28. *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). Thus, the marketplace of ideas protected by the Free Speech Clause should be both free and private, both as to what is expressed and what is not expressed.

29. In other words, viewpoint compulsions imposed by government distort the marketplace of private expression by using coercive inducements and tactics "in order to change citizens' ideological beliefs." Kelly Sarabyn, *Prescribing Orthodoxy*, 8 CARDOZO PUB. LAW, POL'Y & ETHICS J. 367, 373 (2010). This is tyrannical because it seeks to compel citizens to recite and ultimately to believe the "correct" views as defined by the government. *Id.* at 368. Government is free to speak its own message in an effort to change hearts and minds, but it strikes at the core of a free marketplace of private expression when it commandeers citizens to recite or help disseminate the government's political, cultural, or ideological viewpoint.

dignity, which encompasses the right of a person to express what he believes to be true. Even worse, when the law compels a person to say that which he believes to be untrue, the blade cuts deeper. It requires the person to be untrue to himself; and, for those with sincere religious beliefs, perhaps even untrue to God.[30] In *Dignitatis Humanae*, the Second Vatican Council argued that "in accordance with their dignity as persons" all men and women have "a moral obligation to seek the truth, especially religious truth . . . [and] are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth."[31] Similarly, in the words of Justice Kennedy, viewpoint compulsions are inconsistent with human dignity because they typically compel speakers "to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts . . . ."[32]

For example, in *Cohen v. California*,[33] the Supreme Court upheld the right of Mr. Cohen to wear a jacket bearing the words "F[***] the draft" because "the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed."[34] The Court explained its holding by emphasizing the vital importance of human dignity and its relationship to speaker autonomy:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[35]

As Professor (now Judge) Neomi Rao explained:

> *Cohen* emphasized the importance of holding off the government in order to create space for personal expression, even where such expression may be offensive and run against the interests of the government. Dignity did

30. *See* Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, *supra* note 5, at 59; *see also* Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 494 (2015) (stating free speech and religious liberty are fundamental human rights "grounded in the 'inherent dignity' [of] every person").

31. Vatican Council (2D: 1962–1965), *Declaration on Religious Freedom*, *reprinted in* The Sixteen Documents of Vatican II 481, 483 (Marianne Lorraine Trouve ed., N.C.W.C. trans., Pauline Books & Media 1999) (1965); *see also* Kevin J. Hasson, *Religious Liberty and Human Dignity: A Tale of Two Declarations*, 27 HARV. J. L. & PUB. POL'Y 81, 85 (2003).

32. Nat'l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

33. Cohen v. California, 403 U.S. 15 (1971).

34. *Id.* at 16, 18.

35. *Id.* at 24.

> not depend upon an externally defined conception of respectful or civil speech; rather dignity inhered simply in the human capacity for self-expression.[36]

Landmark Supreme Court decisions clearly denounce both compelled speech and viewpoint-based discrimination as among the mortal sins of the First Amendment. Both types of speech transgressions are egregiously wrong because they are tyrannical attacks by government on human dignity and the intellectual autonomy of free men and women.

For example, among a handful of decisions at the apex of the First Amendment canon is Justice Jackson's iconic opinion in *Barnette*.[37] Denouncing government officials who compel speech as authoritarians[38] who abuse their power by seeking to prescribe orthodoxy in "matters of opinion,"[39] Jackson stressed that under the First Amendment government is without power to destroy "intellectual individualism"[40] by compelling speech to achieve "[c]ompulsory unification of opinion."[41] His eloquent defense of freedom of thought and speaker autonomy is more relevant than ever today: "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[42] *Barnette* created the no-compelled-speech doctrine in order to nip authoritarian and totalitarian government in the bud[43] by protecting "the sphere of intellect and spirit" from being commandeered by governmental authorities.[44]

In another important compelled speech case, *Wooley v. Maynard*,[45] the Court made clear that the no-compelled-speech doctrine is designed to protect "freedom of thought,"[46] and explained its reasoning as follows: "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[47]

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36. Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 213 (2011).
37. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1942).
38. *Id.* at 638.
39. *Id.* at 642.
40. *Id.* at 641.
41. *Id.*
42. *Id.* at 634.
43. *Id.* at 641.
44. *Id.* at 642.
45. Wooley v. Maynard, 430 U.S. 705 (1977).
46. *Id.* at 714.
47. *Id.* at 715. The Court further explained that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.* at 714.

Of course, the clearest example of the Court's distaste for viewpoint compulsions as unjust and authoritarian control of "individual speech, thought and expression," was Justice Kennedy's concurring opinion in *NIFLA*.[48] In *NIFLA*, the Court struck down a California law requiring pro-life crisis pregnancy centers to notify their clients about free or subsidized abortion services. Justice Kennedy described this law as an "authoritarian" viewpoint compulsion,[49] and explained why the result was to create a heinous injustice: "Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties."[50]

The California law combined viewpoint discrimination and compelled speech to commandeer pro-life ministries to advertise the state's support for free or subsidized abortion on demand. The effect of the law was to treat pro-life ministries as ventriloquist dummies required to disseminate the state's preferred viewpoint about abortion. It is difficult to think of a more egregious abuse of governmental power over freedom of thought, belief, expression, and human dignity.

Separately, viewpoint discrimination and compelled speech are egregious violations of core First Amendment principles. When combined to create viewpoint compulsions, a toxic violation of free speech results. The remainder of this Article will argue that every landmark compelled speech case involves a viewpoint compulsion, and therefore strikes at the heart and soul of freedom of speech.

III. COMPELLED SPEECH CASES TYPICALLY CONCERN VIEWPOINT COMPULSIONS

It is important to remember that viewpoint discrimination is a subcategory—a particularly egregious subcategory—of content discrimination.[51] In other words, although all viewpoint discrimination is content-based, not all content discrimination is viewpoint-based. I am reminded of Justice Scalia's iconic phrase—"this wolf comes as a wolf"[52]—when I read

48. Nat'l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

49. *Id.*

50. *Id.* Justice Kennedy described the law as "a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech." *Id.* In other words, it was a viewpoint compulsion and a tyrannical affront to human dignity and intellectual autonomy.

51. *See supra* notes 3–7 and accompanying text.

52. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J. dissenting). The full context of the phrase is this:

> Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium

compelled speech cases because most of them so clearly and unabashedly constitute viewpoint compulsions. Sometimes the Court will merely describe the compulsion as "content-based,"[53] which, of course, is correct as far as it goes; but in compelled speech cases, the compulsion is almost always based upon viewpoint.[54]

Indeed, the purpose of compelled speech is typically to require the compelled speaker to express or disseminate a particular point of view preferred by the government. Thus, the courts should take care to describe a viewpoint compulsion as a viewpoint compulsion because that focuses on the seriousness of the offense against freedom of speech. Viewpoint compulsion strikes at the heart and soul of freedom of speech because the law requires an individual not only to express a particular point of view, but to express a false point of view favored by the government. This Article will now proceed to demonstrate that when government compels speech, the result is almost inevitably a viewpoint-based speech mandate.

A. Barnette*'s Viewpoint Compulsion*

In *Barnette*, the West Virginia Board of Education adopted a resolution requiring all teachers and pupils to salute the flag.[55] The Board also decreed that refusal to salute the flag shall "be regarded as an act of insubordination, and shall be dealt with accordingly."[56] The penalty for refusing to salute the flag was expulsion from school, which carried with it the risk of truancy and criminal sanctions for both the "delinquent" child and his parents.[57] Obviously, a law compelling students to pledge allegiance to the national flag is a viewpoint compulsion, one designed to require students and teachers to proclaim their support for "the ideals, principles and spirit of Americanism"[58] and to mandate recognition of the flag as "the symbol of our National Unity."[59]

The Court, in a 6 to 3 majority opinion written by Justice Jackson, struck down the mandatory flag salute. Justice Jackson explicitly acknowledged that an important purpose of free speech under the First Amendment is to nip authoritarian government in the bud by denying tyrants—including

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> of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

Id.

53. *See NIFLA*, 138 S. Ct. at 2371.
54. *See id.* at 2379 (Kennedy, J., concurring).
55. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).
56. *Id.* at 626 n.2.
57. *Id.* at 629.
58. *Id.* at 625 n.1 (quoting W. VA. CODE § 1734 (1941 Supp.)).
59. *Id.* at 626 n.2.

"village tyrants"[60]—the power to "coerce uniformity of sentiment" by compelling flag salutes or other viewpoint compulsions.[61] In his iconic "fixed star" passage,[62] Justice Jackson strongly denounced viewpoint compulsions as egregiously wrongful attempts by government to mandate orthodoxy of opinion.[63] Thus, according to Justice Jackson, the guiding star of the First Amendment requires the Court to strike down viewpoint compulsions because these mandates "invade[] the sphere of intellect and spirit which it is the purpose" of the Free Speech Clause to protect.[64]

B. Wooley v. Maynard*'s Viewpoint Compulsion*

In 1977, forty-four years after its decision in *Barnette*, the Supreme Court decided a second landmark viewpoint compulsion case: *Wooley v. Maynard*.[65] In *Wooley*, the State of New Hampshire adopted a state motto ("Live Free or Die"), placed this ideological message on its automobile license plates, and, ironically, made it a misdemeanor for an automobile owner to knowingly obscure "the figures or letters on any number plate."[66] George Maynard and his wife Maxine were Jehovah's Witnesses who considered the motto "repugnant to their moral, religious, and political beliefs."[67] In order to avoid displaying this ideological message on their license plates, the Maynards covered the motto with tape, and the state of New Hampshire prosecuted Mr. Maynard for obscuring the motto on his license plate. He actually served a brief sentence in jail for failing to display the motto.[68] The Court held that New Hampshire violated the First Amendment by compelling "an individual to participate in the dissemination of an ideological message by displaying it on his private property."[69]

Was the speech mandate in *Wooley* a viewpoint compulsion, or was it merely a content-based compulsion? Clearly, it was the former. New Hampshire did not require Mr. Maynard to speak generally on the issue of liberty; but rather it compelled him to act as a "mobile billboard" for the state's preferred "ideological point of view."[70] *Wooley* makes clear that the landmark doctrine of *Barnette* protects an individual's intellectual au-

60. *Id*. at 638.
61. *Id*. at 640.
62. *Id.* at 642; *see supra* notes 17–18 and accompanying text.
63. *Barnette*, 319 U.S. at 642.
64. *Id.* For a detailed discussion of *Barnette*, see Duncan, *Defense Against the Dark Arts*, *supra* note 18, at 271–77.
65. Wooley v. Maynard, 430 U.S. 705 (1977).
66. *Id.* at 707 (quoting N.H. REV. STAT. ANN. (Supp. 1975)).
67. *Id.*
68. *Id.* at 708.
69. *Id.* at 713.
70. *Id.* at 715.

tonomy not merely from compelled affirmations of belief, but also from attempts by the state to compel an individual to speak or even to help disseminate any religious, political, or ideological viewpoint. Or, as the Court put it, "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[71]

C. Hurley*'s Unanimous Rejection of Compelled Dissemination of Ideological Viewpoints*

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*,[72] a unanimous Supreme Court made clear that not even an antidiscrimination law may treat private expression as a public accommodation requiring one private speaker to disseminate the ideological message of another private speaker.[73] In *Hurley*, the compelled speech issue arose when the Irish-American Gay, Lesbian, and Bisexual Group of Boston ("GLIB"), a group "of gay, lesbian, and bisexual descendants of the Irish immigrants," wished to march in the Boston St. Patrick's Day Parade in order "to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals."[74] When the private organizers of the parade denied GLIB's request to march, the state courts held that this rejection of GLIB's "message"[75] was unlawful sexual orientation discrimination under the state's laws prohibiting discrimination on the basis of sexual orientation "in any place of public accommodation, resort or amusement."[76]

Justice Souter, writing for a unanimous Court, held that although on its face the public accommodations law targeted only discriminatory conduct and not speech, as applied to the parade it "had the effect of declaring the sponsors' speech itself to be the public accommodation."[77] Moreover, when a law such as this forces one to disseminate "a view contrary to one's own,"[78] it creates an unconstitutional viewpoint compulsion and compromises the compelled speakers' "autonomy over [their] message."[79] At the end of the day, *Hurley* makes clear that under the First Amendment "the

71. *Id.* at 714. For a detailed discussion of *Wooley*, see Duncan, *Defense Against the Dark Arts*, *supra* note 18, at 279–80.
72. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).
73. *Id.* at 573–74.
74. *Id.* at 561.
75. *Id.* at 562.
76. *Id*. at 561.
77. *Id.* at 573.
78. *Id.* at 576.
79. *Id.*

choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control."[80]

D. Tornillo*,* Pacific Gas & Electric*, and* Janus*: More Examples of Compelled Speech Dissemination as Viewpoint Compulsions*

In an important article titled *The Law of Compelled Speech*,[81] Professor Volokh restates one aspect of the Court's compelled speech doctrine as follows: "Government coercion of speakers is presumptively unconstitutional when it burdens certain speech . . . by . . . compelling speakers who say something to also carry other speech" of third parties so empowered by government.[82] In these situations, if the speaker exercises his right to speak, he must help disseminate the competing speech of certain third parties. This type of compelled dissemination of the expression of third parties will always amount to viewpoint compulsion, because the empowered third party's expression will always represent the viewpoint of that third party.

For example, in *Miami Herald Publishing Co. v. Tornillo*,[83] the Court described the question presented as "whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press."[84] This Florida law amounts to a facial viewpoint compulsion because a newspaper that criticizes a candidate is required to print "any reply the candidate may make to the newspaper's charges."[85] In other words, the newspaper must print the empowered candidate's views in response to the newspaper's expression. This is not merely a content-based mandate; it is clearly a viewpoint compulsion, because the newspaper is required to print the dissenting viewpoint of candidates it has criticized or opposed.

The Florida Supreme Court upheld the law on the theory "that free speech was enhanced and not abridged by the Florida right-of-reply statute" because it advanced the free flow of political expression to the public.[86]

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80. *Id.* at 575. For a detailed discussion of *Hurley*, see Duncan, *Defense Against the Dark Arts*, *supra* note 18, at 280–83.

81. Eugene Volokh*, The Law of Compelled Speech,* 97 TEX. L. REV. 355 (2018).

82. *Id.* at 359.

83. Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

84. *Id.* at 243.

85. *Id.* at 244. Moreover, failure by the newspaper to comply with the viewpoint compulsion "constitutes a first-degree misdemeanor." *Id.*

86. *Id.* at 245. For a discussion (and my rejection) of the argument that viewpoint compulsions actually advance the marketplace of ideas, see *supra* notes 24–28 and accompanying text. As Justice Powell described the holding in *Tornillo*: "The statute purported to advance free discussion, but its effect was to deter newspapers from speaking out in the first instance: by forcing the newspaper to disseminate opponents' views, the statute penalized the newspaper's own expression." Pac. Gas & Elec. Co. v. Pub. Utils. Com., 475 U.S. 1, 10 (1986).

The Supreme Court of the United States reversed the Florida Supreme Court's decision and held that the Florida right-of-reply law was unconstitutional "because of its intrusion into the functions of editors" to decide what to print and what not to print.[87] Or, as Justice White put it in his concurring opinion, the Florida law "runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor."[88]

When the law penalizes a newspaper's speech by requiring it to help disseminate the competing viewpoint of a third person it has criticized, it doubly poisons the private marketplace of ideas: first by penalizing the speaker's own expression, and second by compelling the unwanted viewpoint. Such totalitarian control over private expression is inconsistent with both the letter and the spirit of the First Amendment. Once again, a viewpoint compulsion was struck down as an unconstitutional restriction on speaker autonomy and "editorial control."[89]

The holding in *Pacific Gas & Electric*[90] flows seamlessly from that of *Tornillo*. Appellant, Pacific Gas and Electric Company, had a practice of distributing a newsletter in the monthly billing envelope it sent to its customers.[91] California's Public Utilities Commission required the company to permit a local advocacy group to use the "extra space" in the billing envelopes four times a year to express a competing message to the company's customers.[92] Thus, as in *Tornillo*, the question presented was whether a privately owned business may be compelled by government to help disseminate the speech of a third party with which the compelled speaker disagrees.[93]

Justice Powell's plurality opinion viewed this case as governed by *Tornillo*.[94] Moreover, the plurality clearly recognized that the Commission's order "discriminates on the basis of the viewpoints of the selected speakers" by selecting "persons or groups . . . who disagree with appellant's views."[95] Justice Powell made clear that although the appellant does not have a right "to be free from vigorous debate . . . it does have the right to be free from government restrictions that abridge its own rights in order to

87. *Tornillo*, 418 U.S. at 258.
88. *Id.* at 261 (White, J., concurring).
89. *Id.* at 258.
90. Pac. Gas & Elec. Co. v. Pub. Utils. Com., 475 U.S. 1 (1986).
91. *Id.* at 5. The newsletter "included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills." *Id.*
92. *Id.* at 6.
93. *Id.* at 4.
94. *Id.* at 11.
95. *Id.* at 12–13.

'enhance the relative voice' of its opponents."[96] Corporations, no less than individuals, may not be compelled to speak with a forked tongue—"to affirm in one breath that which they deny in the next."[97] Viewpoint compulsions are anathema to freedom of speech because they require the compelled speaker to be double-minded and to express ideas he does not believe to be true.

Recently, in *Janus v. American Federation of State, County and Municipal Employees*,[98] the Court struck down a state law requiring public sector employees "to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities."[99] This, said the Court, violates the Free Speech Clause because it compels dissenting workers "to subsidize private speech on matters of substantial public concern."[100]

The force of the no-compelled-speech doctrine as a defense against authoritarian viewpoint compulsions was strong in *Janus*. Justice Alito, speaking for the majority in a 5 to 4 decision, observed that when government compels speech it inflicts even more damage than when it merely restricts speech;[101] this is so because it is "always demeaning" to compel "free and independent individuals to endorse ideas they find objectionable."[102] Invoking Thomas Jefferson, the *Janus* Court forcefully observed that to compel an individual to betray his personal convictions by subsidizing the viewpoints of another "is sinful and tyrannical."[103]

Janus is controversial because it treats agency fees required to be paid by nonmembers to unions as compelled subsidization of the viewpoints "the union takes in collective bargaining and related activities."[104] However, once you accept that the payment of agency fees constitutes the funding of speech, it should be clear that this amounts to a viewpoint compulsion of speech that hits at the core of the First Amendment. As Justice Alito put it, by compelling the payment of agency fees, the state law requires "public employees to affirm or support beliefs with which they disagree[]."[105] If

96. *Id.* at 14 (emphasis omitted).
97. *Id.* at 16.
98. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.,138 S. Ct. 2448 (2018).
99. *Id.* at 2459–60.
100. *Id.* at 2460.
101. *Id.* at 2459, 2464.
102. *Id.* at 2464.
103. *Id.*
104. *Id.* at 2460.
105. *Id.* at 2471.

money is speech, then this law is indeed a viewpoint compulsion that strikes at the heart of the Free Speech Clause.[106]

E. Justice Kennedy's Last Hurrah: NIFLA *and California's Pro-Abortion Viewpoint Compulsion*

In *NIFLA*,[107] the state of California required pro-life crisis pregnancy centers to provide certain "government-drafted" notices to their clients and in their advertisements.[108] For example, licensed pro-life clinics were required to "notify women that California provides free or low-cost services, including abortions" and provide a phone number to learn more about those services.[109] Justice Thomas, writing for a majority, including Justice Kennedy, held that this compelled expression was an unconstitutional "content-based regulation of speech."[110] But the real fireworks were provided by Justice Kennedy in a concurring opinion joined by Chief Justice Roberts and Justices Alito and Gorsuch.

Justice Kennedy made clear that he joined the majority opinion "in all respects," and was writing a separate opinion only to make an even stronger case against California's compelled speech law.[111] Essentially, he wrote to underscore two points. First, California was guilty of something more serious than a content-based regulation of speech; the California law constituted "viewpoint discrimination" and served as "a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech . . . ."[112] Second, Justice Kennedy wrote an eloquent and powerful denunciation of viewpoint compulsions as deplorable and tyrannical enactments of authoritarian government.

Justice Kennedy described the compelled speech law as one in which California had required pro-life crisis pregnancy centers to disseminate the state's message "advertising abortions" and thereby "to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts . . . ."[113] But what is even more noteworthy is Justice Kennedy's response to the self-congratulatory statement by the California

106. As Justice Alito stated: "Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines [the] ends" of the Free Speech Clause. *Id.* at 2464.

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

108. *Id.* at 2369.

109. *Id.* at 2368.

110. *Id.* at 2371.

111. *Id.* at 2378 (Kennedy, J., concurring).

112. *Id.* at 2379. To require a pro-life organization to convey an advertisement for free abortions is clearly not only a viewpoint compulsion, but a particularly egregious one. *See id.*

113. *Id.*

Legislature that "the Act was part of California's legacy of 'forward thinking.'"[114] Justice Kennedy observed that it is not "forward thinking" to compel ideological uniformity and continued:

> It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.[115]

Justice Kennedy is correct. When government requires a person to express an unwelcome viewpoint—one that may even contradict his deeply held political, philosophical, or religious beliefs about issues of great public concern such as abortion—it is anathema to freedom of thought and speech. Government has no business requiring pro-life organizations to advertise for free abortions. The majority in *NIFLA* got it right, and Justice Kennedy's concurring opinion should be studied for generations by everyone interested in free speech as a defense against self-proclaimed "forward thinking" authoritarian regimes.

F. Masterpiece Cakeshop *and* Telescope Media*: Viewpoint Compulsions to Create Speech*

If compelled dissemination of unwanted viewpoints is bad, then how much worse is it when government compels an artist or a writer to actually create and then disseminate unwanted viewpoints? If Rembrandt were alive today and in business as a wedding portrait painter, could the law compel him to paint a portrait of a same-sex couple celebrating their marriage? Could government compel a Jehovah's Witness photographer "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"?[116] Surely, mandates to create unwanted viewpoints are even more poisonous to speaker and artistic autonomy than is a mandate merely to help disseminate an unwanted message.[117]

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114. *Id.*

115. *Id.* For a detailed discussion of *NIFLA*, see Duncan, *Defense Against the Dark Arts*, *supra* note 18, at 286–88.

116. Volokh, *supra* note 81, at 384.

117. When government requires "someone to actively create speech" it deeply and intimately controls "innumerable intellectual and artistic decisions" of artists and other creators of speech. *Id.* In the case of wedding photographers and similar artistic wedding vendors, the law commandeers them "to create images that convey the idea that the wedding is a beautiful, praiseworthy, even holy event." *Id.*

Such was the issue in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission.*[118] In *Masterpiece Cakeshop*, the compelled speech issue concerned a Christian wedding cake artist, Jack Phillips, who considered his custom cake creations to be artistic expression celebrating the beauty of marriage as God had designed marriage.[119] Therefore, although he was happy to serve all customers without regard to sexual orientation, he could not in good conscience create wedding cakes designed to celebrate same-sex marriages.[120]

In July 2012, Charlie Craig and David Mullins, a same-sex couple, visited Phillips's bakery, Masterpiece Cakeshop, and "requested that Phillips design and create a cake to celebrate their same-sex wedding."[121] Phillips informed the couple that based upon his sincerely held religious beliefs, he does not create custom wedding cakes celebrating same-sex marriages, but he also told them that "he would be happy to make and sell them any other baked goods."[122] In other words, Phillips was happy to serve LGBT customers in general, but he believed it would "displease God" if he were to create wedding cakes for same-sex marriages.[123]

The State of Colorado enforced its public accommodations law against Mr. Phillips and ordered him to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples."[124] In other words, Colorado required Phillips to choose between his right as an artist to create custom wedding cakes celebrating opposite-sex marriage and his right not to create wedding cakes celebrating same-sex marriage.[125]

Assuming that wedding cake artistry is speech within the meaning of the First Amendment, the "bake the cake" mandate in this case is clearly a viewpoint compulsion. When the Supreme Court heard oral arguments in this case, Justice Ginsburg asked the gay couple's lawyer, David Cole, what

118. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018). For my analysis of *Masterpiece Cakeshop*, see Richard F. Duncan, *A Piece of Cake or Religious Expression: Masterpiece Cakeshop and the First Amendment*, NEB. L. REV. BULL. (Jan. 7, 2019), https://lawreview.unl.edu/piece-cake-or-religious-expression-masterpiece-cakeshop-and-first-amendment [https://perma.cc/B3YT-6R4R].

119. *See* Duncan, *A Piece of Cake or Religious Expression*, *supra* note 118, at 2.

120. *Id.* at 3.

121. Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015).

122. *Id.*

123. *Id.* at 277.

124. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1726 (2018) (alterations in original).

125. *See* Duncan, *A Piece of Cake or Religious Expression*, *supra* note 118, at 13. If Mr. Phillips made the wedding cakes he wished to make—celebrating traditional weddings—he was compelled to make cakes with messages he wished not to create—cakes celebrating same-sex weddings. The penalty for saying what he wished to say was to be compelled to say something that he wished not to say. Speakers always discriminate in favor of the things that they wish to say and against the things that they wish not to say. That is the baseline for freedom of speech.

would happen if Phillips would design a wedding cake "that said: God bless the union of Ruth and Marty."[126] Cole replied: "[T]hen he would have to say God bless the union of Dave and Craig" because otherwise it would constitute discrimination on the basis of sexual orientation.[127] Thus, the Commission's order was so broad as to require Phillips to include religious blessings on cakes celebrating same-sex marriages. This is a clear case of a viewpoint compulsion. Although the Court decided the case under the Free Exercise Clause, and thus did not decide the compelled speech issue,[128] it should be clear that if custom wedding cakes are determined to be speech, then the mandate to create wedding cakes expressing a positive view of same-sex weddings is a viewpoint compulsion.[129]

Although the Supreme Court did not decide the free speech issue in *Masterpiece Cakeshop*, the Eighth Circuit did not duck the issue in *Telescope Media Group v. Lucero*,[130] a decision that has become the leading federal precedent on compelled artistic creation of unwanted viewpoints. *Telescope Media* is *Masterpiece Cakeshop* 2.0, but with better facts and a better majority opinion.

Telescope Media Group is a small business owned by Carl and Angel Larsen, professional filmmakers and storytellers. The Larsens are devout Christians, who "aim to glorify God in everything they do," including in their work as filmmakers.[131] Although they happily serve all persons, with-

126. Transcript of Oral Argument at 76, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf [https://perma.cc/UD24-VDUZ].

127. *Id.*; *see* Duncan, *A Piece of Cake or Religious Expression*, *supra* note 118, at 4.

128. *Masterpiece Cakeshop*, 138 S. Ct. at 1724. Although the majority opinion in *Masterpiece Cakeshop* did not base its holding on the Free Speech Clause, it nevertheless contains some powerful dicta in support of Phillips's right not to be compelled to create custom cakes with messages that offend his conscience. Speaking for the Court, Justice Kennedy observed that although the free speech issue in this case "is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech[,]" Phillips's claim "is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning." *Id.* at 1723. Moreover, if a baker refuses "to design a special cake with words or images celebrating the marriage[,]" these additional details "might make a difference." *Id.*

129. Custom cakes created by artists such as Jack Phillips to celebrate weddings or other events should be treated as speech under the First Amendment. Even if no words are inscribed on the cake, the "communication takes place through *symbols* that represent ideas, events, persons, places, objects, and so on." Amar, *supra* note 16, at 134 (emphasis in original). Thus, like the message conveyed when someone burns an American flag as part of a peaceful (or "mostly peaceful") protest, a custom cake—whether created to celebrate a wedding, a holiday, or a political cause—is speech protected by the First Amendment. *See id.* at 133–35. And it is an unconstitutional viewpoint compulsion for the government to require a cake artist to create a cake celebrating same-sex marriage.

130. Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019). For a close analysis of *Telescope Media*, see Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, *supra* note 5.

131. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, *supra* note 5 at 67 (quoting Opening Brief for Appellants at 5, *Telescope Media Grp.*, 936 F.3d 740 (No. 17-3352)).

out regard to race, gender, religion, or sexual orientation, their obedience to God requires them to "decline any requests for their services that conflict with their religious beliefs."[132] Thus, their religious conscience precludes them from making films with messages that are inconsistent with "'biblical truth,' such as those that 'promote sexual immorality; support the destruction of unborn children; promote racism or racial division; incite violence; degrade women; or promote any conception of marriage other than as a lifelong institution between one man and one woman.'"[133] In other words, "it is indisputable that the Larsens' 'decisions on whether to create a specific film never focus on *who* the client is, but on *what* message or event the film will promote or celebrate.'"[134]

This litigation arose when the Larsens decided they would like to expand their filmmaking business to include making films promoting "'Christian ideas about marriage' by telling stories 'through their films of marriages between one man and one woman that magnify God's design and purpose for marriage.'"[135] However, under the Minnesota Human Rights Act ("MHRA"), as interpreted by the State of Minnesota, if the Larsens were to make films celebrating opposite-sex marriage, they would be compelled to make films depicting same-sex marriage "in an equally 'positive' light."[136] Moreover, if the Larsens should refuse to make films celebrating same-sex marriage, they would face penalties including "fines, damages awards, and even up to [ninety] days in jail."[137] "Thus, in the concise words of Judge Stras, the question before the court was: 'Can Minnesota require [the Larsens] to produce videos of same-sex weddings, even if the message would conflict with their own beliefs?'"[138]

Regardless of whether custom-designed cakes celebrating matters of public concern—such as cakes depicting the American flag, cakes cele-

132. *Telescope Media Grp.*, 936 F.3d at 748.

133. *See* Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, *supra* note 5, at 67 (quoting *Telescope Media Grp.*, 936 F.3d at 748).

134. *See id.* (quoting Opening Brief for Appellants at 7, *Telescope Media Grp.*, 936 F.3d 740 (No. 17-3352)) (emphasis in original). This is important for First Amendment purposes because it demonstrates that expressive vendors are asserting a right to discriminate against ideas, not persons. *Id.* at n.65.

135. *Id.* at 67–68 (quoting Opening Brief for Appellants at 1, *Telescope Media Grp.*, 936 F.3d 740 (No. 17-3352)).

136. *Telescope Media Grp.*, 936 F.3d at 748–49; *see also* Oral Argument at 26:08–27:15, *Telescope Media Grp*., 936 F.3d 740 (No. 17-3352), http://media-oa.ca8.uscourts.gov/OAaudio/2018/10/173352.mp3 [https://perma.cc/G6MX-B4Q7] (explaining the application of the MHRA to a hypothetical situation). The mandate to create films depicting same-sex marriage in a positive light is obviously a viewpoint compulsion of artistic expression. If you compel an artist to create a message saying that A is equally positive to B, that is explicitly viewpoint-based.

137. *See* Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, *supra* note 5, at 68 (quoting Brief for Appellants at 1, *Telescope Media Grp*., 936 F.3d 740 (No. 17-3552)).

138. *Id.* (alteration in original); *Telescope Media Grp.*, 936 F.3d at 747.

brating Black Lives Matter, or cakes celebrating same-sex weddings—are speech protected by the First Amendment, surely filmmaking is protected speech. Writing for a 2-1 majority in *Telescope Media*, Judge Stras was clear that the Larsens' wedding videos are "in a word, speech"[139] protected by the First Amendment because "they intend to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage."[140] Moreover, it makes no difference that their filmmaking and storytelling are produced "through a for-profit enterprise";[141] whether it be a commercial videography business or a major Hollywood studio, filmmaking is speech, and compelled filmmaking is compelled speech.

Moreover, *Telescope Media* made clear that because the MHRA required the Larsens to create films depicting same-sex marriage in a positive light, the law was a content-based compulsion of protected speech.[142] Judge Stras was correct that the speech compulsion in *Telescope Media* is certainly, *at the very least*, content-based. Indeed, I believe that a law requiring a filmmaker to create a film depicting same-sex marriage in a positive light constitutes a much more egregious viewpoint compulsion. As applied to the Larsens' videography enterprise, the MHRA compelled an unwilling speaker to express a message that takes a particular ideological position on a particular matter of public concern. Notwithstanding their deepest religious convictions about what constitutes the good of marriage,

139. *Telescope Media Grp.*, 936 F.3d at 751. There is a long line of Supreme Court cases recognizing that filmmaking and motion pictures are speech protected by the First Amendment. *See id*. at 750–51 (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65–66 (1981); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952)).

140. *Id.* at 751.

141. *Id.*

142. *Id.* at 753; *see also* Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, *supra* note 5, at 72 ("[T]he MHRA unconstitutionally exacts a penalty on the Larsens' speech celebrating traditional marriage by compelling them to convey an equally positive viewpoint about same-sex marriage. This results in a 'your money or your life' choice for the Larsens—either express a message they wish not to express or choose the safe harbor of self-censorship. The First Amendment does not permit this scenario; speaker autonomy includes both the right to speak and the right not to speak."). For a case agreeing that compelled creation of speech celebrating same-sex marriage is at the very least a content-based compulsion under the Free Speech Clause, see 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021) (under Colorado public accommodations law, "Appellants cannot create websites celebrating opposite-sex marriages, unless they also agree to serve customers who request websites celebrating same-sex marriages"). However, the majority in *Elenis* held that "Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace." *Id.* For my views on the compelling interest issue, see Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, *supra* note 5, at 79–81. *Elenis* got the compelled speech issue mostly right, but the compelling interest issue completely wrong. *Id.* In *Telescope Media*, Judge Stras stated, "regulating speech because it is discriminatory or offensive is not a compelling state interest," and thus "[e]ven antidiscrimination laws, as critically important as they are, must yield to the Constitution." *Telescope Media Grp.*, 936 F.3d at 755. *Telescope Media* and *Elenis* create a split among the circuits, and this may lead to Supreme Court review of this issue.

they were compelled by law to deny their faith by expressing a positive view of same-sex marriage.

Indeed, since the law's viewpoint compulsion is triggered by the Larsens' willingness to create a film celebrating traditional marriage, there are actually two viewpoint restrictions involved; if they create a film expressing a viewpoint they believe to be true—the good of traditional marriage—the law requires them to create a second film expressing a viewpoint they believe to be untrue—the equal goodness of same-sex marriage. In other words, the penalty for expressing a viewpoint they believe pleases God is a mandate to speak with a forked tongue and express an unwanted viewpoint they believe displeases God. This law, as applied to the Larsens, is clearly twice viewpoint-based and thus doubly poisonous to the fundamental freedoms protected by the First Amendment.[143]

IV. CONCLUSION

Content-based restrictions on speech are dangerous. Viewpoint-based restrictions on speech are more harmful. And viewpoint compulsions of speech are pure First Amendment poison, because they compel unwilling speakers to express viewpoints they believe are false, or immoral, or even contrary to their sincere beliefs about what is good, what is true, and what is beautiful. Viewpoint compulsions mandated by government seriously distort the marketplace of private expression, because they make viewpoints held by politically or culturally powerful groups appear more widely held than they actually are. Moreover, when government enacts or enforces viewpoint compulsions, it acts tyrannically and strikes at the heart of speaker dignity and autonomy. In short, viewpoint compulsions are egregious First Amendment evils because they commandeer free men and women to serve as messengers for the government's orthodox version of political, cultural, or ideological truth.

The purpose of this Article was to demonstrate that when the government compels speech the compulsion is inevitably a viewpoint compulsion. The Supreme Court has never upheld a viewpoint compulsion of speech. From its landmark decision in *Barnette* to Justice Kennedy's iconic concurring opinion in *NIFLA*—and in *Wooley*, *Hurley*, *Tornillo*, *Pacific Gas & Electric*, and *Janus* in between—the Supreme Court has consistently (and sometimes unanimously) declared viewpoint compulsions to be tyrannical and egregious violations of the Free Speech Clause. The Court's won-

143. As Professor George observed, viewpoint restrictions forbid persons from saying things they believe to be true; however, viewpoint compulsions force persons to say things they believe are untrue. Waggoner, *supra* note 19 and accompanying text. The former is authoritarian, but the latter is totalitarian. *See id.*

derful and unbroken line of cases, dating back more than three-quarters of a century, should be studied and celebrated by law students and everyone else who loves freedom of speech, freedom of thought, and freedom of belief. This canonical line of First Amendment jurisprudence is the antidote to the deadly poison of viewpoint compulsions. In a contemporary world in which free speech is under constant attack by petty—and not-so-petty—tyrants everywhere, the First Amendment's prohibition of viewpoint compulsions is the Constitution's pearl of great value[144] to free men and women from sea to shining sea.

144. *See Matthew* 13:45-46 (ESV) (explaining the parable of the "merchant in search of fine pearls, who, on finding one pearl of great value, went and sold all that he had and bought it").