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Citation Information

Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016), available at <https://scholar.law.colorado.edu/faculty-articles/18>.

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Article

Truth and Lies in the Workplace: Employer Speech and the First Amendment

Helen Norton[†]

INTRODUCTION

Employers speak to workers (and other audiences) about a range of matters related to the terms and conditions of their workers' employment, such as pay, benefits, hours, hazards, economic security, and available legal rights. Employer speech on these topics can, and often does, valuably inform workers' decisions about jobs and related issues of great life importance.

But employer speech on these topics can also inflict substantial harm. More specifically, employers' lies, misrepresentations, or nondisclosures about the terms and conditions of employment can distort and sometimes even coerce workers' important life decisions—for example, decisions about whether to take, decline, keep, or leave a job, or whether to retire or accept a severance agreement.¹ Relatedly, employers' nondisclo-

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1. See Kent Greenfield, *The Unjustified Absence of Federal Fraud Protections in the Labor Market*, 107 YALE L.J. 715, 719–21 (1997) (“[T]here are abundant examples of companies that mislead their employees. These compa-

tures, lies, or misrepresentations about workers' legal rights can frustrate key workplace protections by skewing workers' decisions about whether to unionize, report illegal workplace conditions, or advocate for different terms and conditions of employment.² Consider one recent example, where an employer's employee handbook denied the existence of federal and state laws that require overtime pay: "There is no overtime pay as there is no shortage for qualified labor. Any hours worked beyond 40 are paid straight time and [it] is understood by the employee that the extra hours are a privilege."³ Workers confronted with employer misrepresentations of this nature—especially (but not only) low-wage and other vulnerable workers—may be unlikely to question, rebut, or resist them for fear of losing their jobs.⁴

Federal, state, and local governments have long sought to address such harms by requiring that employers affirmatively disclose truthful information about workers' legal rights and working conditions. Examples include statutory requirements that employers post notice of workers' rights under the Fair Labor Standards Act,⁵ the Occupational Health and Safety Act,⁶

nies may cause their employees to believe, for instance, that their jobs are more secure than they in fact are, that their jobs will be better than they actually turn out to be, or that their health benefits are assured after retirement when in fact they can be revoked at the will of the company."); Richard P. Perna, *Deceitful Employers: Common Law Fraud as a Mechanism To Remedy Intentional Employer Misrepresentation in Hiring*, 41 WILLAMETTE L. REV. 233, 234–38 (2005) (describing examples of workers' detrimental "reliance on false statements or promises the employer made during pre-hiring negotiations"); Lorraine A. Schmall, *Telling the Truth About Golden Handshakes: Exit Incentives and Fiduciary Duties*, 5 EMP. RTS. & EMP. POL'Y J. 169, 171 (2001) ("Companies are often insulated from liability when they mislead, mischaracterize, or delude employees into accepting early retirement, or even fail to tell them an incentive is anticipated.").

2. See Peter D. DeChiara, *The Right To Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 455 (1995) (describing employers' misrepresentations of law in union organizing campaigns).

3. *Reyes v. Snowcap Creamery, Inc.*, No. 11-cv-02755-JLK-KMT, 2014 WL 2459740, at *6 n.3 (D. Colo. June 2, 2014).

4. See Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 789 (2013) ("[Employers' nondisclosures and false threats of adverse employment action] may be particularly effective in silencing groups such as brown[-]collar workers who already have significant reasons not to engage in claims-making at work.").

5. 29 U.S.C. §§ 201–219 (2012).

6. *Id.* § 657(c).

the Family and Medical Leave Act,⁷ the Americans with Disabilities Act,⁸ and other federal employment laws, as well as a range of state laws requiring disclosure of wages or other specific terms and conditions of employment.⁹ Governments have also sought to address such harms by prohibiting employers from lying about or misrepresenting workers' rights or working conditions. Examples here are fewer in number, but they include the National Labor Relations Act's (NLRA) treatment of certain employer lies (and other communications) as coercive speech in violation of the Act,¹⁰ certain statutory and common law causes of action for fraud and negligent misrepresentation,¹¹ and the Employee Retirement and Income Security Act's (ERISA) treatment of certain employer lies (and other communications) about employee benefits as a breach of fiduciary duty.¹² Commentators and policymakers have further proposed a variety of additional measures to address related harms that would prohibit certain lies or misrepresentations by—or require certain truthful disclosures of—employers. Examples include proposals to require employers to disclose salary ranges, various job-related hazards, and on-the-job injury rates, as well as proposals to prohibit employer lies about related terms and conditions of employment.¹³

7. *Id.* § 2619(a).

8. 42 U.S.C. § 12115 (2012).

9. *E.g.*, CONN. GEN. STAT. § 31-71f (2015); HAW. REV. STAT. § 388-7 (2015); N.C. GEN. STAT. § 95-25.13 (2015); N.Y. LAB. LAW § 195(1)(a) (McKinney 2015); 43 PA. STAT. AND CONS. STAT. ANN. § 260.4 (West 2009).

10. *See infra* notes 30–35 and accompanying text.

11. *See, e.g.*, CAL. LAB. CODE § 970 (West 2011) (prohibiting knowingly false representations intended to influence workers' choice of employment); COL. REV. STAT. § 8-2-104 (2015) (prohibiting false or deceptive representations about certain terms and conditions of employment).

12. *See Varsity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (describing “knowing and significant” deceit by employer to save money at the expense of a plan's beneficiaries as a violation of fiduciary duty and thus of ERISA).

13. *E.g.*, Jeremy Blasi, *Using Compliance Transparency To Combat Wage Theft*, 20 GEO. J. ON POVERTY L. & POL'Y 95 (2012) (urging enactment of laws requiring employers to disclose their record of compliance or noncompliance with wage and hour laws); Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2011) (proposing a mandatory disclosure regime of job-related hazards and injuries, contractual job security provisions, work-family policies, agreements waiving and affecting legal rights, and salary ranges); Greenfield, *supra* note 1, at 785–88 (urging the enactment of federal legislation to prohibit employer fraud); Schmall, *supra* note 1 (proposing changes to ERISA to address its failure to protect workers from “fraud, lack of disclosure, or renege[d] promises”).

These important measures, however, are now increasingly vulnerable to constitutional attack in light of the recent antiregulatory turn in First Amendment law, in which corporate and other commercial entities seek—with growing success—to insulate their speech from regulation in a variety of settings.¹⁴ Examples of this turn include challenges to disclosure requirements in a range of commercial contexts, as well as *Citizens United v. FEC* and related decisions invalidating the government’s regulation of corporations’ political speech.¹⁵ The Supreme Court’s decision in *United States v. Alvarez* adds to these complications by leaving unsettled the constitutionality of the government’s efforts to regulate lies and misrepresentations in several areas.¹⁶ A number of thoughtful commentators have documented this trend’s implications for settings involving corporations’ speech to voters and consumers.¹⁷ This Article con-

14. See John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–24 (2015) (“[C]orporations have increasingly displaced individuals as direct beneficiaries of First Amendment rights . . .”).

15. 558 U.S. 310 (2010).

16. 132 S. Ct. 2537 (2012); see also Tamara R. Piety, *The Heroic Corporation and First Amendment Romanticism: A Response to Professors Redish and Neuborne*, 92 TEX. L. REV. 181, 199–200 (2014) (“[T]raditional First Amendment doctrine protects a great deal of false speech, sometimes explicitly and sometimes as a function of the strict scrutiny standard of review.”).

17. E.g., Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015) (“[W]hat has been called First Amendment opportunism[] [occurs] where litigants raise novel free speech claims that may involve the repackaging of other types of legal arguments. . . . First Amendment expansionism[] [occurs] where the First Amendment’s territory pushes outward to encompass ever more areas of law.”); Tamara R. Piety, “A Necessary Cost of Freedom”? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 51 (2012) (“Much of the work of the Federal Trade Commission, the Securities and Exchange Commission, and countless other governmental agencies is predicated on the government’s ability to pursue and punish not only fraud, but also statements which may be misleading or on the government’s ability to require various disclosures in order to conduct certain businesses. After *Sorrell*, many of these laws will be challenged.”); Robert Post & Amanda Shanor, Commentary, *Adam Smith’s First Amendment*, 128 HARV. L. REV. FORUM 165, 167 (2015), http://cdn.harvardlawreview.org/wp-content/uploads/2015/03/vol128_PostShanor2.pdf (“It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation. The echoes of *Lochner* are palpable.”); Michael R. Siebecker, *Securities Regulation, Social Responsibility, and a New Institutional First Amendment*, 29 J.L. & POL. 535, 535 (2014) (“[A] looming jurisprudential train wreck between the Supreme Court’s commercial speech doctrine and its disparate approach to corporate political speech threatens the integrity of the securities regulation regime.”); Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 26 (2015) (“[T]he First Amend-

tributes to that discussion by examining these developments' significant but under-explored First Amendment implications for the workplace.

To this end, this Article explores how First Amendment law may be changing in ways that undercut the government's efforts to inform and empower workers by casting doubt on its ability to require truth or prohibit falsity in a variety of settings.¹⁸ This Article then considers the circumstances under which we should instead understand the First Amendment to permit the government to require employers to tell the truth about workers' legal rights and other working conditions. In so doing, this Article focuses specifically on employers' objectively verifiable speech about workers' rights and other working conditions (such as pay, benefits, job security, hours, and hazards) and uses the term "employer speech" as shorthand for employers' speech on these topics. Because federal and state statutory protections set certain baseline conditions for the employment relationship that cannot be negotiated away (for example, by setting minimum wages or maximum hours), this Article treats employer speech about workers' legal rights as a subset of employer speech about the terms and conditions of employment.

More specifically, the constitutionality of governmental efforts to regulate employer speech remains both undertheorized and unsettled. As just one illustration, courts and commentators have yet to consider, much less offer, a comprehensive approach to whether and when speech by employers on these topics should be characterized as political speech subject to greater constitutional protection (and thus less regulation), commercial speech subject to less protection (and thus greater regulation), or something else entirely.

ment has become the new *Lochner*, used by profit-seeking actors to interfere with the regulatory state in a way that substantive due process no longer allows." Thomas Jackson and John Jeffries were among the first to express concern about the potential deregulatory implications of the Supreme Court's protection of commercial speech. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

18. For example, as discussed in more detail *infra* notes 43–45 and accompanying text, the D.C. Circuit struck down the National Labor Relations Board's proposal to require employers to post notice of workers' rights under the NLRA, relying on free speech arguments to invalidate workplace disclosures of the sort that other employment statutes have long required. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), *overruled on other grounds by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

This history—with its gaps and inconsistencies—reminds us of the limits of traditional speech categories and encourages a turn to theoretical and doctrinal assessments of speech regulations in other contexts. These alternative contexts largely eschew such traditional categories to focus instead on the dynamics of certain speaker-listener relationships. Indeed, although many think of the First Amendment as primarily focused on protecting speakers of conscience, most First Amendment theories urge the protection of speech at least in part to further listeners' autonomy, enlightenment, and self-governance interests.¹⁹ For this reason, theory and doctrine in other settings sometimes support the content-based regulation of expression to improve the communicative discourse and thus protect listeners' First Amendment interests.²⁰ This approach is especially tolerant of the government's efforts, in certain contexts, to prohibit lies and misrepresentations and to require truthful disclosures to inform and empower listeners' decision making.

The choice between a speaker- or listener-centered approach for First Amendment purposes sometimes turns on whether the contested expression occurs in a relationship where the speaker lacks dignitary interests of its own (e.g., a publicly held for-profit corporation as opposed to an individual). Although the protection of dignitary speakers' choice to lie—or to decline to tell the truth—may at least sometimes further autonomy interests protected by the First Amendment,²¹ the protection of lies or nondisclosures by speakers without such dignitary interests does not. For these reasons, a number of commentators have explained the Court's commercial speech doctrine as justified in part on the grounds that commercial entities have no intrinsic expressive interests of their own; governments can thus privilege listeners' interests as consumers in receiving accurate information both by prohibiting commercial actors' lies and misrepresentations and by requiring them to make truthful disclosures about a range of transaction-related matters.²²

19. See Post & Shanor, *supra* note 17, at 170 (“The constitutional value of commercial speech lies in the rights of *listeners* to receive information so that they might make intelligent and informed decisions. Ordinary First Amendment doctrine, by contrast, focuses on the rights of *speakers*, not listeners.”).

20. See *infra* Part II.

21. See *infra* note 87 and accompanying text.

22. See *infra* notes 84–86 and accompanying text.

Even if the contested speech is uttered by a speaker with her own dignitary interests, theory and doctrine still sometimes support a listener-centered approach for First Amendment purposes when the expression occurs within a relationship in which content-based regulation can help improve the communicative discourse. This can be the case where the listener has less information, expertise, or power than the speaker—i.e., where the speaker has greater (and sometimes even exclusive) informational access and listeners’ opportunities for counterspeech and exit may be constrained. Examples include (but are not limited to) speech by professionals and other fiduciaries to their clients and beneficiaries where speakers’ insincerity and inaccuracy threaten especially grave harms to their listeners. Although the individual speakers in these relationships may have substantial expressive interests of their own, governments—and courts—sometimes choose to privilege listeners’ autonomy, enlightenment, and self-governance interests in receiving accurate information by prohibiting lies and requiring truthful disclosures by these speakers. In other words, relationships matter for free speech purposes in ways that sometimes support the choice to privilege listeners over speakers when their First Amendment interests are in tension.

This, in turn, invites us to consider the nature of the communicative relationship between employers and workers.²³ Our constitutional comfort (or discomfort) with government’s efforts to regulate employer speech in this context depends on how we characterize this relationship and the resulting flow of information and power within the workplace. Even if some employers have dignitary speech interests of their own (a premise, as discussed below, that remains contested²⁴), employer speech on these topics takes place in a communicative relationship in which workers are comparatively disadvantaged in terms of information and power. More specifically, the employment rela-

23. Although employment law has traditionally focused on regulating the relationship between “employers” and their “employees,” the emergence of the “sharing” or “gig” economy demonstrates how those who are hard to fit in traditional employer/employee categories increasingly control access to work. These developments invite us to broaden our understanding of the universe of actors who shape access to job opportunities, as well as our understanding of how they can use speech to expand or constrain those opportunities. See Kenneth G. Dau-Schmidt, *Labor Law 2.0: The Impact of New Information Technology on the Employment Relationship and the Relevance of the NLRA*, 64 EMORY L.J. 1583 (2015).

24. See *infra* notes 89–96 and accompanying text.

tionship is riddled with information asymmetries: employers know considerably more than workers about the terms and conditions of employment, about current and future industry and economic projections, and—as repeat players with greater resources—about available legal protections. Moreover, workers also experience significant power disadvantage, as employers’ control over workers’ economic livelihood also permits them to control workers’ expression and sometimes even their physical liberty (e.g., by compelling workers’ attendance at “captive audience” meetings²⁵).

Because of these information and power asymmetries, this Article asserts that a focus on employer speech as occurring within a listener-centered relationship better and more coherently furthers key First Amendment values than do efforts to force employer speech to fit within existing and often unsatisfactory constitutional categories. Because workers’ interests as listeners are frustrated by employers’ lies and nondisclosures, a listener-centered view of workplace relationships would understand the First Amendment to permit government to prohibit employers from lying about certain workplace issues, as well as to require employers affirmatively to tell the truth by compelling them to disclose information about those matters.

This Article proceeds in three Parts. Part I offers a brief history of the courts’ approach to employer speech that reveals the construction of new First Amendment barriers to governmental efforts to inform and empower workers. Part II describes free speech theory and doctrine in other settings in which listeners have less information or power than speakers, and thus where content-based speech regulation sometimes helps improve the communicative discourse consistent with the First Amendment. Part III asserts that employer speech occurs within a communicative relationship that involves information and power asymmetries such that workers’ First Amendment interests as listeners are frustrated by employers’ lies and nondisclosures. Part III then explores in more detail what this means specifically for the regulation of truth and lies in and about the workplace and proposes that the First Amendment should be understood to permit government to require employers to disclose objectively verifiable information about workers’ rights and other working conditions, as well as to prohibit em-

25. See *infra* note 126 and accompanying text.

ployer lies or misrepresentations about these matters that threaten to coerce or manipulate workers' choices.

I. A BRIEF HISTORY OF EMPLOYER SPEECH AND THE FIRST AMENDMENT

To date, courts and agencies have grappled with First Amendment challenges involving employer speech about workers' rights and other working conditions in just a few discrete areas, with little effort to reconcile or connect them. The constitutionality of governmental efforts to regulate truth and lies in and about the workplace thus remains both undertheorized and unsettled. Moreover, as discussed below, courts in recent years have erected new First Amendment barriers to these measures.

A. EMPLOYERS' ANTIUNION SPEECH

Courts and commentators have most extensively discussed employer speech (as I use the term here²⁶) in the context of union representation campaigns—that is, employer speech urging workers to vote against unionization. As explained below, in recent years courts and the National Labor Relations Board (NLRB or the Board) have become increasingly willing to treat employer lies and misrepresentations in this setting as protected expression.

For a short period after the National Labor Relations Act's enactment in 1935, the NLRB interpreted the statute to prohibit employers from directly communicating *any* views about unionization to their workers during these campaigns.²⁷ The Supreme Court soon suggested that the First Amendment prohibited such an interpretation,²⁸ and the 1947 Taft-Hartley amendments to the Act expressly protected employer speech as a statutory matter.²⁹ More specifically, § 8(c) of the NLRA provides that:

26. See *supra* note 18 and accompanying text.

27. See *Am. Tube Bending Co.*, 44 N.L.R.B. 121, 131–34 (1942), *enforcement denied*, 134 F.2d 993 (2d Cir. 1943).

28. See *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945).

29. Archibald Cox characterized the 1935 Wagner Act as reflecting the congressional policy determination “that the Government should affirmatively encourage union organization and collective bargaining,” while the 1947 Taft-Hartley amendments “represent an abandonment of the policy of affirmatively encouraging the spread of collective bargaining, and the striking of a new balance between protection of the right to self-organization and various opposing claims.” Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 3–4 (1947).

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit.³⁰

Section 8(c)'s language has generated a great deal of debate over whether and when employer speech involves an unprotected "threat of reprisal or force or promise of benefit" within the meaning of the statute—that is, when employer speech is impermissibly "coercive."³¹ Courts and the NLRB have sometimes interpreted § 8(c) to prohibit certain employer lies or misrepresentations as coercive and thus actionable under § 8(a) as unfair labor practices.³² For example, the Court has held that an employer's false (as well as true) threats that employees would lose their jobs if they voted to unionize were sufficiently coercive of economically vulnerable workers to be unprotected by the First Amendment and § 8(c).³³ In addition to false threats, the NLRB has found some employer (and union) lies or misrepresentations about workers' legal rights to be impermissibly coercive, and thus actionable as unfair labor practices, because of their capacity to skew workers' choice to exercise those

30. 29 U.S.C. § 158(c) (2012); *see also* NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (describing § 8(c) as "merely implement[ing] the First Amendment").

31. *See* ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 177 (2d ed. 2004) ("[Employer speech can constitute coercion] if it explicitly threatens loss of employment, loss of pay, loss of promotion, or violence if the listener votes for the union or if the union wins the election."). In certain contexts, moreover, an employer's promise of benefits can sometimes operate as coercively as threats of reprisal. *See* NLRB v. Exch. Parts Co., 375 U.S. 405, 409 (1964) ("The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.").

32. Note that § 8(c) also protects noncoercive union speech from liability under § 8(b), which prohibits unions from engaging in unfair labor practices. 29 U.S.C. § 158 (2012).

33. *Gissel*, 395 U.S. at 617–18 ("[A]ny balancing of [employee] rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.").

rights (e.g., an employer's misrepresentations to workers that it could permanently replace strikers protesting unfair labor practices).³⁴ At other times, however, courts and the NLRB have declined to characterize employers' lies or misrepresentations about workplace law as coercive and have thus treated them as protected by § 8(c) from unfair labor practices liability.³⁵

While § 8(c) protects employers' noncoercive speech from liability as an unfair labor practice under NLRA § 8(a), it does not address whether or when other legal provisions may regulate employers' noncoercive speech. The NLRB has thus at times taken the position that noncoercive employer (or union) speech—including lies—can justify setting aside the results of a union representation election when it manipulates or otherwise improperly influences workers' assessment of the value of unionization and thus violates the Board's "laboratory conditions" doctrine that seeks to determine workers' true preferences.³⁶ As an example of lies found to be impermissibly manipulative of workers' decisions under this doctrine, the NLRB and courts have at times indicated their willingness to set aside election results based on a party's false representations on "matters of racial interest."³⁷ As an illustration, the Sixth Circuit applied

34. See *Nat'l Micronetics, Inc.*, 277 N.L.R.B. 993, 995–96 (1985).

35. See *John W. Galbreath & Co.*, 288 N.L.R.B. 876, 877 (1988); *Furr's Inc.*, 265 N.L.R.B. 1300, 1300 n.10 (1982); *County Line Cheese Co.*, 265 N.L.R.B. 1519, 1519 (1982); see also GORMAN & FINKIN, *supra* note 31, at 191 ("The Board's disinclination to intervene on account of misrepresentations applies to misstatements of law as much as to statements of fact."). As I have explored elsewhere, the line between coercive and noncoercive speech is deeply contested in a variety of expressive contexts. Helen Norton, *The Government's Lies and the Constitution*, 91 *IND. L.J.* 73, 94 (2015) (discussing philosophers' and legal commentators' long-standing struggles to determine when speech rises to the level of coercion).

36. *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948) ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. . . . When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again."); see also Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 *MINN. L. REV.* 495, 549 (1993) ("[T]he Board [in *General Shoe*] uncoupled the question of whether conduct was an unfair labor practice from the question of whether such conduct required the Board to overturn election results.").

37. See *KI (USA) Corp. v. NLRB*, 35 F.3d 256, 260 (6th Cir. 1994) (setting aside election results upon finding that the union had falsely represented the employer's views on racial matters); *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 71–72

this standard to uphold the NLRB's decision to set aside an election result upon finding that the employer had manufactured racist propaganda and fraudulently distributed it as the work of the union.³⁸

In recent decades, however, the NLRB has taken an increasingly hands-off approach to lies and misrepresentations in this context, equating union representation elections to political elections in which lies remain largely unregulated.³⁹ Its current position remains that of *Midland National Life Insurance Co.*, where it stated that:

[W]e will no longer probe into the truth or falsity of the parties' campaign statements, and we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is.⁴⁰

The agency now sets aside election results on the basis of lies deemed noncoercive only when they take the form of lies about who is responsible for certain election-related speech (that is, forgery) and not those that involve other deliberate misrepresentations of fact or law.⁴¹ The Board (and commentators) has largely justified its growing reluctance to regulate employer lies on policy grounds, but some have suggested that

(1962) ("So long . . . as a party limits itself to truthfully setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feeling by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane . . .").

38. *Ishikawa Gasket Am., Inc.*, 337 N.L.R.B. 175 (2001), *aff'd*, 354 F.3d 534 (6th Cir. 2004).

39. *See Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 132-33 (1982).

40. *Id.*; *see also Affiliated Midwest Hospital, Inc.*, 264 N.L.R.B. 1094 (1982) (extending *Midland* to hold that the Board will not set aside election results based on parties' misrepresentations about the Board's actions and decisions). For a summary of the Board's back-and-forth approach to regulating lies and misrepresentations, *see Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343, 346 (6th Cir. 1984).

41. Courts have generally followed suit, although at times some have resisted the Board's approach to lies in this setting as too deferential. *See NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726, 729 (1st Cir. 1983) ("Some misrepresentations may be so material and fraudulent as to undermine the employees' freedom of choice, rendering their section 7 right to self-organization a nullity. Were this such a case, the Board's flat insistence, under *Midland*, upon certifying the results of the fraudulent election might constitute legal error.").

any efforts to regulate such speech could raise First Amendment concerns as well.⁴²

Not only are courts and the NLRB increasingly likely to treat employer lies and misrepresentations as protected expression, but corporate and other commercial entities also increasingly resist—with some success—the government’s efforts to require them to post truthful disclosures in the workplace. For example, in *National Ass’n of Manufacturers v. NLRB*, the D.C. Circuit interpreted § 8(c) to deny the NLRB the power to require employers to post notices of workers’ NLRA rights.⁴³ Under the NLRB’s proposed rule, employers who failed to post the required notice could be found to have engaged in an unfair labor practice under § 8(a). Even though many other employment statutes have long—and, until recently, uncontroversially⁴⁴—required employers to post similar notices of workers’ legal rights in the workplace, the National Association of Manufacturers and other groups alleged that the NLRB’s no-

42. See Shawn J. Larsen-Bright, *Free Speech and the NLRB’s Laboratory Conditions Doctrine*, 77 N.Y.U. L. REV. 204 (2002) (suggesting that the Board’s “laboratory conditions” doctrine would violate the First Amendment if applied to regulate noncoercive speech).

43. *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013). The panel’s decision was overruled in part on other grounds by *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc). There the en banc D.C. Circuit overruled portions of panel decisions in three different cases that it described as offering an unduly limited reading of Supreme Court precedent to apply rational-basis scrutiny to compelled commercial disclosures only “to cases in which the government points to an interest in correcting deception.” *Id.* at 22. The en banc court, however, overturned neither the *National Ass’n of Manufacturers* panel’s invalidation of the Board’s proposed notice-posting rule nor its free speech analysis of that rule. The Fourth Circuit struck down the Board’s proposed notice-posting rule on administrative law grounds without addressing the challengers’ free speech arguments. See *Chamber of Commerce v. NLRB*, 721 F.3d 152, 166 (4th Cir. 2013).

44. See *Lake Butler Apparel Co. v. Sec’y of Labor*, 519 F.2d 84, 89 (5th Cir. 1975) (“Lastly, Lake Butler argues that the OSHA requirement that the information sign be posted at its clothing factory violates its First Amendment rights to freedom of speech. However, Lake Butler does not cite us to any cases on the issue and we are hard put to find any. The argument is seemingly nonsensical for, if the government has a right to promulgate these regulations, it seems obvious that they have a right to statutorily require that they be posted in a place that would be obvious to the intended beneficiaries of the statute—Lake Butler’s employees. The posting of the notice does not by any stretch of the imagination reflect one way or the other on the views of the employer. It merely states what the law requires. The employer may differ with the wisdom of the law and this requirement even to the point as done here, of challenging its validity. . . . But the First Amendment which gives him the full right to contest validity to the bitter end cannot justify his refusal to post a notice Congress thought to be essential.” (citations omitted)).

tice-posting rule compelled employers to engage in speech against their will in violation of § 8(c) as well as the First Amendment. The D.C. Circuit found that the rule violated § 8(c) without expressly addressing the constitutional claim, but its statutory analysis relied exclusively on First Amendment law. More specifically, it drew from a range of First Amendment precedent in both commercial and noncommercial settings to conclude that employers' refusal to post the government's notice was itself speech protected by § 8(c) (and, by implication, the First Amendment). The court's broad view of employers' speech rights suggests a willingness to find other disclosure requirements to violate the First Amendment, and employer groups have mounted related free speech challenges to similar measures.⁴⁵

The courts' protective approach to employer speech contrasts starkly with their very different treatment of unions' speech in related contexts.⁴⁶ More specifically, courts have often justified substantial regulation of union picketing and other pro-labor expression not only because they have been relatively quick to view such speech as coercive, but also because they have often characterized it as economically motivated speech on matters of private concern—and thus less deserving of constitutional protection than speech on matters of public concern.⁴⁷

45. See Nat'l Ass'n of Mfrs. v. Perez, 103 F. Supp. 3d 7, 15–19 (D.D.C. 2015) (rejecting a First Amendment challenge to the Department of Labor's requirement that federal contractors post notice of workers' NLRA rights). There the district court distinguished the D.C. Circuit's holding in *National Ass'n of Manufacturers v. NLRB* as limited to § 8(c), even while acknowledging that “the court in [*National Ass'n of Manufacturers*] did rely on First Amendment jurisprudence to give content to the protections afforded by section 8(c).” *Id.* at 15.

46. See Cynthia Estlund, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 960 (1982) (“The Supreme Court has thus incorporated into First Amendment doctrine a hierarchy of values that is more consistent with the free enterprise system than with the system of freedom of expression.”); Richard Michael Fischl, *Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?*, 10 CARDOZO L. REV. 729, 741 (1989) (“[M]y principal point is that labor is different—that it seems to enjoy a special exemption from the constitutional protection available to other citizens because of assumptions we share about what it means to be an employee.”); Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 47 (2011) (“[I]t is difficult if not impossible to reconcile existing labor speech doctrine with First Amendment cases arising in other contexts—yet the distinctions have proven resilient, albeit with shifting rationales.”).

47. The Court has most often relied on distinctions between speech on matters of public or private concern to assess First Amendment claims by de-

As Charlotte Garden has observed, “The Court’s most recent explanation for its different treatment of unions, as compared to other types of groups (such as the Westboro Church), rests on its perception that union picketing is essentially economic” speech on a matter of private, rather than public concern.⁴⁸ In contrast, courts to date have not considered whether employer speech in the context of union organizing campaigns should be characterized as self-interested speech on economic matters (less protected from regulation) as opposed to speech on matters of public concern (largely protected from regulation).⁴⁹ Of

endants in defamation and intentional infliction of emotional distress cases and by public employees. *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (public employee); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (defamation). Holding that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection,” the Court has also stated that “First Amendment protections are often less rigorous” with respect to speech on matters of private concern. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). The Court has indicated that speech involves matters of public concern when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (per curiam). However, “the boundaries of the public concern test are not well defined.” *Id.* at 83.

48. Garden, *supra* note 46, at 21; *see also* Catherine L. Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 *BERKELEY J. EMP. & LAB. L.* 277, 308–09 (2015) (“Restrictions on labor picketing have sometimes been justified on a separate ground: that labor picketing is ‘economic’ rather than ‘political’ speech and that the state has greater power to regulate economic activity than to regulate political activity. Courts sometimes assess the content of labor speech under the laxer constitutional standard used to assess the content of commercial speech, based upon the supposition that the two forms of speech are analogous.”).

On the other hand, a divided Court recently characterized related union speech as involving a matter of public concern in a context when doing so disadvantaged the union. *Harris v. Quinn*, 134 S. Ct. 2618, 2642–43 (2014). There the majority held that the First Amendment did not permit a public employees’ union to require workers to pay dues to support its collective bargaining efforts because its speech seeking to increase “wages and benefits for personal assistants would almost certainly mean increased expenditures under the Medicaid program, and it is impossible to argue that the level of Medicaid funding (or, for that matter, state spending for employee benefits in general) is not a matter of great public concern.” *Id.* The dissent, in contrast, noted the majority’s departure from longstanding precedent. *Id.* at 2655 (Kagan, J., dissenting) (“But that view of the First Amendment interests at stake blinks decades’ worth of this Court’s precedents. Our decisions . . . teach that internal workplace speech about public employees’ wages, benefits, and such—that is, the prosaic stuff of collective bargaining—does not become speech of ‘public concern’ just because those employment terms may have broader consequence.”).

49. A number of commentators have explored the implications of extending the more protective standards long applied to employer speech to union

course, acknowledging that both can be true may be the more accurate characterization, as speech on these topics (by unions as well as employers) is often both economically and politically motivated and of both public and private concern.⁵⁰

B. EMPLOYERS' COMMERCIAL SPEECH

Outside of the unionization context, courts sometimes treat employer speech about workers' rights and working conditions as commercial speech subject to less First Amendment protection and thus greater governmental regulation. This analysis is complicated, however, by growing challenges to the premise that commercial speech should be subject to greater governmental regulation than other types of speech.

First, some background on commercial speech more generally. Since the 1970s, the Court has explained that commercial speech is worthy of First Amendment protection because of its informational value to listeners (that is, consumers).⁵¹ It has relatedly held that commercial speech that is false, misleading, or related to an illegal activity is entitled to no constitutional protection—and can be banned outright—because such speech frustrates listeners' informational interests.⁵² Moreover, it has permitted government relatively broad leeway to require commercial speakers to make truthful disclosures,⁵³ upholding such

speech as well. *See, e.g.*, Fisk & Rutter, *supra* note 48; Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1058–62 (2013); Garden, *supra* note 46, at 19.

50. *See* Fisk & Rutter, *supra* note 48, at 312 (“Labor speech addresses a mix of economic and political concerns (but of course, so does core political speech).”); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1417 (1982) (“The core ideological function served by the public/private distinction is to deny that the practices comprising the private sphere of life—the worlds of business, education, and culture, the community, and the family—are inextricably linked to and at least partially constituted by politics and law.”).

51. *See* *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (“[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”); *Va. State Bd. of Pharmacy v. Va. Citizen Consumer Council, Inc.*, 425 U.S. 748, 763–64 (1976) (emphasizing the value of “the free flow of commercial information” to individual consumers and the public more generally).

52. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–64 (1980).

53. The Court applied intermediate scrutiny to laws regulating truthful and nonmisleading commercial speech on the premise that such speech—

requirements when they are “reasonably related to the State’s interest in preventing deception of consumers.”⁵⁴ Lower courts have also often upheld commercial disclosure requirements to inform consumers even when the regulated commercial speakers have not engaged in deception.⁵⁵ Courts have long viewed such disclosures as protecting listeners’ informational interests while posing little danger of chilling commercial speakers who retain strong economic incentives to speak; indeed, the Court’s commercial speech doctrine has relied in part on the “hardiness” of commercial speech.⁵⁶ In short, at least until recently,⁵⁷ courts have generally been quite tolerant of governmental efforts to prohibit lies and compel disclosures in commercial settings.

Courts have only occasionally explored whether and when employer speech about workers’ rights and working conditions should be understood as commercial speech subject to greater governmental regulation.⁵⁸ The Supreme Court specifically considered whether commercial speech includes job advertisements (which often include information about the terms and conditions of employment) in *Pittsburgh Press Co. v. Pittsburgh*

although still of relatively low value—can helpfully inform individuals about their choices in the commercial realm. *Id.*

54. *Zauderer*, 471 U.S. at 651 (holding that disclosure requirements that are reasonably related to the State’s interest in preventing consumer deception do not violate commercial speakers’ First Amendment rights).

55. *E.g.*, *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014); *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009). The Supreme Court has yet to address the question of whether rational-basis scrutiny should apply to compelled commercial disclosures intended to further listeners’ informational interests absent the government’s showing of deception by the commercial speaker.

56. *See Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24 (“The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.”).

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

58. As just one example, the D.C. Circuit did not consider this possibility when considering the constitutionality of the NLRB’s regulation of workplace speech in *National Ass’n of Manufacturers v. NLRB*. *See supra* notes 43–45 and accompanying text.

Commission on Human Relations.⁵⁹ There it rejected a First Amendment challenge to a city antidiscrimination ordinance that prohibited newspapers from publishing employers' sex-segregated want ads.⁶⁰ As it concluded:

None [of the ads] expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor do any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.⁶¹

The Court then treated this particular commercial speech as entitled to no constitutional protection because it advertised illegal activity in the form of discriminatory hiring practices that violated statutory civil rights protections.⁶² Lower courts have generally applied *Pittsburgh Press* to hold that employers' recruitment-related speech, job advertisements, interviews, and other job-related negotiations (which, again, generally include information about the terms and conditions of employment) constitute commercial speech.⁶³ Employers' communications about the terms and conditions of employment to prospective or current workers thus should generally fall within the definition of commercial speech under which government has traditionally been permitted considerable latitude to regulate lies and misrepresentations as well as to require truthful disclosures.

More difficult questions arise when a commercial speaker's expression occurs in a setting that does not involve traditional advertisements or negotiations or when it is combined with arguably noncommercial expression. Although the Court has yet

59. 413 U.S. 376 (1973).

60. *Id.* at 391.

61. *Id.* at 385.

62. *Id.* at 387–88.

63. *E.g.*, *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808, 818–19 (9th Cir. 2013) (characterizing potential employers' solicitation of day laborers as commercial speech because it involved advertisements and negotiations for work); *Centro de La Comunidad Hispana v. Town of Oyster Bay*, 128 F. Supp. 3d 597, 610 (E.D.N.Y. 2015) (same); *Calderon v. City of Vista*, No. 06CV1443-L(LSP), 2006 WL 2265112, at *2 (S.D. Cal. Aug. 7, 2006) (same); *Nomi v. Regents for the Univ. of Minn.*, 796 F. Supp. 412, 417 (D. Minn. 1992) (“[Military job] recruiting proposes a commercial transaction; the purpose of recruiting is to reach an agreement under which services will be exchanged for compensation.”), *vacated as moot*, 5 F.3d 332 (8th Cir. 1993); *N.J. Dep't of Labor & Workforce Dev. v. Crest Ultrasonics*, 82 A.3d 258, 260 (N.J. Super. Ct. 2014) (characterizing state law that regulated job advertisements as a regulation of commercial speech).

to offer a clear definition of commercial speech for First Amendment purposes more generally, speech that does “no more than propose a commercial transaction”⁶⁴ clearly constitutes core commercial expression; the Court has also characterized commercial speech as “expression related solely to the economic interests of the speaker and its audience.”⁶⁵ That speech proposing a commercial transaction may be accompanied by other speech does not necessarily rob it of its commercial character: according to the Court, the key determination is whether the commercial speech is “inextricably intertwined” with otherwise fully protected speech.⁶⁶ For example, the Court has held that contraceptive advertisements constituted commercial speech even though the regulated mailings also included discussion of other important topics of public concern like family planning and sexually transmissible diseases.⁶⁷ The Court there made clear its practical concern that “[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.”⁶⁸

The speech at issue in *Nike, Inc. v. Kasky* highlights these definitional challenges in the context of an employer’s alleged lies about its treatment of its workers.⁶⁹ Nike faced allegations that overseas workers who made Nike products were subjected to physical abuse and illegal working conditions—allegations that received extensive public attention.⁷⁰ Nike refuted these

64. *Va. State Bd. of Pharmacy v. Va. Citizen Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press*, 413 U.S. at 385).

65. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

66. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (determining that “pure” speech and commercial speech were not “inextricably intertwined” to justify characterizing the speech as noncommercial); see *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (“[W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.”).

67. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

68. *Id.* at 68. The *Bolger* Court noted that the combination of three factors—advertising format, product reference, and commercial motivation—provided “strong support” for characterizing the mailings as commercial speech despite their inclusion of political and other noncommercial content as well. *Id.* at 66–68. The *Bolger* Court also indicated, however, that each of those criteria need not be met before speech may be characterized as commercial. *Id.* at 67 n.14.

69. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003) (per curiam).

70. 539 U.S. at 656.

reports in a variety of communications that included press releases, letters to newspaper editors, and letters to university athletic directors with whom it did business.⁷¹ When a plaintiff filed suit against Nike alleging that these communications included factual misrepresentations in violation of California's consumer protection law, Nike's defenses included its claim that its speech—even if intentionally false—was protected by the First Amendment as political, rather than commercial, expression.⁷² The Supreme Court granted certiorari, only later to dismiss it as improvidently granted.⁷³

The question whether to characterize such speech as political or commercial (which, in turn, determines the extent to which it may be regulated consistent with the First Amendment) continues to generate considerable controversy. Tamara Piety, for example, emphasizes the speaker's identity as a corporation engaged in for-profit activities to urge that such expression always be characterized as commercial and thus subject to greater government regulation.⁷⁴ Others focus on the expression's motive or format (for example, whether its audience includes consumers), while others argue for a narrow definition of commercial speech limited only to traditional advertisements.⁷⁵ Still others urge that commercial speech should

71. *Id.* at 658.

72. *Id.*

73. *Id.* at 655. The Court's dismissal of certiorari thus left in place the California Supreme Court's ruling that Nike's statements constituted regulable commercial speech "[b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products . . ." 45 P.3d at 247.

74. TAMARA PIETY, BRANDISHING THE FIRST AMENDMENT 12 (2012) (proposing to expand the definition of low-value and thus less protected commercial speech to include all speech by for-profit entities because all such speech is "essentially promotional"); see Piety, *supra* note 16, at 200 ("A commercial entity will only have an interest in conveying truthful information to consumers about its product if that truthful information will help it sell the product. If it does not help to sell the product or, worse still, depresses sales, the company will not only have no incentive to tell the truth, it may have a legal duty to lie unless there is a legal compulsion to tell the truth.")

75. See Erwin Chemerinsky & Catherine Fisk, *What Is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143, 1145 (2004) ("Factual statements by a manufacturer to consumers about its products with the objective of increasing sales are and should be considered commercial speech."); *id.* at 1143 ("The issue in *Nike, Inc. v. Kasky* was whether the First Amendment protects a company's making false factual statements about its products, likely to matter greatly to some consumers in their purchasing decision, in an effort to increase sales."); Jennifer L. Pomeranz, *Are We*

receive full constitutional protection akin to political speech, which would eliminate any need to define commercial speech or to distinguish it from political expression.⁷⁶

Nike's speech might be characterized as employer speech of the sort at issue in this Article, as it presented allegedly false factual claims about its employees' working conditions.⁷⁷ Even more on point would be a scenario in which an employer allegedly violates U.S. employment law with respect to its workers on American soil and falsely denies those allegations in a variety of communications to a range of audiences. Characterizing such speech as commercial or noncommercial—which in turn largely determines whether its truth and falsity can be regulated under current First Amendment doctrine—is complicated by the fact that the employer's speech is directed to current and prospective workers as well as to a broad audience on a matter of interest to workers specifically as well as to the public more generally.

Here too such speech may be accurately described as both political and commercial, and of both public and private concern⁷⁸—which again reminds us of the limits of these catego-

Ready for the Next Nike v. Kasky?, 83 U. CIN. L. REV. 203, 219 (2014) (“It is irrelevant if these communications were triggered by a national debate, false accusations, or the company's own desire to reach potential or actual consumers. Presenting factual information about one's own company, or its product, is not the act of engaging in a debate or commenting on public issues, but rather part of promotional communication.”).

76. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring) (“[T]here is no ‘philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.” (quoting 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996))); Deborah J. LaFetra, *Kick It up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1207 (2004) (urging “full First Amendment protection for corporate speech” because of its value to listeners and the difficulties in parsing commercial and noncommercial speech); Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553 (1997) (same).

77. *Nike, Inc.*, 539 U.S. at 656.

78. See Estlund, *supra* note 13, at 356–57 (“[I]n choosing whether to take or quit a job, employees are more akin to investors (of their own human capital) or consumers (of a package of ‘goods’ associated with a job). As such, they have a recognizable stake in information about the job that may be hidden from them. All the while, it is crucial to keep in mind that employees are also members of society and a majority of the voting citizenry. Their terms and conditions of employment, in the aggregate and in the staggering disparities of wealth and opportunities that they create, shape society and give the public a large stake in learning about what goes on at work.”).

ries.⁷⁹ The next Part thus turns to theoretical and doctrinal assessments of speech regulations in other contexts that largely eschew such categories to focus instead on the dynamics of certain speaker-listener relationships.

II. LISTENER-CENTERED RELATIONSHIPS AND THE FIRST AMENDMENT

As courts and commentators struggle with questions about whether employer speech should be characterized as political or commercial, or of public or private concern, the most accurate answer may often be “all of the above.”⁸⁰ This invites us to consider instead whether we should take a speaker-centered or listener-centered approach to the protection and regulation of such expression. Many think of the First Amendment as safeguarding the interests of speakers, especially the lonely individual speaker of conscience.⁸¹ Most First Amendment theories, however, do not focus exclusively on speakers’ interests and instead also seek to further the interests of listeners—that is, to inform listeners’ search for truth and to facilitate their exercise of autonomy and their participation in democratic self-governance.⁸² This Part describes how such a listener-centered focus can sometimes justify expression’s regulation as well as its protection to safeguard listeners’ First Amendment interests.⁸³

79. See generally Cynthia Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990) (discussing concerns about the Court’s content-based distinction between speech of ostensibly public and private interest); Cristina Carmody Tiley, *Tort, Speech, and the Dubious Alchemy of State Action*, 17 U. PA. J. CONST. L. 1117, 1165–66 (2015) (explaining how social media and other online speech platforms change the nature of the boundaries between public and private that govern the Court’s categorical approach).

80. See Caroline Mala Corbin, *Compelled Disclosure*, 65 ALA. L. REV. 1277, 1283 (2014) (“More fundamentally, though, speech really exists along a continuum rather than in two distinct categories. Speech designated as commercial or political is often really a mixture of the two . . .”).

81. See Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 14 (1989) (“It is fair to assert that throughout the formative period of our free speech heritage . . . the paradigm beneficiary of the free speech principle has been a vulnerable speaker of conscience, impelled to speak out by the demands of humanity, yet subject to waves of unnecessarily harsh parochial intolerance.”).

82. See Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 423 (1980) (describing the positive values most often identified as underlying the First Amendment).

83. See PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 7 (2013) (“It is

A. COMMUNICATIVE RELATIONSHIPS WHERE SPEAKERS HAVE NO DIGNITARY INTERESTS OF THEIR OWN

As discussed in Part I, the Court has justified the protection as well as the content-based regulation of commercial speech to protect listeners' interests in receiving accurate information that aids their decision making.⁸⁴ Many thoughtful commentators have explained the choice to privilege consumers' interests as listeners in part on the grounds that commercial speakers do not have dignitary interests of their own—that is, they themselves do not have expressive interests protected by the First Amendment.⁸⁵ As Margaret M. Blair and Elizabeth Pollman have observed:

[T]he Court has never based its corporate rights jurisprudence on the idea that a corporation is a constitutionally protected “person” in its own right. The Court has instead granted constitutional rights to corporations to derivatively protect the rights of the natural persons that are assumed to be represented by the corporation, or that are interacting with the corporation.⁸⁶

Arguments for adopting a listener-centered approach for First Amendment purposes are thus especially strong in expressive contexts lacking a dignitary speaker, as some (but not all) would describe the commercial setting. And although the protection of dignitary speakers' choice to lie (or to decline to tell the truth) sometimes furthers autonomy interests protected by the First Amendment,⁸⁷ the protection of lies or nondisclo-

evident that the law—especially First Amendment law—does not and cannot always ignore the context of speech or the institutional nature of the speaker, and that it does not and cannot always treat the ‘state’ as a monolithic entity. Again and again, courts abandon, or carve out exceptions to, the context-insensitive rules that they so often assert are the very foundation of the rule of law, and certainly of the First Amendment.”); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) (urging that First Amendment doctrine should turn in part on institutional context).

84. As Burt Neuborne observed, the Court has sometimes taken such an approach with respect to speech in communicative environments “that boast numerous hearers interested in maximizing their capacity to exercise efficient and autonomous choice.” Neuborne, *supra* note 81, at 9.

85. See C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 997 (2009) (“[C]ommercial speech is not an exercise of freedom by morally significant flesh-and-blood individuals to the extent that the speech is properly attributed to a legally constructed commercial entity.”).

86. Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1678 (2015).

87. See David S. Han, *Autobiographical Lies and the First Amendment’s Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 115 (2012) (finding First Amendment autonomy value in “knowing, factual lies about oneself that are intended to influence one’s public perception . . .”).

tures made by speakers without such dignitary interests does not. A derivative understanding of these speakers' rights thus permits the regulation of their statements' truth or falsity to protect listeners' interests in receiving accurate information.⁸⁸

The premise that corporate and other commercial speakers do not have expressive interests of their own, however, now faces increasing pressure.⁸⁹ As just one example, the challengers in *National Ass'n of Manufacturers v. NLRB* opposed the NLRB's requirement that employers post notice of workers' NLRA rights by relying on compelled-speech precedent that involved individual human speakers with clear dignitary interests of their own⁹⁰—and the D.C. Circuit similarly relied on those cases in striking down the NLRB's rule as a violation of employers' free speech rights.⁹¹ These decisions included *West Virginia Board of Education v. Barnette* (where the Court struck down a school board's requirement that students salute the flag)⁹² and *Wooley v. Maynard* (where the Court invalidated New Hampshire's requirement that the state's motorists display its motto "Live Free or Die" on their license plates).⁹³ Neither the challengers nor the D.C. Circuit acknowledged that the

88. See BURT NEUBORNE, MADISON'S MUSIC 119 (2015) ("First Amendment doctrine should recognize that hearers as well as speakers are entitled to be treated with dignity.").

89. See *id.* at 117 ("Despite its hearer-borrowed nature, the [Court's contemporary] corporate speech doctrine is relentlessly speaker centered, with not a hint of concern for the interests of hearers except as a rhetorical flourish designed to further enable privileged speakers."); Piety, *supra* note 17, at 5 ("*Sorrell* completes what has been a decades-long process of turning the rationale for commercial speech doctrine upside down by putting the speaker, rather than the public interest, at the center of the analysis. It completes what I call has been a 'bait-and-switch' whereby the protection for commercial speech was offered under one justification, but once it was granted, has morphed into something completely different."); Rodney A. Smolla, *Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1295–96 (2004) (noting a paradigm shift in which the focus of the Court's commercial speech doctrine "has moved from consumer protection to speaker protection"); G. Edward White, *The Evolution of First Amendment Protection for Compelled Commercial Speech*, 29 J.L. & POL. 481, 496–98 (2014) ("A majority of Justices no longer believe that the sole First Amendment dimension of commercial speech cases is the social interest in the circulation of information about commercial products.").

90. See *supra* notes 43–45 and accompanying text.

91. See *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 956–58 (D.C. Cir. 2013) (discussing precedent and concluding that "these, and other such cases, may [not] be distinguished from this one on the Board's terms").

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

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

schoolchildren and motorists in those cases held autonomy and self-expression interests quite distinguishable from those of most corporate and other commercial entities.⁹⁴

Moreover, even those who are generally skeptical about commercial speakers' expressive interests still sometimes identify certain corporate speakers—including, but not limited to, nonprofit corporations—as having comparatively strong expressive claims in their own right.⁹⁵ The Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.* offers a related illustration, interpreting the Religious Freedom Restoration Act's statutory protection of "persons'" religious exercise to include at least some family-owned and closely held corporations.⁹⁶ As the next Section explains, however, speakers' claims to expressive interests of their own do not always doom the case for treating their listeners' interests as paramount for First Amendment purposes.

B. COMMUNICATIVE RELATIONSHIPS THAT INVOLVE IMBALANCES OF INFORMATION OR POWER

Although dignitary speakers may have autonomy interests in deciding what they will and will not say—for example, in uttering falsehoods or resisting truthful disclosures—listeners themselves have autonomy, enlightenment, and democratic self-governance interests in receiving accurate information that empowers their decision making. We may thus still choose to

94. See Kendrick, *supra* note 17, at 1204 ("A court could, in short, easily distinguish the Notice Posting Rule from the Pledge of Allegiance. But the D.C. Circuit did not. It is this fact that makes *National [Ass'n] of Manufacturers* so indicative of current trends in First Amendment law.")

95. See, e.g., SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 101 (2014) (recognizing the complex cases of nonprofit corporations, the press, and other market actors).

96. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774, 2785 (2014); see also Thomas W. Joo, *Corporate Speech & the Rights of Others*, 30 CONST. COMMENT. 335, 340 (2015) (suggesting that the Court's statutory reasoning in *Hobby Lobby* "would seem to apply" to corporations' free exercise claims as well). For contrasting normative views, see Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277 (2015) (arguing that corporations do not have protected religious exercise rights); Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 321 (2015) ("Of course corporations are not genuine human beings and should not automatically receive all the constitutional rights that human beings claim. At the same time, . . . it is similarly obvious that corporations should be able to claim some constitutional rights. So which ones, and when?"); Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47 (2015) (arguing that corporations have protected religious exercise rights).

privilege comparatively disadvantaged listeners over comparatively advantaged speakers when their First Amendment interests collide.⁹⁷ More specifically, even in relationships where the presence of a dignitary speaker is uncontested, theory and doctrine sometimes support a listener-based approach to First Amendment analysis when those relationships involve asymmetries of information or other forms of power.

Daniel Halberstam is among those to have described such a relationship-specific approach to First Amendment analysis:

Substantively, the view that the speaker and listener occupy determined social roles with respect to their discourse leads to a focus on the protection of the specific communicative relationship as opposed to a general prohibition of all content-based regulation. With regard to these communications, such as discussions between professional and client, government regulation is not invariably destructive of communicative interests, but may indeed foster the communicative relationship and assist in institutionalizing the bounded discourse. Content-based government regulation that assists in maintaining the boundaries of the discourse is therefore permissible, although similar regulation would not be allowed absent the special relationship between the speaker and listener.⁹⁸

Relatedly, Seana Shiffrin has explored in detail “features of the moral and epistemic environment” of certain communicative relationships that should trigger heightened expectations of speakers’ sincerity and accuracy.⁹⁹ As one example, she offers

97. See Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 170 (1997) (“A system of free expression based on Kantian autonomy, however, would not merely concern itself with protection against government suppression. Because the State’s purpose is to preserve the dignity of its citizens, such a system would also ensure that citizens use speech consistently with autonomy. The State can and should regulate speech that, by attempting to override the thought processes of other individuals, disrespects their rational capacities.”).

98. Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 869 (1999); see also *id.* at 834 (“In other words, whether the relationships are ones of trust, such as those between lawyer and client or doctor and patient, or are merely common material enterprises, such as those between buyers and sellers, their presence triggers a contextual First Amendment review that is specifically centered around the social relation, as opposed to an abstract review such as that traditionally applied to the street-corner speaker.”).

99. Seana Valentine Shiffrin, *Deceptive Advertising and Taking Responsibility for Others* 33 (UCLA Sch. of Law Pub. Law & Legal Research Paper Series, Research Paper No. 15-28, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658450; see also *id.* at 15 (“[T]he moral wrong of deception is better understood in terms of the failure to exercise due care to ensure one does not impart or reinforce inaccurate beliefs in another.”).

a relationship-centered explanation as to why the regulation of lies by those with expert information should not offend the First Amendment:

Regulating lies by experts about the contents of their actual, certified, or claimed expertise does not single out content. Rather, it attaches to a feature of the speaker and the relationship between the speaker and the utterance. This relationship is singled out as meriting regulation for content-independent reasons, namely that listeners should be able to rely upon the sincerity of experts because they have or claim special access to information that listeners either do not have, or reasonably should not be expected to cultivate on their own.¹⁰⁰

A focus on the “epistemic” features of communicative relationships emphasizes information asymmetries between speakers and listeners.¹⁰¹ Indeed, a great deal of contract and commercial law attends to these differentials between transactional partners.¹⁰² For example, regardless of whether commercial speakers have dignitary interests of their own, consumers as listeners have strong informational interests in accurate commercial speech that furthers their own exercise of autonomy. For these reasons, Leslie Gielow Jacobs characterizes transactional communications more broadly as regulable in order to inform and further parties’ decision making by correcting informational asymmetries.¹⁰³

100. SHIFFRIN, *supra* note 95, at 132.

101. See JASON STANLEY, *HOW PROPAGANDA WORKS* 145 (2015) (“One can command someone to believe something, by presenting *oneself* as an epistemic authority, whose expert testimony is sufficient to back up one’s practical command.”).

102. Moreover, as Professor Shiffrin explains, “Not only does a consumer face practical barriers to gaining full information about the foods they consider, it is further unavailable to her (and her representatives) as a matter of legal right.” Shiffrin, *supra* note 99, at 26; see also *id.* at 27 (“[W]hen we grant a monopoly, whether partial or total, to one party over information relevant to both parties, over which both parties have entitlements and/or strong moral interests, the party with exclusive access should bear a higher level of responsibility for ensuring that communications concerning this information are successful in imparting *accurate* uptake.”).

103. Leslie Gielow Jacobs, *Compelled Commercial Speech as Compelled Consent Speech*, 29 J.L. & POL. 517, 522 (2014) (“This government regulatory power to require the disclosure of facts material to informed consent is not limited to commercial contracts. Consent is a crucial element that renders many types of transactions legal and enforceable. Governments have always had the authority to define the facts that must be communicated and the circumstances that must exist to create this critical element of consent.”).

As Rebecca Tushnet observes, market efficiency offers a related justification for privileging listeners’ interests in transactional contexts. Tushnet, *supra* note 17, at 37 (“Compelled commercial disclosures are a form of regulation of information where deception may not be the regulator’s primary concern.

Theory and doctrine sometimes privilege listeners' First Amendment interests in noncommercial contexts as well, by requiring even dignitary speakers to address information asymmetries through compelled disclosures. For example, although a five-to-four Court in *Citizens United v. FEC* struck down federal restrictions on corporate speakers' independent campaign expenditures,¹⁰⁴ an eight-to-one majority upheld federal law requiring that political speakers disclose themselves as the source of certain campaign communications to further listeners' interests: "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."¹⁰⁵ More generally, the Court has upheld a variety of statutes requiring individual political speakers to disclose their identities—for example, as petition signatories or as sources of certain campaign contributions—for the public's benefit as listeners.¹⁰⁶ In this manner, the Court has permitted government to require even political speakers with clear dignitary interests of their own to tell the truth about certain matters to facilitate their listeners' First Amendment interests.¹⁰⁷

Although speaker-listener information asymmetries alone sometimes justify regulation to protect listeners' interests, as we have seen, the case for such regulation becomes even

Instead, the concern is for the available mix of truthful information—a key part of the structure of a market, because well-functioning markets require lots of information."); see also Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 451 (2012) ("Deceptive behavior is a costly activity that aims primarily at the redistribution rather than the production of value and often causes poor decision making.").

104. *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

105. *Id.* at 371.

106. *E.g.*, *Doe v. Reed*, 130 S. Ct. 2811, 2819 (2010); *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976), *superseded by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, Pub L. No. 107-155, 116 Stat. 81, *as recognized in* *McConnell v. FEC*, 510 U.S. 93 (2003).

107. The contemporary Court remains deeply divided on these issues. See NEUBORNE, *supra* note 88, at 11 ("In settings where the deregulatory First Amendment allows the speech process to be dominated by the strong to the detriment of the weak, the Court often splits 5-4 over the constitutionality of efforts to restrain overly powerful speakers, enhance weak ones, and protect vulnerable hearers."). Relatedly, the Court has increasingly resisted—in recent years—legislative efforts to restrict the volume of speech by comparatively wealthy speakers. See, *e.g.*, *Citizens United*, 558 U.S. 310 (striking down limits on corporate expenditures on independent campaign communications).

stronger when accompanied by power differentials.¹⁰⁸ This can be the case, for example, when listeners occupy a position of relative dependence or vulnerability with respect to speakers. Professionals' and other fiduciaries' speech to their clients and beneficiaries occurs within such a relationship where listeners trust speakers for important advice and guidance. As Paul Horwitz explains, professional speech is both protected and regulated because it rests on "expertise based on a body of specialized knowledge" designed to further listeners' autonomy by informing and advising their choices, often in high-stakes situations.¹⁰⁹ The relationship is thus one where professionals' speech may be regulated to protect listeners by prohibiting lies and misrepresentations, as well as requiring truthful disclosures of listeners' options and risks—even though doctors, lawyers, and other expert speakers of course possess dignitary interests of their own.¹¹⁰ A number of thoughtful commentators

108. In a related context, Yochai Benkler characterized the distinction between privacy and transparency as turning on "a theory of asymmetric power":

The core of the argument is that privacy is at risk when there are powerful observers and vulnerable subjects. Transparency, by contrast, involves disclosure of information about powerful parties that weaker parties can use to check that power or its abuse. When we say that an act of information disclosure "threatens privacy" or "promises transparency," we are making a judgment about who has power and who is susceptible to it and how that power ought to be limited.

Yochai Benkler, *The Real Significance of Wikileaks*, AM. PROSPECT, May 2011, at 31, 33.

109. HORWITZ, *supra* note 83, at 248–50; *see also id.* at 250 ("It is a fiduciary relationship: the patient, owing to the inequality of knowledge between him and the dentist, is entitled to expect competent professional advice, not just the dentist's personal opinion. Dentists offering advice to patients, in short, are supposed to provide the best views of the profession. They may be free to offer dissenting views outside that context—indeed, if professional knowledge is to advance, professionals must be able to challenge the boundaries of received professional opinion—but they are constrained in what they can say within the fiduciary relationship."); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 972 (2007) ("Informed consent doctrine mandates the communication of medical knowledge to the end that a lay patient can receive the expert information necessary to make an autonomous, intelligent and accurate selection of what medical treatment to receive.").

110. *See, e.g.*, COLO. REV. STAT. § 12-43-214 (2015) (requiring psychotherapists to disclose their credentials, available grievance procedures, therapeutic methods, duration of therapy, confidentiality rules, and more); MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2015) ("A lawyer shall not knowingly . . . make a false statement of fact of law to a tribunal . . ."); *id.* r. 4.1(a) ("In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person."); *id.*

have made related observations in the information technology context, where government regulation may help address technology users' vulnerability to those with whom they entrust important information or upon whose judgment they rely.¹¹¹

Relationships in which speakers have the ability to coerce or otherwise control their listeners (even absent some special relationship of trust) also involve asymmetries of power that may justify regulation to protect listeners' interests. As an illustration, consider situations in which speakers hold their listeners "captive" in some respects, as the First Amendment "permits the government to prohibit offensive speech when the 'captive' audience cannot avoid the objectionable speech."¹¹² The Court has suggested in related contexts that women seeking abortions at health care facilities can be considered "'captive' by medical circumstance" (that is, with limited possibilities for exit or rebuttal), which increases the coercive effect of speech targeted to them.¹¹³ In short, listener-centered relationships include not only those in which listeners have less access to key information than speakers, but also those in which listeners are dependent on or vulnerable to comparatively powerful speakers in various ways.

r. 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

111. See, e.g., Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1186 (2016) ("Because of their special power over others and their special relationship to others, information fiduciaries have special duties to act in ways that do not harm the interests of the people whose information they collect, analyze, use, sell, and distribute. . . . And because of their different position, the First Amendment permits somewhat greater regulation of information fiduciaries than it does for other people and entities."); James Grimmelman, *Speech Engines*, 98 MINN. L. REV. 868, 903–04 (2014) (describing the "inescapable information asymmetry between users and search engines" that should be understood to trigger duties of loyalty and care).

112. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988).

113. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768 (1994) ("[W]hile targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance."). For related discussion, see Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 941 (2009); Nadia N. Sawicki, *Compelling Images: The Constitutionality of Emotionally Persuasive Health Campaigns*, 73 MD. L. REV. 458, 506–20 (2014).

III. A LISTENER-BASED APPROACH TO EMPLOYERS' TRUTH AND LIES

This Part proposes a First Amendment theory of employer speech that turns not on a determination of whether employer speech about workers' rights and other working conditions is political or commercial—or of public or private concern—but instead on its occurrence within a listener-centered relationship. In so doing, this Part urges that a focus on the nature of the employment relationship better and more coherently furthers key First Amendment values than does a myopic focus on whether the contested speech fits within existing and often unsatisfactory constitutional categories. This Part then explores the doctrinal implications of this approach more specifically for the regulation of truth and lies in and about the workplace.

A. EMPLOYER SPEECH AS OCCURRING IN A LISTENER-CENTERED RELATIONSHIP

Whether the employment relationship is one that justifies the regulation of employers' truth and lies to inform and empower listeners' decision making turns in great part on how one characterizes the flow of information and power within that relationship.¹¹⁴ As examples, we might characterize the employment relationship as one between arms-length parties to a commercial transaction, between unequal parties in a hierarchical system, between fiduciaries and beneficiaries in a relationship of trust, between competing participants in public policy debates, or perhaps something else altogether. This Section asserts that the workplace relationship involves both information and power asymmetries that justify its characterization as listener-centered, and thus proposes that employers as speakers have heightened responsibilities of accuracy and sincerity when they address workers' rights and other working conditions.¹¹⁵

114. I am persuaded by those who argue that corporations' free speech rights are best understood as derivative of their listeners', and thus both protected and regulable to protect those listeners' interests. *See supra* notes 84–87 and accompanying text. Because I have little to add to the many commentators who have thoughtfully explored this issue—and because I recognize that some employers are not corporations—here I focus instead on whether employer speech can be regulated to protect listeners' interests even if some employers are dignitary speakers in their own right, and thus have claims to expressive interests themselves.

115. The employment relationship is an especially strong candidate for characterization as listener-centered because it involves asymmetries of power

First, the employment relationship is a transactional relationship riddled with information asymmetries.¹¹⁶ Employers know considerably more than workers about the terms and conditions of employment, about industry and economic projections, and—as repeat players with greater resources—about applicable law. As Joseph Mastrosimone, among others, has observed, “The employer holds all of the information in such cases. It is the employer that knows the true state of the industry

as well as of information. In future work, I hope to explore in greater detail whether and when asymmetries of information *or* power by themselves suffice to justify a listener-centered approach to the regulation of speech in other communicative relationships.

116. Employer speech on workers’ rights and other working conditions can also be characterized as key to commercial transactions, with workers akin to consumers. Indeed, all employers are commercial actors in that they buy the labor of their workers (and may buy or sell other goods and services as well), even if their reason for existence is noncommercial—as is true, for example, of many nonprofit employers. To be sure, a purely transactional view of employer speech that involves only asymmetries of information would appropriately constrain the speech of all parties to these transactions, including that of the workers themselves. Indeed, workers’ speech is already controlled for falsity by the at-will employment regime (in which workers are subject to termination for any reason), by contract in certain contexts (where collective bargaining agreements and fixed-term contracts permit termination for “just cause”), and by statute in a number of jurisdictions. *E.g.*, IOWA CODE § 715A.6A (2016) (prohibiting knowingly false claims of certain academic degrees to secure employment or certain other benefits); TENN. CODE ANN. § 39-17-112 (2014) (same); RESTATEMENT (SECOND) OF TORTS § 532 (AM. LAW INST. 1977) (prohibiting fraudulent misrepresentations); *see also* United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (plurality opinion) (explaining that the First Amendment does not protect applicants’ lies to “secure moneys or other valuable considerations, say offers of employment . . .”); Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1454–66, 1490 (2015) (distinguishing “high value” lies by reporters or investigators to uncover wrongdoing from employees’ damaging lies to and about their employers). Employees who act as their employers’ agents also bear fiduciary responsibilities to their employer principals that include duties of candor and disclosure. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (AM. LAW INST. 2006) (“The elements of common-law agency are present in the relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner.”); *id.* § 8.11 (“An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when . . . subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent’s duties to the principal . . .”). Unions’ speech is already heavily regulated as well. As just one example, the Labor-Management Reporting and Disclosure Act requires unions to make numerous disclosures about dues, fees, finances, potential conflicts of interest, and organizational structure. 29 U.S.C. §§ 431–432 (2012).

and the true state of the company's financial viability."¹¹⁷ Workers' First Amendment interests as listeners in truthful employer speech on these topics thus justify the protection as well as the regulation of this speech to address their informational disadvantage. Such regulation furthers efficiency interests as well. As Kent Greenfield explains, "Lack of accurate information about job security (or, for that matter, about any other employment condition valued by employees) will cause workers to allocate their labor to inefficient uses and will force employers offering secure employment to pay more in wages than they would need to if workers had correct information."¹¹⁸

To be sure, a listener-centered view would support the protection as well as the regulation of employer speech, as a great deal of employer speech on such topics can valuably inform workers' decisions about whether to take or leave a job, whether to join or reject a union, or whether to engage in protected activity.¹¹⁹ For this reason, I do not advocate the regulation of a wider swath of truthful and noncoercive employer speech, such

117. Joseph P. Mastro Simone, *Limiting Information in the Information Age: The NLRB's Misguided Attempt To Squelch Employer Speech*, 52 WASHBURN L.J. 473, 512 (2013); see also Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781, 781 (2014) ("[M]uch of the employment-related information that would be valuable to individuals and the public is not readily available to outsiders to an organization, or even to insiders."); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 209 (2001) ("[I]t is not clear that most workers have the information that would equip them to engage in appropriate bargaining . . .").

118. Greenfield, *supra* note 1, at 744–45; see also *id.* at 788 ("The labor market, like the capital market, depends on the free flow of information to ensure allocational efficiency. Fraud regulation, in fact, may be more important in the labor market because workers cannot easily minimize the risk of fraud through diversification. Moreover, there are fewer incentives for private monitoring to take the place of government regulation.").

119. See Paul Barron, *A Theory of Protected Employer Rights: A Revisionist Analysis of the Supreme Court's Interpretation of the National Labor Relations Act*, 59 TEX. L. REV. 421, 468 (1981) ("Because normally only the employer is in a position to inform employees of potential drawbacks to unionization, the law must permit a certain amount of employer speech in order to ensure an informed electorate. If the employer's speech is merely informational—that is, conveys clearly provable facts—it will not interfere with employee rights in any event."); Cox, *supra* note 29, at 15 (noting informational value of employers' speech to answer attacks or charges, or to share sincerely held opinions); Joseph K. Pokempner, *Employer Free Speech Under the National Labor Relations Act*, 25 MD. L. REV. 111, 146–47 (1965) ("Since both are likely to prosper or suffer together, it is only fair that an employer be given the opportunity to express to his employees his view on the impact of unionization on the success of the business.").

as sincere and accurate employer speech on controversial topics or employer speech that involves expression of opinion rather than fact.¹²⁰ As discussed below, however, I agree that attention to the power differentials between employers and workers can help us recognize a broader swath of employer speech as impermissibly coercive and thus unprotected by the First Amendment.¹²¹

Second, arguments for a listener-based approach to employer speech gain even more force once we understand the communicative relationship between employers and workers as involving something other than an arms-length transaction between equals.¹²² Indeed, in addition to experiencing disadvantage in terms of information (itself a form of power),¹²³ workers also confront economic and expressive inequalities that limit traditional remedies of exit and counterspeech.

120. For other views, see Becker, *supra* note 36, at 500 (urging that employers have no legal interest in union representation elections and thus that their antiunion speech should be subject to greater regulation more generally); Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 361–62 (1995) (“The abstract ‘right’ of [employer] free speech becomes, within the particular context of the workplace and its existing structure of rights and privileges, the right to control and dominate.”).

121. See *infra* notes 169–76 and accompanying text.

122. See RICHARD EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* 12 (1979) (“Conflict exists because the interests of workers and those of employers collide, and what is good for one is frequently costly for the other. Control is rendered problematic because, unlike the other commodities involved in production, labor power is always embodied in people, who have their own interests and needs and who retain their power to resist being treated like a commodity.”); *id.* at 13 (“The workplace becomes a battleground, as employers attempt to extract the maximum effort from workers and workers necessarily resist their bosses’ impositions.”).

123. See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 19 (1978) (“To the extent that knowledge gives power, to that extent do lies affect the distribution of power; they add to that of the liar, and diminish that of the deceived, altering his choices at different levels.”); Estlund, *supra* note 13, at 372 (“[I]nformation asymmetries confer a bargaining advantage on the more informed party. Workers who lack material information about jobs—both the job that is under negotiation and possible alternative jobs—are at a bargaining disadvantage.”); see also Charlotte S. Alexander, *Workplace Information-Forcing: Constitutionality and Effectiveness*, 53 AM. BUS. L.J. 487, 527 (2016) (“Workplace information-forcing seeks to equalize not only an information asymmetry but also, in some sense, the power asymmetry that is inherent in employment relationships by forcing a transfer of knowledge between the parties.” (footnote omitted)).

More specifically, employers' economic power includes their power over workers' livelihoods. As we have seen, the Supreme Court emphasized workers' economic dependence on their employers when characterizing an employer's false threats that employees would lose their jobs if they voted to unionize as "a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment."¹²⁴ Harassment law relatedly considers the power dynamics of the workplace by treating employers' quid pro quo requests or demands for sexual favors as unprotected speech that coerces its listeners by forcing them to a choice between submission and adverse job consequences.¹²⁵ That employers at times have the power to control workers' physical liberty—e.g., by compelling workers' attendance at "captive audience" meetings—further illustrates how this communicative relationship differs from most others in its coercive potential.¹²⁶

124. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *see also* *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945) ("When to this persuasion other things are added which bring about coercion, or give it that character, the limit of [First Amendment protections] has been passed."); *id.* at 543–44 (Douglas, J., concurring) ("[O]nce [someone] uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment.").

125. *E.g.*, Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 704 (1995) ("Even the most diehard free speech absolutist recognizes that the speech involved in quid pro quo harassment is tantamount to threats or extortion, expression that has long been punishable without raising substantial free speech concerns in any context."); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1800 (1992) ("[Q]uid pro quo harassment[, even if it involves speech,] would seemingly be as unprotected by the First Amendment as any other form of threat or extortion."). Courts have thus treated employers' harassing speech as akin to coercive conduct unprotected by the First Amendment. *See* *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) ("Title VII [is] an example of a permissible content-neutral regulation of conduct."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." (citations omitted)).

126. *See* Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-Citizens United Environment*, 120 YALE L.J. FORUM 17, 19–22 (2010), <http://www.yalelawjournal.org/forum/addressing-political-captive-audience-workplace-meetings-in-the-post-citizens-united-environment> (explaining how employers may compel worker attendance at such meetings

Workers experience expressive as well as economic inequality, further distinguishing workplace relationships from those involving the free-flowing exchange of ideas and meaningful opportunities for counterspeech. As Cynthia Estlund explains, “Particularly in the private sector, employers enjoy nearly untrammelled power to censor and punish the speech of their employees, subject only to a variety of limited statutory and common law restrictions”¹²⁷ In other words, the workplace is not a free speech zone: workers experience asymmetries of information and power such that their speech is neither fully informed nor fully free.¹²⁸ Workplace relationships thus involve both the moral as well as the epistemic features that Seana Shiffrin identifies as key to triggering heightened expectations of comparatively powerful speakers’ sincerity and accuracy.¹²⁹

by threatening their jobs or by punishing counterspeech).

127. Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 689 (1997); see also ALEXANDER HERTEL-FERNANDEZ, WHO OWNS YOUR POLITICS? THE EMERGENCE OF EMPLOYEE MOBILIZATION AS A SOURCE OF CORPORATE POLITICAL INFLUENCE 2 (2015) (documenting ways in which employers exploit workers’ economic dependence to coerce workers’ political behavior); Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091, 1093 (2011) (“Among the most serious . . . collective-action problems are restrictions on employee discourse, particularly the restrictions on employees’ ability to access and discuss relevant information.”).

128. Workers’ relative dependence and vulnerability lead some to urge that employers should even be understood to have fiduciary responsibilities towards their employees, which would further support the regulation of employers’ truth and lies to prevent exploitation within a relationship of trust and vulnerability. See Matthew T. Bodie, *Employment as Fiduciary Relationship*, GEO. L.J. (forthcoming 2017) (“Employees share many of the characteristics of beneficiaries in fiduciary relationships: the employer exercises discretion in the management of the firm, employees are vulnerable to the use of that discretion and the potential for opportunism, and employees must incur agency costs in managing their relationship with the employer.”); Marleen A. O’Connor, *Restructuring the Corporation’s Nexus of Contracts: Recognizing a Fiduciary Duty To Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1194 (1991) (“[A] stakeholder model of corporate social responsibility . . . recognizes that employees have legitimate noncontractual claims against the corporation.”); see also RICHARD A. BALES ET AL., UNDERSTANDING EMPLOYMENT LAW 215 (2007) (explaining that “ERISA places fiduciary duties on [employers (and others)] who use their discretion to administer and manage employee benefit plans [on behalf of employees and other plan beneficiaries]”).

129. To the extent that unions enjoy the same information and power advantages over workers as do employers, the same analysis would apply to unions’ speech on workers’ rights and working conditions—and, indeed, unions’ speech is already heavily regulated. See *supra* note 116. But, as Craig Becker

To be sure, some take a very different view, describing the workplace as just another forum for the marketplace of ideas. Such an approach, for example, equates union representation elections with political campaigns in which speech is largely unregulated.¹³⁰ The NLRB itself has sometimes relied on these analogies in justifying its hands-off approach to most lies in this setting.¹³¹ But such parallels fail to acknowledge the information and power differentials in the employer speech context that differ markedly from those in purely political settings.¹³² For these reasons the Court rejected this metaphor in *NLRB v. Gissel Packing Co.*:

Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk.¹³³

Political analogies also fail because employers in union representation elections “are not competing against unions in a neutral election, but rather are attempting to influence an elec-

explains, unions in many respects do not hold the same coercive power over workers as employers do. *See* Becker, *supra* note 36, at 582 (“[N]one of the coercive practices routinely ascribed to unions—enforcing a closed shop, extracting compulsory dues, forcing employees to strike—have ever been lawful absent employer consent and most are now unlawful even with employer consent. Only by gaining a share of employers’ economic authority can unions gain any coercive power in the workplace. A majority vote for representation affords the union no authority to set the terms of employment, yielding it only a right to negotiate about wages, hours, and working conditions, and placing the employer under no obligation to reach agreement with the union.” (footnotes omitted)).

130. *See* Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 68 (1964) (“[R]epresentation elections are closely akin to political contests.”); Mastro Simone, *supra* note 117, at 475 (“[O]ne of the central features of American labor law[] [is] the approximation of the democratic process through the union representation campaign. Akin to a political election, the representation election provides a limited, but an important, period of time during which the union, employer, and employees can engage in protected, lawful speech to persuade the employees how to vote in the election.” (footnote omitted)).

131. *See supra* notes 39–42 and accompanying text.

132. *See* Becker, *supra* note 36, at 497 (“This conception . . . subvert[s] labor’s right to representation, for it rests on a fiction of equality between unions and employers as candidates vying in the electoral arena. . . . [L]awmakers have elaborated the political model into a web of union election rules that obscures inequality in the workplace.”).

133. 395 U.S. 575, 617–18 (1969).

tion in an arena where they hold ultimate power.”¹³⁴ As discussed above, employers are free not only to require workers to attend captive audience meetings involving antiunion speech at the workplace, but also to deny unions’ access to employees.¹³⁵ In short, the information and power dynamics of workplace relationships are vastly different from those in the political arena.

B. THE DOCTRINAL IMPLICATIONS OF A LISTENER-BASED APPROACH TO EMPLOYER SPEECH

The preceding Section asserted that employers’ speech about workers’ rights and other working conditions occurs within a relationship that should be understood as listener-centered for First Amendment purposes. This Section examines the doctrinal consequences of this assessment for the regulation of employers’ truth and lies.

1. Requiring Employers’ Truthful Disclosures

As a doctrinal matter, a listener-centered focus can inform our choice of the appropriate level of scrutiny to be applied to government requirements that comparatively knowledgeable or powerful speakers make truthful disclosures of fact or law for listeners’ benefit.¹³⁶ For example, a listener-centered focus suggests that government requirements of truthful disclosures to inform and empower listeners in those relationships should receive deference in the form of rational-basis scrutiny—the standard that the Supreme Court has applied to compelled commercial disclosures when necessary to address commercial speakers’ deception, and that many lower courts apply to compelled commercial disclosures that seek to inform and empower consumers even absent a history of deception by the regulated speakers.¹³⁷

134. Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 33 (2008); see also Becker, *supra* note 36, at 523–47.

135. See *supra* note 126 and accompanying text.

136. See Helen Norton, *Secrets, Lies, and Disclosure*, 27 J.L. & POL. 641, 642 (2012) (describing how a listener-based focus may affect disclosure law doctrine).

137. See *supra* note 55 and accompanying text. The Court applies “exacting scrutiny” to disclosure requirements in the campaign speech context, which requires that the required disclosure be substantially related to a sufficiently important government interest. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 366 (2010); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). Disclosure requirements may be less likely to survive this scrutiny when applied to less powerful

A listener-centered focus can also inform our analysis whether a contested disclosure requirement survives the relevant level of scrutiny. For example, regardless of the level of scrutiny applied, courts considering challenges to disclosure requirements in other contexts generally assess the government's motive in seeking disclosure as well as balance the disclosure's expressive costs against its benefits in informing listeners' decision making.¹³⁸ This approach recognizes that the government often (but not always) has good reason for seeking disclosures that inform and empower listeners, and also that different disclosure requirements may vary considerably in their potential to chill protected expression.¹³⁹ This approach supports requirements that comparatively knowledgeable and powerful speakers make truthful disclosures not only of important information to which they have unique (and perhaps exclusive) access, but also important information that the speakers are in the best position to communicate even though they might otherwise be loath to disclose for self-interested reasons. Think, for instance, of requirements that cigarette manufacturers post government health warnings on cigarette packages and advertisements where smokers are most likely to see them, as tobacco manufacturers are uniquely well positioned to disseminate this important message—but unlikely to do so voluntarily.

speakers. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (striking down Ohio's disclaimer requirement as applied to a single individual circulating hand-produced political literature).

138. See *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524–25 (D.C. Cir. 2015) (explaining that courts considering First Amendment challenges to compelled disclosures should first assess the adequacy of the government's interest, and then evaluate the disclosure's effectiveness in achieving that interest); Leslie Kendrick, *Disclosure and Its Discontents*, 27 *J.L. & POL.* 575, 577 (2012) (“[D]isclosure law is about both categorization and balancing, both purpose and effects.”); *id.* at 587 (“Given that disclosure may at once provide listeners (and would-be speakers) with useful information and deter other would-be speakers (and thus deprive listeners of other viewpoints), determining the effect of a law upon autonomy may require a type of balancing.”).

139. Kendrick, *supra* note 138, at 586 (“There are enough legitimate reasons for the government to legislate disclosure that it would be improper to draw an inference of discrimination from the fact of a disclosure requirement. First, information is necessary to governance, particularly so in a regulatory state. The government may legitimately seek disclosures to ensure the functioning not just of its campaign finance system but also of its securities laws, its prescription drug approval process, and any number of other regulatory undertakings. . . . Second, in contrast with most restrictions on speech, compelled disclosure may itself serve First Amendment values.”).

For example, disclosures of the sort proposed by the NLRB with respect to workers' NLRA rights¹⁴⁰—as well as various disclosure requirements enacted by Congress and many state legislatures with respect to workers' rights under other employment laws¹⁴¹—offer significant listener-centered benefits by addressing workers' lack of knowledge about available workplace protections. Many workers simply do not know their legal rights: as one illustration, a study by Charlotte Alexander and Arthi Prasad found that fifty-nine percent of workers surveyed had inaccurate substantive knowledge of their rights under wage and hour law and seventy-seven percent had inaccurate procedural legal knowledge—that is, they did not know where to file a wage and hour complaint.¹⁴² Alexander and Prasad further found that “the least politically, economically, and socially powerful and secure workers were the . . . least likely to have accurate substantive and procedural legal knowledge.”¹⁴³ For these reasons, Jeffrey Hirsch suggests that “the lack of knowledge appears so severe that it may effectively eliminate those rights for most workers.”¹⁴⁴ Amanda Ireland relatedly fears that workers' ignorance of the law in some areas may be growing; she attributes worker ignorance about NLRA rights to declining unionization rates and increasing numbers of immigrants and young workers who may be especially unfamiliar with their legal rights.¹⁴⁵ Requiring that employers post notice

140. See *supra* notes 43–45 and accompanying text.

141. See *supra* notes 5–9 and accompanying text.

142. Charlotte S. Alexander and Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1093–95 (2014).

143. *Id.* at 1098–99; see also DeChiara, *supra* note 2, at 433–34 (“For example, during union organizing campaigns, employees' ignorance of the law hinders their ability to assess employer anti-union propaganda, thus diluting their right to organize. In the non-union setting, employees' ignorance leads to the underutilization of legitimate workplace protests, of the voicing of group grievances, and of requests for outside help from government agencies or other third parties. In sum, lack of notice of their rights disempowers employees.” (footnotes omitted)).

144. Hirsch, *supra* note 127, at 1148; see also *id.* at 1147 (describing the NLRA's application to nonunion workers as “one of the best-kept secrets of labor law”).

145. See Amanda L. Ireland, *Notification of Employee Rights Under the National Labor Relations Act: A Turning Point for the National Labor Relations Board*, 13 NEV. L.J. 937, 947–48 (2013). On the other hand, sometimes workers overestimate their legal rights, also to their detriment. See Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 10 (2002) (“The problem with erroneous employee beliefs about [their job security] is that they allow employers to have it both

of workers' rights under the NLRA and other important employment laws thus improves the chances that workers will actually receive such information. As Professor Alexander observes, "From a practical standpoint, no other entity likely has the level and consistency of access to workers than does the employer."¹⁴⁶

Government requirements that employers post these notices can also help deter violations of law by educating employers about their legal responsibilities.¹⁴⁷ Consider, for example, the numerous comments received by the National Labor Relations Board that opposed its notice-posting rule "precisely because the commenters believe[d] that the notice w[ould] increase the level of knowledge about the NLRA on the part of employees[,] . . . strongly suggest[ing] that the commenters themselves do not understand the basic provisions of the NLRA."¹⁴⁸ The Board responded that "fear that employees may exercise their statutory rights is not a valid reason for not informing them of their rights," and concluded that the notice-posting rule "may have the beneficial side effect of informing employers concerning the NLRA's requirements" and discouraging employers from retali-

ways: Employers enjoy the considerable benefits of employee beliefs that they are largely protected against unjustified discharge while escaping the costs of that legal protection."); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133–47 (1997) (documenting how workers overestimate their own job security).

146. Alexander, *supra* note 123, at 526; *see also id.* at 527 ("Workplace information-forcing rules may rightly target the employer *because* of this superior access to information. It is more efficient for the employer to transfer its knowledge to the worker, or to be the conduit for the government's provision of knowledge, than for the less informed party to expend the resources in an attempt to inform him- or herself."). For other examples of government requirements that more knowledgeable or powerful speakers bear responsibility for disclosures on matters of law as well as fact, *see supra* note 110.

147. *See* DeChiara, *supra* note 2, at 434 ("[T]he vast number of employer unfair labor practices now committed may diminish if managers had reason to believe employees knew of their right to seek relief from the Board."); Estlund, *supra* note 117, at 781–85 (emphasizing the enforcement benefits of mandatory disclosure); Charlotte Garden, *Meta Rights*, 83 FORDHAM L. REV. 855, 859 n.17 (2014) ("[F]irst, the process of notifying individuals of their rights could serve an educative function for institutions themselves, thereby preventing inadvertent violations; and second, having to provide notice makes institutions acutely aware that individuals know their rights, which could itself deter violations.").

148. Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,016–17 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

ating against those who might exercise their NLRA rights.¹⁴⁹ Indeed, many employers as well as workers do not realize that the NLRA provides even nonunionized workers with important protections. As just one illustration, many employers continue to adopt policies prohibiting workers from discussing their pay with each other largely because both employers and workers are unaware that the NLRA protects concerted activity and thus prohibits such pay secrecy policies.¹⁵⁰

This analysis applies not only to requirements that employers disclose truthful information about workers' legal rights, but also about the terms and conditions of workers' employment. Examples include requirements that employers provide written disclosures about pay, hours, workplace hazards, on-the-job injury rates, any contractual job security provisions, and available policies related to work-life and work-family issues.¹⁵¹ Here too such factual disclosures both inform workers' job-related decisions and facilitate the enforcement of workplace law.¹⁵²

In short, a listener-centered approach explains the value of requiring speakers to make truthful disclosures on matters of great import to listeners. This can be the case when the speakers have better—and sometimes exclusive—access to the in-

149. *Id.*

150. See Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 121, 148–49 (2003); Hirsch, *supra* note 127, at 1104 (“If employees are unaware of the options or legal protections for acting collectively, they are unlikely even to consider such action, much less actually attempt it. . . . The reality is that most employees are probably unaware of their right to engage in many types of collective action, such as sharing salary information with coworkers, much less the way in which they can exercise those rights.”).

151. See Estlund, *supra* note 117, at 783–85; Estlund, *supra* note 13, at 371 (“Ensuring that such information is disclosed up front—if it can be done at low cost and in a manner that renders information usable by workers—should generally produce contracts that better match workers and jobs and better satisfy parties’ preferences.”).

152. To be sure, however, disclosures can be incomplete and otherwise imperfect. For a critical view of disclosure, see Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011) (arguing that mandatory disclosures too often fail to inform and improve their listeners’ decisions). For more optimistic views of disclosures’ effectiveness, see CASS R. SUNSTEIN & RICHARD H. THALER, *NUDGE* 105 (2008) (advocating disclosures as an effective policy “nudge”); Hirsch, *supra* note 127, at 1150 (“[T]he labor information gap is so great that narrowing it is an easy target. For most employees, a simple notice providing general information about their labor rights and, most importantly, identifying the NLRB as a point of contact would be a dramatic improvement over the status quo.”).

formation as a formal matter (as is the case of certain information about the terms and conditions of employment). This can also be the case when speakers have better access to the information as a functional matter (e.g., when they are more knowledgeable as repeat players) and are well positioned to deliver the message effectively to listeners.

Nor do these disclosures threaten significant harm to free speech interests. The First Amendment harms of government-compelled disclosures in other settings potentially include injuries to both speakers and listeners: speakers (at least those with dignitary interests of their own) can suffer autonomy harms if they are forced to mouth beliefs that they do not themselves hold, while listeners can experience instrumental damage to the quality of their decision making if they are confused about the true source of the contested message or if the disclosure is factually inaccurate.¹⁵³ Compelled disclosures about workers' rights or other working conditions, however, rarely threaten these harms. For example, not only did the NLRB's proposed notice-posting rule involve a description of existing law rather than a statement of opinion, it also made clear that the notice represented the government's speech rather than the employer's.¹⁵⁴ In other words, employers were not required to mouth or affirm a belief they did not hold and they remained free to surround the required notice with messages of their own. Moreover, because the rule required employers to post what was clearly the government's notice about workers' rights, there was no danger that listeners would be confused about the source of the speech. The expressive costs of such disclosures are thus very low.

Relatedly, courts often require the content of compelled disclosures to be "factual and uncontroversial,"¹⁵⁵ both to protect listeners from inaccuracy as well as to protect speakers from compelled affirmations of belief (which are considerably more offensive to speakers' autonomy interests than compelled disclosures of objectively verifiable facts). Disclosures of prova-

153. See Corbin, *supra* note 80, at 1280–99.

154. See Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,049 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104) (listing the text of the proposed notice, including a reminder that it is an "official Government Notice" that "must not be defaced by anyone").

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

ble fact (such as those regarding specific terms and conditions of employment) and accurate descriptions of current law can readily satisfy this standard.¹⁵⁶ Nevertheless, the challengers in *National Ass'n of Manufacturers v. NLRB* characterized the NLRB's notice-posting rule as impermissibly one-sided and "controversial" because it did not devote as much space and detail to workers' rights *not* to join a union or engage in other protected activities as the challengers would have liked.¹⁵⁷ In other words, under the challengers' view, a disclosure is impermissibly "controversial" for First Amendment purposes when one party does not want the matter discussed in a particular way, or at all.¹⁵⁸ Such an approach, however, would enable challeng-

156. The Supreme Court made a related point when discussing when a notice's description of law is (or is not) accurate. *See* *Marquez v. Screen Actors Guild, Inc.* 525 U.S. 33, 36, 47 (1998) ("[W]e must determine whether a union breaches its duty of fair representation when it negotiates a union security clause that tracks the language of [the statute] without explaining, in the agreement, this Court's interpretation of that language. We conclude that it does not. . . . The logic of petitioner's argument has no stopping point; it would require unions (and all other contract drafters) to spell out all the intricacies of every term used in a contract.").

157. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 958 (D.C. Cir. 2013) ("Plaintiffs here [employers] . . . see the poster as one-sided, as favoring unionization, because it fails to notify employees, *inter alia*, of their rights to decertify a union, to refuse to pay dues to a union in a right-to-work state, and to object to payment of dues in excess of the amounts required for representational purposes." (citations omitted)). The proposed notice actually described workers' NLRA rights as follows:

Under the NLRA, you have the right to: Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment; Form, join or assist a union; Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions; Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union; Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union; Strike and picket, depending on the purpose or means of the strike or the picketing; Choose not to do any of these activities, including joining or remaining a member of a union.

76 Fed. Reg. 54,006, 54,048. The notice then listed a variety of specific activities by employers as well as by unions that would violate workers' NLRA rights. *Id.* at 54,048–49.

158. *See* Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 910 (2015) ("Plainly a mandated disclosure cannot become controversial merely because a speaker objects to making it. . . . Nor should mandated factual disclosures become constitutionally disfavored because they occur in circumstances of acrimonious political controversy."). For a discussion of related

ers to defeat listeners' substantial informational interests simply by manufacturing controversy over what is accurate information. For example, such an approach would potentially treat the Surgeon General's requirement that cigarette manufacturers display warnings about the dangers of tobacco as impermissibly one-sided and thus "controversial" in that it fails to note that smoking brings many people great pleasure and that some smokers live long and healthy lives. An approach more consistent with the protection of listeners' First Amendment interests would thus understand "factual and uncontroversial" in this context to refer to assertions that are provable (or disprovable) as a factual matter in the same way required of contested assertions in defamation, perjury, and antifraud law.¹⁵⁹ As Robert Post has explained, "The requirement that information be 'uncontroversial' would therefore seem best interpreted as a description of the epistemological status of the information that a speaker may be required to communicate."¹⁶⁰ In other words, here "uncontroversial" should mean factually or empirically uncontroversial rather than politically uncontested.

In sum, government requirements that employers disclose truthful information about workers' rights and other working conditions can provide considerable value to workers as listeners while imposing little, if any, expressive costs. They thus can readily satisfy not only rational-basis scrutiny but also intermediate or even exacting scrutiny when appropriately drafted

tactics in other settings, see generally NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT* (2010) (describing how certain commercial movements invested in intensive media and lobbying campaigns to cast doubt on science that threatened their interests); Yussuf Saloojee & Elif Dagli, *Tobacco Industry Tactics for Resisting Public Policy on Health*, 78 *BULL. WORLD HEALTH ORG.* 902, 903 (2000) ("[T]he industry established the Tobacco Industry Research Council. . . . Its true purpose was to deliberately confuse the public about the risks of smoking. 'Doubt is our product,' proclaimed an internal tobacco industry document in 1969. 'Spread doubt over strong scientific evidence and the public won't know what to believe.'").

159. See *Milkovich v. Lorain Journal, Co.* 497 U.S. 1, 20–21 (1990) (holding that the elements of defamation require a statement that contains a "provably false factual connotation . . . sufficiently factual to be susceptible of being proved true or false"); Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 *HASTINGS L.J.* 157, 175 (2001) (describing perjury law as targeting false and material assertions, "the truth or falsity of which can be ascertained by relatively uncontroversial methods").

160. Post, *supra* note 158.

to achieve the government's strong interest in informing and protecting workers.¹⁶¹

2. Prohibiting Employers' Lies and Misrepresentations

In contrast to compelled disclosures' requirement that employers engage in *more* speech, government's efforts to prohibit employers' lies and misrepresentations may result in *less* speech, and thus may trigger greater First Amendment suspicion.¹⁶² Nonetheless, a listener-centered approach helps us recognize how information and power asymmetries exacerbate the harms of employer lies and misrepresentations in ways that can justify their regulation consistent with the First Amendment.

Recall *United States v. Alvarez*, in which the Court considered the constitutionality of the Stolen Valor Act, a federal law that criminalized a speaker's false claims that he or she had received certain military honors.¹⁶³ Although the opinions did not reach majority agreement on a test for determining when the Constitution protects lies from regulation, each opinion attended to the harms of such lies. Justice Kennedy's plurality opinion concluded that only harm-causing lies have historically been treated as unprotected by the First Amendment (and that the Act impermissibly punished lies that did not actually cause harm).¹⁶⁴ Justice Breyer's concurrence assessed the harms threatened by the targeted lies as well as the harms to free speech interests posed by the Act's enforcement (and found that the latter outweighed the former).¹⁶⁵ Justice Alito's dissent concluded that lies have been historically unprotected apart from

161. See Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right To Know"*, 58 ARIZ. L. REV. 421, 438–39 (2016) (urging that compelled commercial disclosures receive heightened scrutiny but concluding that many such disclosures will survive such scrutiny, especially when motivated by government's substantial interests in consumer protection or regulatory enforcement).

162. See *Citizens United v. FEC*, 558 U.S. 310, 369 (2010) ("The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech."); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113–14 (2d Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.")

163. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

164. *Id.* at 2547–51.

165. *Id.* at 2551–56.

any harm they cause while also finding that the Act permissibly punished harmful lies.¹⁶⁶ In other words, the plurality and the dissent would treat harm-causing lies as unprotected by the First Amendment, while the concurrence would assess the contested lies' harms in applying intermediate scrutiny to the government's regulation of those lies.

Powerful speakers' lies can harm their listeners' interests in especially grave ways precisely because of such speakers' power: employers' lies, for example, can be especially costly to workers in stark monetary terms.¹⁶⁷ As discussed below, information and power asymmetries explain those lies' great capacity for harm and thus why First Amendment doctrine should permit the regulation of lies within the listener-centered employment relationship.¹⁶⁸ These harms include most prominently the harms of coercion and manipulation, which describe different ways in which a liar may seek to bend her listener's will for her own purposes—the first through power and the second through the distortion of information.¹⁶⁹

First, greater attention to the power asymmetries between speakers and listeners can inform our understanding of when and how employers' lies can inflict the harms of coercion. Courts and commentators have extensively examined this possibility in the context of lies by law enforcement officers who have the power to enforce sanctions against, or to control the physical liberty of, listeners.¹⁷⁰ More specifically, when deter-

166. *Id.* at 2556–65.

167. See Greenfield, *supra* note 1, at 750 (“[W]hen a company defrauds an investor about an investment, the damage is to savings. When a company defrauds a worker about her work, the damage is to subsistence.”).

168. Those harms may mean either that these lies are unprotected by the First Amendment (under the approach advocated by the *Alvarez* plurality and dissent) or that their harm justifies their regulation under intermediate scrutiny (under the approach advocated by the concurrence).

169. See STUART P. GREEN, LYING, CHEATING, AND STEALING 93–96 (2006) (distinguishing the harms of coercion and exploitation). This Article focuses on employers' lies, misrepresentations, and nondisclosures about workers' legal rights and working conditions and the harms they inflict to workers' autonomy and livelihood. Note that some employer lies about other topics can inflict other sorts of harms—for example, employers' defamatory lies about employees that can inflict reputational harms. See, e.g., *Baravati v. Josephthal, Lyon, & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994) (upholding arbitrator's award against employer for its defamatory statements about employee).

170. To be sure, some may argue that law enforcement officers' lies told to identify wrongdoing and thus to protect the public interest are considerably less harmful than employers' lies told to advance their own interest at the expense of workers. I discuss the law enforcement context here simply to illus-

mining whether police interrogators' lies deprive their targets of constitutionally protected liberties, the Court seeks to determine whether the lies take the form of "coercion, not mere strategic deception," such that they render a confession (or other decision to waive a constitutional right) involuntary.¹⁷¹ In assessing whether law enforcement officers' lies are impermissibly coercive, courts generally try to determine whether their target could reasonably be expected to resist them with silence rather than with an incriminating response or other waiver of a constitutional right.¹⁷² More specifically, courts generally treat police interrogators' lies to their targets about available legal rights as coercing the waiver of such rights and thus violating constitutional due process protections.¹⁷³ In other words, comparatively powerful speakers' lies about the existence of, or the consequences of exercising, legal rights can be the practical equivalent of denying those rights altogether. For similar reasons, employers' lies about workers' legal rights can effectively frustrate the exercise of those rights because, as a functional matter, the employer is the entity that will recognize or deny them.¹⁷⁴

Powerful speakers' lies about other matters can also carry coercive potential when delivered in settings that offer listeners limited meaningful opportunities for exit or voice—as is the case in certain custodial or otherwise captive settings. Attention to the ways in which power dynamics operate in the workplace enables us to understand a broader range of employer lies as coercive and thus sufficiently harmful to justify their regula-

trate the ways in which powerful speakers' lies—regardless of their self-regarding or other-regarding motive—may coerce their listeners.

171. See, e.g., *Illinois v. Perkins*, 496 U.S. 292, 297 (1990) ("*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. . . . Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda's* concerns.>").

172. Again, the line between coercive lies and those that are instead "merely" deceptive remains subject to vigorous dispute. Justices Marshall and Stevens, for example, are among those to have urged the Court to recognize a broader range of police lies as unconstitutionally coercive. See Norton, *supra* note 35, at 94–95 (describing disagreements over whether and when police lies should be considered impermissibly coercive in violation of the Due Process Clause).

173. See Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH. L. REV. 1275, 1276–86 (2007).

174. See DeChiara, *supra* note 2, at 455–56 (describing employers' misrepresentations to workers about the legal scope of unions' power in ways likely to shape workers' votes about unionization).

tion consistent with the First Amendment (and § 8(c) of the NLRA).¹⁷⁵ For example, employers' lies and misrepresentations carry great coercive potential when delivered at employers' "captive audience" meetings on the job that workers are required to attend as a condition of employment and that offer no opportunity for escape or rebuttal.¹⁷⁶

Second, even in the absence of coercion, greater attention to information asymmetries between speakers and listeners can enlighten our understanding of when and how employers' lies exploit such asymmetries to manipulate workers' choices about matters of great life importance. For instance, although coercion may be less likely with respect to employer speech that takes place away from the workplace, workers' informational disadvantage about such matters remains. Powerful speakers' lies can thus be especially successful in manipulating listeners when the speaker has unique or privileged access to the information in question compared to the listener and where those lies thus may be more likely to be believed and less subject to rebuttal by counterspeech.¹⁷⁷

Recall, for example, the allegations that Nike lied about its working conditions in defending itself against reports that it supported sweatshop labor and other abusive workplace practices overseas.¹⁷⁸ The *Nike* case presented a hard First Amendment problem under current doctrine because of its setting and audience: it involved a commercial speaker's efforts to shape listeners' decisions to protect its economic interests by making alleged misrepresentations to a broad public audience about its

175. As discussed *supra* notes 26–42 and accompanying text, however, in recent decades courts and the NLRB have become increasingly slow to view employers' lies (and other employer speech) as impermissibly coercive.

176. Here I focus specifically on employers' lies and misrepresentations about workers' rights and other working conditions. A number of commentators have urged that employers' antiunion speech more generally should always be considered impermissibly coercive when delivered to a "captive audience." See, e.g., Roger C. Hartley, *Freedom Not To Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. LAW 65 (2010); Paul M. Secunda, *The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA*, 5 FLA. INT'L U. L. REV. 385 (2010).

177. See Charlotte S. Alexander, *Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems*, 48 CONN. L. REV. 177, 189–97 (2015) (describing "facts about on-the-ground conditions of work that are held exclusively by the employer or to which the employer blocks access," such as "information about employees' occupational health risks, pay and benefits, employee status, and job security").

178. See *supra* notes 69–73 and accompanying text.

employment practices that had become a topic of public policy debate. On one hand, Nike's speech could be characterized as factual commercial speech about its own working conditions, directed at least in part to present or prospective workers as well as to consumers. On the other hand, Nike's assertions could also be characterized as employer speech on a matter of public concern to a broad audience not limited to workers or consumers.

To be sure, some thoughtful commentators describe such speech as inevitably commercial and thus subject to regulation.¹⁷⁹ But understanding employer speech as occurring within a listener-centered relationship offers an alternative framework for explaining when and why alleged lies of this sort should be regulable apart from their characterization as commercial or political, or of private or public concern. Key to this determination is whether the employer speaks to an audience that includes workers on an issue material to workers' decision making to which it has unique informational access; in other words, whether workers as listeners suffer information asymmetries such that we should have heightened expectations of employers' sincerity and accuracy. For these reasons, Seana Shiffrin has explained that speakers like Nike who have greater informational access to the matter in question should be held to bear greater responsibilities to their listeners:

Although the discussion of this case has focused on Nike's status as a commercial speaker (and a corporate, nonindividual speaker), it may be independently relevant that Nike is an expert on conditions in its own factories, and this fact may subject it to special requirements of accuracy about facts within its expertise. A related argument is that Nike had special access to information about its own factories and the legal ability to exclude others who wished to visit to verify or disconfirm Nike's allegations, giving Nike a special obligation of accuracy.¹⁸⁰

In other words, what matters under a listener-based framework is not the characterization of the employers' alleged lies as political or commercial or something else, but instead whether they are likely to exploit workers' informational disadvantage and thus manipulate decisions about whether to take

179. See PIETY, *supra* note 74, at 12 (suggesting that commercial actors' speech is always commercial and thus subject to less First Amendment protection from regulation).

180. SHIFFRIN, *supra* note 95, at 132 n.28; see also Shiffrin, *supra* note 99, at 27 n.45 ("Nike had a special obligation of accuracy that Nike is an expert on conditions in its own factories, with special access to information and the legal ability to exclude others who wished to visit to verify or disconfirm Nike's allegations.").

or keep a job or engage in protected activity. These lies' capacity to inflict manipulative harm turns on whether they exploit information asymmetries to workers' detriment as listeners rather than on whether their audience also includes the broader public. To be sure, Nike's alleged lies may not have manipulated decisions by American workers because they concerned the overseas treatment of other workers. But recall the related hypothetical posed earlier, in which an employer alleged to violate U.S. employment law with respect to its workers on American soil falsely denies those allegations in a variety of communications directed to current and prospective workers as well as to the broader public.¹⁸¹ Such lies can threaten manipulative harm to workers' important life decisions.

Indeed, securities and consumer protection law regulate precisely the same sorts of lies and misrepresentations to prevent the manipulation of listeners who suffer related information asymmetries. For example, securities law prohibits corporations' knowing or reckless misrepresentations about their compliance with federal employment law even when directed to a broad public audience, so long as their listeners (for example, actual or prospective buyers or sellers of securities) can prove sufficient harm in the form of materiality and detrimental reliance.¹⁸² Shareholder elections offer another parallel, in which lies and misrepresentations by comparatively knowledgeable speakers are heavily regulated to protect shareholders' informational interests as listeners regardless of whether those assertions are directed to broad or narrow audiences.¹⁸³

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

182. See *Longman v. Food Lion, Inc.*, 197 F.3d 675 (4th Cir. 1999) (concluding that the plaintiff could show detrimental reliance on a corporation's alleged misrepresentations about the legality of its labor practices delivered to the general public via press releases as required by Rule 10b-5, but did not show that such misrepresentations were material to its decisions to buy or sell securities); see also *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1327–28 (2015) (indicating that a CEO's statement of belief that the company's contracts complied with applicable law could be actionable under § 11 of the Securities Act either if the speaker did not actually hold that belief or if the statement conveyed untrue facts about the basis for the speaker's belief).

183. The Securities Exchange Act of 1934 prohibits materially false or misleading statements or omissions and requires certain affirmative disclosures related to proxy elections. See *J. I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964) ("The purpose of [the statutes] is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure."); 17 C.F.R. § 240.14a-9 (2016) (prohibiting false or misleading statements); see also *Greenfield*, *supra* note 1, at 726–30 (describing securities

In short, under a listener-centered approach, employers' lies and misrepresentations about workers' rights and other working conditions should be regulable to prevent the harms of manipulation when they concern a matter to which the employer has stronger (and sometimes exclusive) informational access and when they are material to workers' decisions, regardless of whether they take place in communications directed only to workers or instead in those that also include broader public audiences.¹⁸⁴ For this reason, a listener-centered approach explains why the First Amendment should permit the NLRB to be quicker to regulate lies in the context of union representation elections given those lies' substantial capacity to distort or manipulate workers' choices through information differentials. As Matthew Bodie has urged:

Unlike perhaps every other regime of commercial regulation, the Board's regulation of the union representation election does not penalize for fraud. This failure is anathema to the need for employees to trust the information they are getting from unions and employers. . . . The Board, should, at the least, treat material misrepresentations as grounds for overturning an election.¹⁸⁵

To be sure, proposals to regulate employers' lies and misrepresentations may trigger an understandable search for limiting principles. But recall that a listener-centered approach to the regulation of truth and lies applies only to those relationships—like those between employers and workers—with cer-

law restrictions on fraudulent speech); Neuborne, *supra* note 81, at 42–62 (same).

184. See, e.g., Cruz v. Maypa, 773 F.3d 138, 141–43 (4th Cir. 2014) (describing an employer's lies to her prospective employee about the job's pay, hours, benefits, and other working conditions that induced the applicant to take a job to her great detriment).

185. Matthew T. Bodie, *Mandatory Disclosure in the Market for Union Representation*, 5 FLA. INT'L U. L. REV. 617, 641–42 (2010). For examples of such material misrepresentations placed in historical context, see Ahmed A. White, *The Wagner Act on Trial: The 1937 "Little Steel" Strike and the Limits of New Deal Reform* 49 n.243, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443447 (describing "patently false or vastly exaggerated" claims by employers that unions were controlled by corrupt or communist influences); *id.* at 57 ("The [employer] campaign was founded on a remarkably disingenuous but effective inversion of the basic facts of the strike, which presented the companies and their loyal employees—and by extension employers and anti-union workers generally—as the victims of a campaign of violence and coercion . . . supported in various ways by the Board and the Wagner Act."); Ahmed A. White, *Workers Disarmed: The Campaign Against Mass Picketing and the Dilemma of Liberal Labor Rights*, 49 HARV. C.R.-C.L. L. REV. 59, 62 (2014) (describing propaganda efforts by employers and their allies to characterize labor's effective strategy of mass picketing as "anticipatorily violent").

tain “features of the moral and epistemic environment” that should “impose a heightened duty of care on the speaker for the listeners’ mental contents.”¹⁸⁶ Moreover, this Article addresses only the regulation of truth and lies on objectively verifiable matters to which speakers have greater (and sometimes even exclusive) informational access.¹⁸⁷ This Article does not address other types of content-based speech regulation within these relationships. Indeed, governmental efforts to regulate truthful speech in listener-centered relationships (for example, professionals’ speech to their patients) may appropriately trigger greater First Amendment suspicion.¹⁸⁸ Again, a listener-centered approach supports the protection of speech in these relationships that furthers listeners’ First Amendment interests, while permitting the regulation of speech that frustrates those interests. In the commercial speech context, for example, the Court has sought to achieve this balance by treating commercial speech that is false, misleading, or related to illegal activity as entirely unprotected by the First Amendment, while applying intermediate scrutiny to government’s regulation of truthful and nonmisleading commercial speech.¹⁸⁹

Some may fear that the government’s regulation of employers’ truth and lies offends a “negative” or “anti-paternalistic” understanding of the First Amendment that would limit the government’s power to declare itself the arbiter of truth.¹⁹⁰ But, of course, powerful speakers’ manipulative lies

186. Shiffrin, *supra* note 99. As discussed above, health care providers’ speech to patients in health care facilities provides another example of speech that occurs in a listener-centered environment that can justify higher expectations of comparatively knowledgeable and powerful speakers’ accuracy and sincerity. See *supra* notes 112–13 and accompanying text.

187. See *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

188. See Corbin, *supra* note 80, at 1298–1309 (discussing dangers of government’s ideology-driven regulation of professional speech); Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1297–1302 (2016) (same); Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289 (2015) (urging that some governmental restrictions of professional speech receive heightened First Amendment scrutiny).

189. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–64 (1980).

190. See Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. L. REV. 1, 3, 21 (2008) (“[T]he First Amendment is primarily about constraining the collective authority of temporary political majorities to exercise their power by determining for everyone what is true and false [S]tructural interpretation builds into the First Amendment a deep skepticism about the good faith of those controlling the government.”); *id.* at 17 (explaining this view of the First Amendment as “en-

themselves frustrate listeners' autonomy and are thus paternalistic in their efforts to bend the listener's will to that of the speaker.¹⁹¹ For these reasons, government's regulation of lies and misrepresentations can itself be understood as antipaternalistic by privileging listeners' core First Amendment interests.¹⁹²

One can also anticipate related institutional competence concerns—that is, concerns that courts are not well positioned to determine the truth or falsity of employer speech about workers' rights or other terms and conditions of employment. But courts make similarly complex assessments of assertions' accuracy in a wide range of constitutional, statutory, and common law contexts. Gregory Klass, for example, has detailed a large and well-established “law of deception” (including “the torts of deceit, negligent misrepresentation, nondisclosure, and

tirely negative” in that it “does not rest on the affirmative claim that free speech will lead to any particular social or political benefits” but instead emphasizes the dangers created “when collective entities are involved in the determination of truth”); Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 451 (2012) (“The first [justification for freedom of speech] justifies the First Amendment primarily on the grounds of distrust of government. . . . An anti-paternalistic approach would lead to a general refusal to regulate false statements—not because we value falsity, but because we are reluctant to hand over to the state the authority to make such determinations.”).

191. See Shiffrin, *supra* note 99, at 18 (“Paternalism, . . . involves the unwelcome substitution of one party's agency or judgment for another's, in the latter's rightful sphere of autonomy, that emanates from an implicit or explicit judgment by the former of the inferiority of the latter's judgment or agency.”).

192. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 357 (1991) (“When the government prevents people from making decisions on the basis of false information, it does not manipulate their mental processes to serve the government's ends. Rather, it enables those processes to function as they should, to promote the ends of the listener.”); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1108–09 (2006) (“[O]ther theories of the function of free expression—especially theories of autonomy—tend to support government restrictions on deception, at least when adopted to preserve the autonomy of those whom deceptive speakers otherwise might manipulate.”); see also CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 34 (1993) (“[W]e might conclude that the New Dealers were trying to regulate speech in order to protect the *deliberative autonomy* of everyone involved. They sought to do this by limiting certain forms of coercion and deception that had otherwise been made possible by law. Restrictions on the sharp or coercive practices of people who sell securities, food, and drugs, or who manage broadcasting stations, might well promote the system of free expression.”); *id.* at 176 (“[R]espect for choices should not be identified with respect for autonomy; some choices reflect an absence of autonomy, as in cases of insufficient education, manipulation, or lack of options.”).

defamation; criminal fraud statutes; securities law, which includes both disclosure duties and penalties for false statements”) that calls upon courts to make a variety of similar determinations regarding falsity and state of mind.¹⁹³

Finally, some may wonder whether the government’s regulation of employers’ truth and lies threatens to chill valuable speech. Here too these concerns are dramatically lessened with respect to the regulation of employers’ truth and lies on objectively verifiable matters to which they have greater (and sometimes even exclusive) informational access, and in settings where listeners’ opportunities for counterspeech and exit are constrained. Restrictions on this relatively narrow swath of speech pose less potential for chilling valuable expression than do restrictions that sweep more broadly. Moreover, as the Court has recognized in the context of commercial speech, chilling may be considerably less likely with respect to powerful speakers—like employers—that have strong incentives and opportunities to engage in continued speech.¹⁹⁴

CONCLUSION

The longstanding need for a coherent First Amendment theory of employer speech is now even more pressing in light of the recent antiregulatory movement to expand free speech protections for corporate and other commercial speakers that threatens to undercut government’s efforts to inform and empower workers. This Article asserts that a focus on employer speech as occurring within a listener-centered relationship better and more coherently furthers key First Amendment values than do efforts to force employer speech to fit within existing and often unsatisfactory constitutional categories. More specifically, this Article proposes a theory of employer speech that recognizes that this expression occurs within a communicative relationship that involves information and power asymmetries

193. *Klass*, *supra* note 103, at 480–81; *see also id.* at 449 (noting that there are often good reasons to let judges and juries determine a message’s falsity and the speaker’s state of mind).

194. *See* ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 76 (2015) (“The First Amendment has therefore been interpreted to prohibit state regulations that chill the creation of democratic legitimation. Because the speech of ordinary commercial corporations is by law required to promote its corporate financial interests, there is no reason to regard such corporate speech as vulnerable and delicate. That is why chilling effect analysis typically does not apply in the analogous arena of commercial speech.”).

where workers' First Amendment interests as listeners are frustrated by employers' lies and nondisclosures. This Article concludes that the First Amendment should be understood to permit government to require employers to make truthful disclosure about workers' legal rights and other working conditions, as well as to prohibit employer lies or misrepresentations about these matters that threaten to coerce or manipulate workers' choices.