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Free Speech and Public Health: Unraveling the Commercial-Professional Speech Paradox

WENDY E. PARMET[*] & JASON SMITH[**]

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I. INTRODUCTION

Public health advocates have puzzled in recent years over an apparent paradox. Commercial speech with a significant potential to harm health, such as tobacco marketing, appears to be receiving more robust protection under the First Amendment than the speech of health care professionals that aims to protect patient health.[1] This disparate treatment of commercial and professional speech[2] relating to health has significant ramifications for public health,[3] as the

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[*] Matthews University Distinguished Professor of Law and Professor of Public Policy and Urban Affairs, Northeastern University. Many thanks to Carly Perkins, Michael DiFrancesco, Jonathan Herrick, Bhagyashree Sonwane, Tristan Sullivan, and Natasha Tygai for their excellent research assistance, and to Dean Jeremy Paul and Claudia Haupt for their thoughtful comments.

[**] Assistant Professor, Department of Nursing and Health Sciences, California State University, East Bay.

[1] *See infra* notes 7–91 and accompanying text.

[2] For one approach to defining commercial speech, see Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1154–64 (2012). For a definition of professional speech, see Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1246–48 (2016) [hereinafter Haupt, *Professional Speech*]. In a later paper, Claudia Haupt adds "[p]rofessional speech communicates the knowledge community's insights through the professional to the client, . . . for the purpose of enabling the client to make important decisions based on this advice." Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 YALE L.J.F. 150, 159 (2017) [hereinafter Haupt, *Content-Neutrality*]. For present purposes, we accept that professional speech is speech that occurs in the context of a professional (physician-patient/lawyer-client) relationship, and that it does not include public speech by professionals. The questions of when and whether professional speech should be viewed as commercial speech are beyond the scope of this paper.

[3] We use the term "health" to refer to both the health of individuals and populations. For a discussion of health and sickness as experienced by individuals, see, for example, ERIC J. CASSELL, THE NATURE OF HEALING: THE MODERN PRACTICE OF MEDICINE 1–50 (2013). For a discussion of the meaning of population health, see, for example, WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 7–9 (2009). We define "health-related speech"

regulation of speech has long been an important tool in the public health toolbox.[4] Whether that tool remains constitutional is critical to the future of public health protection.

This Article explores this paradox and considers the application of the speech clause to professional and commercial speech pertaining to health. The Article makes two related arguments: first, the paradox may be resolving as courts are moving, with some exceptions, towards an approach that treats both commercial and professional speech related to health in a similar manner;[5] and second, courts are beginning to recognize, as they should, that speech's impact on health should be a crucial aspect of the inquiry into when the regulation of commercial or professional speech affecting health violates the First Amendment.[6] As we explain, health is a constitutional norm on par with and complementary to the values of autonomy and self-governance that are often cited as undergirding the First Amendment's protection of speech. Focusing on the state's legitimate role in furthering public health helps bring together the divergent doctrines now governing commercial and professional speech under the First Amendment.

II. COMMERCIAL AND PROFESSIONAL SPEECH DOCTRINE

We have argued previously that laws that aim to protect health, both of individuals and of populations, frequently implicate speech.[7] Without repeating that discussion here, suffice it to say that speech can impact health in numerous ways.[8] For example, by counseling patients to stop smoking, health care workers can help their patients adopt healthier lifestyles. Likewise, discussions between health professionals and patients can determine treatment decisions with significant implications for patient health.[9] Commercial speech can also affect

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as speech that has a significant foreseeable impact on the health of individuals or populations. For a discussion of the difficulties related to determining which speech falls within that category, see *infra* note 223 and accompanying text.

[4] For a fuller discussion of the regulation of speech as a public health tool, see Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363, 373 (2006).

[5] *See infra* notes 67–91 and accompanying text.

[6] *See infra* notes 172–210 and accompanying text. Our goal is to situate health in the discussion of professional and commercial speech in broad strokes. The discussion below does not consider the application of the First Amendment to political, artistic, or other forms of speech that relate to health, nor to challenges to government-supported speech. Although many of the arguments we offer pertaining to the value given to public health by the Constitution may pertain to those forms of speech, *see infra* notes 133–209 and accompanying text, there are both conceptual and doctrinal reasons to limit our discussion to the areas of commercial and professional speech.

[7] *See* Parmet & Smith, *supra* note 4, at 373.

[8] *See id.* at 380–83.

[9] *See, e.g.*, Anthony Jerant et al., *Physician Training in Self-Efficacy Enhancing Interviewing Techniques (SEE IT): Effects on Patient Psychological Health Behavior Change Mediators*, 99 PATIENT EDUC. & COUNSELING 1865, 1871 (2016); S.A. Rose et al.,

health by influencing cultural attitudes and behaviors. For example, advertisements and product placements can motivate people to smoke.[10]

As a result of speech's impact on health, laws that seek to protect public health frequently target speech.[11] This creates a tension between public health laws and the First Amendment.[12] Two doctrines play an especially important role in resolving this tension: the commercial speech doctrine and the evolving doctrine around professional speech. We discuss both here.

A. *Commercial Speech*

When the Supreme Court initially established First Amendment protection for commercial speech, it emphasized the interests of the listener, noting that commercial speech can provide valuable information about choices that affect individuals' health.[13] But, in the years since, the Court has given less weight to those interests as its analysis has evolved to one that emphasizes the interests of the speaker, and approaches strict scrutiny.[14]

Courts reviewing First Amendment challenges to regulations of commercial speech continue to cite the four-part test announced by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[15] That test first requires the court to ask whether the speech concerns lawful activity and is

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Physician Weight Loss Advice and Patient Weight Loss Behavior Change: A Literature Review and Meta-Analysis of Survey Data, 37 INT'L J. OBESITY 118, 118–27 (2013).

[10] *See* News Release, World Health Organization, Ban Tobacco Advertising To Protect Young People (May 29, 2013), http://www.who.int/mediacentre/news/releases/2013/who_ban_tobacco/en/ [https://perma.cc/WGF2-PC85] ("Research shows about one third of youth experimentation with tobacco occurs as a result of exposure to tobacco advertising, promotion and sponsorship."); *Enforce Bans on Tobacco Advertising, Promotion and Sponsorship*, WORLD HEALTH ORG., http://www.who.int/tobacco/mpower/enforce/en/index1.html [https://perma.cc/KE3J-HE7W] ("[T]he tobacco industry links its products with success, fun and glamour. The results are devastating for public health . . . .").

[11] Public health policymakers sometimes target speech in the belief that public health laws that focus on speech are more respectful of individual choice than laws that directly regulate health-related behaviors. For example, a law requiring manufacturers to label dangerous ingredients in their products may be viewed as less paternalistic and more respectful of consumer choice than a law outlawing the ingredients. *See* Wendy E. Parmet, *Paternalism, Self-Governance, and Public Health: The Case of E-Cigarettes*, 70 U. MIAMI L. REV. 879, 892–97 (2016).

[12] The increasing scrutiny given to laws that affect speech have added to this tension. *See infra* notes 20–35 and accompanying text. In effect, public health laws that at one time would not have been viewed as raising First Amendment issues are now considered problematic.

[13] Bigelow v. Virginia, 421 U.S. 809, 818, 822 (1975).

[14] Jonathan H. Adler, *Persistent Threats to Commercial Speech*, 25 J.L. & POL'Y 289, 291–97 (2016); Micah Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J.L. & POL'Y 53, 54 (2016).

[15] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

not misleading.[16] Second, if the answer is "yes," the speech is entitled to First Amendment protection, and the court must determine whether the asserted state interest is substantial.[17] Third, the court asks if the regulation directly advances the state's interest and, fourth, if the regulation is more "extensive than is necessary to serve that interest."[18] In applying the third and fourth parts of the test, the Supreme Court has articulated that there must be a "'fit' between the legislature's ends and the means chosen to accomplish those ends."[19]

In the years since *Central Hudson*, its test has been applied with increasing rigor, as the Court has given less weight to the interests of listeners, including their health interests, while placing a greater burden on the state to demonstrate the fit between the restriction on speech and the interest the state seeks to protect.[20] Many of these cases have involved health regulations.[21] For example, in striking down regulations of tobacco advertising and marketing in *Lorillard Tobacco Co. v. Reilly*, the Court rejected the state's evidence as to the fit between the state's goal of protecting the health of children and the scope of its regulations.[22] Later, in *Sorrell v. IMS Health Inc.*, the Court found that a Vermont law barring the sale of data pertaining to physician prescription practices violated the First Amendment.[23] Without deciding if the speech at issue was commercial, the Court held that laws that discriminate on the basis of content or speakers demand so-called "heightened scrutiny."[24] The Court added, "[u]nder a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment."[25]

Sorrell's impact for health regulations became evident in *United States v. Caronia*, in which the U.S. Court of Appeals for the Second Circuit relied on *Sorrell* in holding that off-label promotion of drug use was protected under the First Amendment.[26] Many commenters believe that as a result of *Caronia*, the

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[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (quoting Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986)).

[20] *See* sources cited *supra* note 14.

[21] Wendy E. Parmet & Peter D. Jacobson, *The Courts and Public Health: Caught in a Pincer Movement*, 104 AM. J. PUB. HEALTH 392, 393 (2014); Samantha Rauer, Note, *When the First Amendment and Public Health Collide: The Court's Increasingly Strict Constitutional Scrutiny of Health Regulations that Restrict Commercial Speech*, 38 AM. J.L. & MED. 690, 691 (2012).

[22] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561 (2001).

[23] Sorrell v. IMS Health Inc., 564 U.S. 552, 580 (2011).

[24] *Id.* at 566.

[25] *Id.* at 571–72. *Sorrell*'s heightened scrutiny appears close to strict scrutiny. However, as discussed below, in health cases, heightened scrutiny should be understood as a particular form of intermediate scrutiny in which the health evidence matters. *See infra* notes 196–210 and accompanying text.

[26] United States v. Caronia, 703 F.3d 149, 163–64 (2d Cir. 2012). *Caronia* was followed in Amarin Pharma, Inc. v. FDA, 119 F. Supp. 3d 196, 223–30 (S.D.N.Y. 2015).

foundation for regulating the safety of pharmaceuticals is now threatened.[27] The 21st Century Cures Act, enacted after *Caronia*, would seem to support those fears as it expands the ability of drug companies to promote off-label uses by including a provision that would exempt economic information conveyed to payors from the definition of a misbranded drug.[28]

Mandatory disclosures, which are among the most commonly used forms of health regulations, are also threatened.[29] In 1985, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, the Court suggested that laws mandating disclosures were subject to less stringent review than those that restrict speech.[30] Some lower courts, however, have read *Zauderer* narrowly. In *R.J. Reynolds v. FDA*, for example, the D.C. Circuit struck down FDA regulations requiring graphic warning labels on cigarette packages, disputing the strength of the FDA's scientific evidence.[31] In its decision, the court also questioned whether "the government can assert a substantial interest in discouraging consumers from purchasing a lawful product, even one that has been conclusively linked to adverse health consequences."[32] The D.C. Circuit later overruled *R.J. Reynolds* to the extent it limited *Zauderer* to disclosures that remedy deception.[33] Nevertheless, the treatment of mandatory disclosure laws, especially those that do not mandate simple factual information, remains uncertain.[34] The relationship of these commercial speech disclosure cases to

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[27] *E.g.*, Aaron S. Kesselheim & Michelle M. Mello, *Prospects for Regulation of Off-Label Drug Promotion in an Era of Expanding Commercial Speech Protection*, 92 N.C. L. REV. 1539, 1570–74 (2014); Christopher Robertson, *When Truth Cannot Be Presumed: The Regulation of Drug Promotion Under an Expanding First Amendment*, 94 B.U. L. REV. 545, 552–55 (2014).

[28] 21 U.S.C. § 352(a) (2012); *see* Deborah Mazer & Gregory Curfman, *21st Century Cures Act Lowers Confidence in FDA-Approved Drugs and Devices*, HEALTH AFF. BLOG (Feb. 14, 2017), http://healthaffairs.org/blog/2017/02/14/21st-century-cures-act-lowers-confidence-in-fda-approved-drugs-and-devices/ [https://perma.cc/LF2N-KHZK].

[29] Berman, *supra* note 14, at 54–65. For a discussion of the proliferation of laws requiring disclosures and their efficacy, see generally Lisa A. Robinson et al., *Efficient Warnings, Not "Wolf or Puppy" Warnings* (Harvard Kennedy Sch. of Gov't, Faculty Research Working Paper Series, Paper No. 16-033, 2016), https://ssrn.com/abstract=2839311 [https://perma.cc/26YK-C9YX]. *See also* Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1282–89 (2014) (contrasting the courts' treatment of commercial and professional speech cases).

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

[31] R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1222 (D.C. Cir. 2012).

[32] *Id.* at 1218 n.13.

[33] Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 22–23 (D.C. Cir. 2014).

[34] For example, while this paper was in press, the Ninth Circuit reversed the denial of a preliminary injunction of a San Francisco ordinance compelling warning labels on advertisements for sugar-sweetened beverages. Am. Beverage Ass'n v. City & Cty. of S.F., Nos. 16-16072, 16-16073, 2017 WL 4126944 (9th Cir. Sept. 19, 2017). In that case, although the court found that *Zauderer* permitted mandatory disclosures "beyond the context of preventing consumer deception," *id.* at *5, it insisted that the regulation could be upheld only if the information required was "'purely factual and uncontroversial'" and did not unduly

professional speech, including informed consent, is also unclear, a point that has been especially apparent in cases reviewing laws that impose disclosure requirements on so-called crisis pregnancy centers (CPCs).[35]

B. *Professional Speech*

As courts have performed increasingly rigorous scrutiny of laws regulating commercial speech, they have struggled to apply the speech clause to laws that regulate the speech of health care professionals.[36] These cases have arisen in a variety of different contexts, including abortion, bans on sexual orientation change efforts (SOCE), and speech regarding firearms. Although courts have applied different approaches, several recent decisions suggest that laws regulating the speech of health care professionals should be subject to intermediate, or heightened, scrutiny.[37] Importantly, some state laws can

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burden the speaker. *Id.* (citing CTIA-The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1117, 1119 (9th Cir. 2017)). What that court failed to consider is how a regulation that is being challenged could ever be found to be uncontroversial. See also *Nat'l Ass'n. of Mfrs. v. Sec. & Exch. Comm'n*, 800 F.3d 518 (D.C. Cir. 2015), in which the D.C. Circuit explained that the court must first "'assess the adequacy of the [governmental] interest motivating' the disclosure requirement." *Nat'l Ass'n of Mfrs.*, 800 F.3d at 524 (quoting *Am. Meat Inst.*, 760 F.3d at 23). This suggests that fairly stringent review will be applied before the court turns to the looser review offered by *Zauderer*. Moreover, like the Ninth Circuit, the D.C. Circuit noted that *Zauderer* requires that the disclosure be factual and "uncontroversial." *Id.* at 527. Other courts, however, have read *Zauderer* more broadly. *See, e.g.*, A Woman's Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168, 1217 (E.D. Cal. 2015), *aff'd*, 669 Fed. App'x. 495 (9th Cir. 2016), *cert. granted sub nom.* Nat'l Inst. of Family & Life Advocates v. Becerra, No. 16-1140, 2017 WL 5240894 (Nov. 13, 2017) (upholding state disclosure law applicable to crisis pregnancy centers). For a discussion of the uncertainty surrounding the doctrinal approach to mandatory disclosures, while arguing that mandatory disclosure laws should receive heightened review, see Adler, *supra* note 14, at 19–20.

[35] *See, e.g.*, Evergreen Ass'n v. City of N.Y., 740 F.3d 233, 245–48, 250–51 (2d Cir. 2014) (citing both professional and commercial speech cases, but without deciding level of scrutiny, upholding law requiring CPCs to disclose if they had a licensed health care provider on staff, but striking down provision requiring centers to tell clients that the health department recommends that clients see licensed providers); Centro Tepeyac v. Montgomery Cty., 722 F.3d 184, 192 (4th Cir. 2013) (declining to classify the speech as either commercial or professional, applying strict scrutiny, and affirming the preliminary injunction of law mandating that CPCs tell patients that county health officer encourages them to see a licensed health provider). For an analysis of these cases, see Aziza Ahmed, *Informed Decision Making and Abortion: Crisis Pregnancy Centers, Informed Consent, and the First Amendment*, 43 J.L. MED. & ETHICS 51, 53–54 (2015); B. Jessie Hill, Casey *Meets the Crisis Pregnancy Centers*, 43 J.L. MED. & ETHICS 59, 64–66 (2015).

[36] In the health care context, most discussions of professional speech focus on physician-patient communications, but the concept applies equally to the speech of other health professionals. For definitions of professional speech, see sources cited *supra* note 2.

[37] Scholars have noted that courts have treated speech claims differently in the context of abortion. Caitlin E. Borgmann, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047, 1087 (2014); Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1176 (2014).

survive this scrutiny; others cannot. In effect, the fate of restrictions on health-related professional speech depends on the state's ability to demonstrate that the law in question is plausibly designed to achieve the state's health goals.[38]

The question of how courts should review laws regulating the professional speech of health care providers arose first in the context of abortion and pregnancy counseling.[39] In 1991, in *Rust v. Sullivan*, the Supreme Court upheld a federal law that barred recipients of Title X funds from counseling patients about or referring them for abortions.[40] The Court in that case rejected the First Amendment claim on the theory that the ban did not suppress speech, rather it prohibited a grantee from "engaging in activities outside of the project's scope."[41] Moreover, because the "doctor-patient relationship established by the Title X program" was not so "all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice," the Court concluded that it did not have to decide whether "traditional" doctor-patient relationships "should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government."[42]

The next year, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court was forced to consider the application of the First Amendment to physician speech outside of the context of government-funded services.[43] In their joint opinion upholding a law requiring physicians to inform patients about the impact of an abortion on the fetus, Justices O'Connor, Kennedy, and Souter stated that the First Amendment rights of physicians in the context of the patient-physician relationship are "subject to reasonable licensing and regulation by the State."[44] The joint opinion then cited *Wooley v. Maynard*, which helped to establish a First Amendment right against compelled speech,[45] and *Whalen v. Roe*, which applied rational basis review to a Fourteenth Amendment challenge to a law requiring physicians to give patient information to the state.[46]

Casey's brief, and somewhat cryptic treatment of the First Amendment claim, paved the way for divergent approaches towards the regulation of professional speech relating to abortion.[47] Some courts read *Casey* as suggesting

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[38] *See infra* notes 196–210 and accompanying text.

[39] Professional speech was explored earlier in Justice White's concurrence in *Lowe v. Sec. & Exch. Comm'n*, 472 U.S. 181, 211, 228–33 (1985) (White, J., concurring).

[40] Rust v. Sullivan, 500 U.S. 173, 203 (1991).

[41] *Id.* at 194.

[42] *Id.* at 200.

[43] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

[44] *Id.* at 884.

[45] *Id.* (citing Wooley v. Maynard, 430 U.S. 705, 714–17 (1977)).

[46] *Id.* (citing Whalen v. Roe, 429 U.S. 589, 597–98 (1977)).

[47] The literature on these cases is extensive. *See, e.g.*, Corbin, *supra* note 37, at 1190–92; Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 CORNELL J.L. & PUB. POL'Y 1, 6–25 (2011); Sonia M. Suter, *The First Amendment and Physician Speech in Reproductive Decision Making*, 43 J.L. MED. & ETHICS 22, 22–28 (2015); Timothy Zick, *Justice Scalia and Abortion Speech*, 15 FIRST AMEND. L. REV. 288,

that state laws regulating the speech of abortion providers should not receive heightened scrutiny. For example, in *Texas Medical Providers Performing Abortion Services v. Lakey*, the Fifth Circuit denied a First Amendment challenge to a Texas law compelling physicians to perform and display a sonogram and explain the sonogram's results to the woman prior to performing an abortion.[48] The *Lakey* court cited *Casey* for its conclusion that "informed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, non-misleading, and relevant disclosures."[49]

In contrast, in *Stuart v. Camnitz*, the Fourth Circuit reviewed a North Carolina law requiring physicians to go beyond customary medical practice and "perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions" even when "the woman actively 'avert[s] her eyes' and 'refus[es] to hear.'"[50] To analyze the law the court adopted a "heightened intermediate scrutiny standard," because of a "confluence of . . . factors," including the fact that the regulation instructed physicians to do something (conduct) and to say something (speech).[51] The court added: "The government's regulatory interest is less potent in the context of a self-regulating profession like medicine."[52]

Courts have also struggled with professional speech cases in contexts apart from abortion. Recognizing that states have traditionally had broad authority to regulate the practice of medicine,[53] some courts have concluded that state laws that regulate the professional speech of health care providers must be given greater deference than laws restricting other forms of speech, including the public speech of health professionals. One especially influential decision was *Pickup v. Brown*, in which the Ninth Circuit upheld SB 1172, a California law that prohibited mental health professionals from engaging in SOCE efforts with minors, a practice about which the "prevailing opinion of the medical and psychological communities [is that it has] not been shown to be effective and that it [instead] creates a potential risk of serious harm to those who experience it."[54] In upholding the law, the court described a continuum.[55] At one end is expressive speech, which has the greatest protection under the First Amendment; on the other end, pure conduct, which may have an incidental

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291–329 (2017). Many of these cases also raise due process claims. An analysis of those claims is beyond the scope of this paper.

[48] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 575–78 (5th Cir. 2012).

[49] *Id.* at 576.

[50] Stuart v. Camnitz, 774 F.3d 238, 242 (4th Cir. 2014) (quoting N.C. GEN. STAT. § 90-21.85(b) (2015)).

[51] *Id.* at 248.

[52] *Id.*

[53] *See infra* notes 155–60 and accompanying text.

[54] Pickup v. Brown, 740 F.3d 1208, 1223 (9th Cir. 2014).

[55] *Id.* at 1227–29. This continuum approach has its antecedent in *Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Douglas, J., concurring).

effect on speech.[56] The court explained that "the confines of a professional relationship"[57] lie in the middle of the continuum. At this midpoint, the court argued, the protection for professionals' speech "is somewhat diminished" because the purpose of those relationships is to "advance the welfare of the clients, rather than contribute to public debate."[58] Moreover, state regulation of medical treatment, "even when that treatment is performed through speech alone," lies on the other side of the continuum and is thus devoid of First Amendment protection.[59] As the court saw it, laws regulating speech conducted in the course of treatment are not really restrictions on speech; they are regulations of conduct.[60]

The Ninth Circuit relied on *Pickup* in *National Institute of Family and Life Advocates v. Harris*,[61] which considered a California law requiring so-called crisis pregnancy centers to notify patients that:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].[62]

After deciding that the law regulated professional speech, the court, in an opinion by Judge Nelson, concluded "that the Licensed Notice regulates speech that falls at the midpoint of the *Pickup* continuum, and that intermediate scrutiny should apply."[63] The court reached this decision despite the Supreme Court's decision in *Reed v. Town of Gilbert, Arizona*, which underscored that "content-based laws" are unconstitutional unless "the government proves that they are narrowly tailored to serve compelling state interests."[64] Instead, the Ninth Circuit found that strict scrutiny was inapplicable both because the law did not discriminate on the basis of the speaker's viewpoint, and because not all content-based restrictions are subject to strict scrutiny.[65] The court also argued that regulations of abortion are subject to different treatment.[66]

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[56] *Pickup*, 740 F.3d at 1227–29.
[57] *Id.* at 1228.
[58] *Id.*
[59] *Id.* at 1230.
[60] *Id.* at 1231.
[61] Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 838–40 (9th Cir. 2016), *cert. granted sub nom.* Nat'l Inst. of Family & Life Advocates v. Becerra, No. 16-1140, 2017 WL 5240894 (Nov. 13, 2017).
[62] *Id.* at 830 (citing CAL. HEALTH & SAFETY CODE § 123472(a)(1) (2015)).
[63] *Id.* at 839.
[64] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).
[65] *Nat'l Inst. of Family*, 839 F.3d at 837 (citing United States v. Swisher, 811 F.3d 299, 311–13 (9th Cir. 2016) (en banc)).
[66] *Id.* For a further discussion of the differential treatment accorded laws that regulate speech related to abortion, see sources cited *supra* note 37.

Other circuits, however, appear to be rejecting *Pickup*'s continuum with its attempt to distinguish the regulation of professional speech from the regulation of medicine. Instead, they recognize that laws that regulate professional speech regulate *speech*, not conduct, and need to be understood as such. Nevertheless, like the Ninth Circuit in *National Institute of Family and Life Advocates*, these courts seem to accept that the state may have a more legitimate interest in regulating professional speech than other forms of speech, and that judicial review should be closer to intermediate than strict scrutiny. For example, in *King v. Governor of New Jersey*, the Third Circuit rejected *Pickup*'s approach, though not its conclusions, in upholding a New Jersey SOCE ban.[67] Looking to Justice White's concurrence in *Lowe v. Securities & Exchange Commission*[68] and the Supreme Court's discussion of professional speech in *Casey*,[69] the court, in an opinion written by Judge Smith, concluded that "commercial and professional speech share important qualities and, thus, that intermediate scrutiny is the appropriate standard of review for prohibitions aimed at either category."[70] According to Judge Smith, this means that "prohibitions of professional speech are constitutional only if they directly advance the State's interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest."[71] The court added: "[A] regulation of professional speech is spared from more demanding scrutiny only when the regulation was, as here, enacted pursuant to the State's interest in protecting its citizens from ineffective or harmful professional services."[72]

Recently, the Eleventh Circuit applied a similar approach in its en banc decision in *Wollschlaeger v. Governor*.[73] The case concerned Florida's Firearm Owner's Protection Act (FOPA) which, contrary to recommendations from the American Medical Association and the American Pediatrics Association, barred physicians from routinely asking patients about gun safety and ownership.[74] Reflecting the lack of clarity in the precedent, and the difficulty reconciling the speech clause with the state's interest in regulating the practice of medicine, the court initially struggled to articulate the appropriate standard of review.[75] A three-judge panel issued three separate decisions.[76] Each upheld FOPA using a

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[67] King v. Governor of N.J., 767 F.3d 216, 226–29 (3d Cir. 2014).

[68] Lowe v. Sec. & Exch. Comm'n, 472 U.S. 181, 212–36 (1985) (White, J., concurring).

[69] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).

[70] *King*, 767 F.3d at 234.

[71] *Id.* at 233.

[72] *Id.* at 235.

[73] Wollschlaeger v. Governor of Fla., 848 F.3d 1293 (11th Cir. 2017) (en banc). For a fuller discussion, see Wendy E. Parmet et al., Wollschlaeger v. Governor of Florida—*The First Amendment, Physician Speech, and Firearm Safety*, 374 NEW ENG. J. MED. 2304 (2016).

[74] *Wollschlaeger*, 848 F.3d at 1300 (citing FLA. STAT. §§ 790.338, 456.072, 395.1055, 381.026 (2017)).

[75] Parmet et al., *supra* note 73, at 2305.

[76] *Id.* at 2305–06.

different standard of review, from rational basis to intermediate scrutiny to strict scrutiny.[77] Each decision was later vacated.[78]

The en banc court issued two separate majority opinions. The first, authored by Judge Jordan and joined by eight other judges, focused on the First Amendment issues and struck down the provisions of FOPA that dealt with record-keeping, inquiries of patients, and prohibitions of harassment.[79] The court began by rejecting the state's contention, based on *Pickup*, that FOPA did not regulate speech.[80] As the court made clear, laws that regulate the speech of professionals regulate speech.[81] Moreover, the court explained, under *Reed*, FOPA was a content-based restriction.[82] Nevertheless, the court concluded it did not have to decide if *Reed* required strict scrutiny because FOPA's record-keeping, inquiry, and anti-harassment provisions could not survive the heightened scrutiny articulated in *Sorrell*.[83] In applying that standard, the court adopted an approach that bears significant resemblance to the one taken by the Third Circuit in *King*,[84] concluding that all of FOPA's provisions, other than the ban on discrimination, violated the speech clause.[85] A second majority decision, authored by Judge Marcus and joined by six other judges, concluded that FOPA's anti-harassment provision also violated the Due Process Clause because it was impermissibly vague.[86] In his lone dissent, Judge Tjoflat, who authored the three vacated panel decisions, argued that the Supreme Court had erred in insisting that content-based regulations of speech should be subject to strict scrutiny.[87] According to Judge Tjoflat, states should apply a "sliding scale" in which the state's interest in regulating the medical profession is weighted against the physician's freedom of speech.[88] The result of this balance, he argued, requires courts to engage in intermediate scrutiny.[89] However, as applied by Judge Tjoflat, intermediate scrutiny comes close to rational basis review, as he would have upheld the state law in the absence of any evidence demonstrating how the state law protected the state's asserted interests.[90]

Although the *Wollschlaeger* court did not settle upon a standard of review applicable to professional speech, its approach, like that of the Third Circuit in

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[77] *Id.*

[78] *Id.* at 2306.

[79] *Wollschlaeger*, 848 F.3d at 1311.

[80] *Id.* at 1308.

[81] *Id.*

[82] *Id.* at 1307 (citing Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015)).

[83] *Id.* at 1311–16.

[84] *See supra* notes 67–72 and accompanying text.

[85] *Wollschlaeger*, 848 F.3d at 1317. In contrast, the court upheld FOPA's anti-discrimination provision, finding that it could be read as applying to conduct rather than speech. *Id.*

[86] *Id.* at 1319–20.

[87] *Id.* at 1336–37 (Tjoflat, J., dissenting).

[88] *Id.* at 1335.

[89] *Id.* at 1337–38.

[90] *See id.*

King, demonstrated how courts can preserve the state's ability to protect health while respecting the freedom of speech of health professionals. Under this approach, courts apply a heightened, but not fully strict, form of scrutiny, which requires careful consideration of the evidence proffered by the state in support of the regulation of professional speech.[91] As we explain below, this approach resembles what courts purport to do in commercial speech cases, and is justified by the fact that health itself is a constitutional value, complementary to other goals that animate the First Amendment.

III. FIRST AMENDMENT THEORY

To make sense of the First Amendment's application to health-related commercial and professional speech, it helps to recall the underlying purposes of the speech clause as they relate to the type of speech in question.[92] In the last few years, several scholars have offered such an analysis for professional speech. This scholarship provides an important foundation for the application of the speech clause to health-related speech.[93]

One of the first and most important scholarly discussions of the relationship between commercial and professional speech was written by Daniel Halberstam in 1999, before the First Amendment became of central concern to health law.[94] According to Halberstam, the "common thread" between the two forms of speech stems not from the fact that both receive less protection under the First Amendment than political or artistic speech, but from the fact that both occur within the context of "defined social relationships" that are themselves of constitutional value.[95] In commercial speech, he argues, the relationship is one

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[91] Because the *Wollschlaeger* court did not reject strict scrutiny, it might have applied it if it had found that FOPA survived heightened or intermediate scrutiny. However, for reasons explained below, we believe intermediate or heightened scrutiny is the appropriate approach for reviewing laws that restrict health-related professional speech. *See infra* notes 185–210 and accompanying text.

[92] *See, e.g.*, ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 4 (2012).

[93] Our review here is by no means complete. We focus on some key papers that offer insights that are especially relevant for the approach we lay out in Part IV. Other recent contributions to the literature regarding commercial speech include Charlotte S. Alexander, *Workplace Information-Forcing: Constitutionality and Effectiveness*, 53 AM. BUS. L.J. 487 (2016), and Micah L. Berman, *Commercial Speech Law and Tobacco Marketing: A Comparative Discussion of the United States and Canada*, 39 AM. J.L. & MED. 218 (2013). On professional speech, see, for example, Erika Schutzman, *We Need Professional Help: Advocating for a Consistent Standard of Review when Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019 (2015); Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67 (2016); Zick, *supra* note 47; and Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289 (2015).

[94] Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999).

[95] *Id.* at 777.

between sellers and vendors; in the case of professional speech, it is between professional and client or patient.[96]

Halberstam begins by arguing that both commercial and professional speech receive First Amendment protection because we value the relationships in which they are uttered.[97] This conclusion leads him to the insight that the regulation of both commercial and professional speech "should be permissible even when content- or viewpoint-based, insofar as it preserves the respective institution."[98] For commercial speech, this means that the state can regulate false or deceptive advertising, as well as the marketing of unlawful activities.[99] It also suggests that in reviewing regulations of commercial speech, courts should apply a "more qualitative approach" that "would instead examine the impact of a given regulation on the bounded discourse of the affected speech practice."[100] As applied to regulations of tobacco advertising, this demands a nuanced analysis that considers the advertising's impact on children, as well as addiction.[101]

While not noting that commercial and professional speech often relate to a similar subject—health—Halberstam applies a similar approach to professional speech. Because communications between physicians and patients may secure patient autonomy, he argues, physician speech is "generally free from government control."[102] Yet, as with commercial speech, the nature and norms of the relationship between the parties set the scope of permissible regulations.[103] Content-based regulations of professional speech are permissible as long as they "assist[] in maintaining the boundaries of the discourse."[104] Although Halberstam does not say that the regulation of professional speech should be subject to intermediate scrutiny, his treatment of professional speech alongside commercial speech, and his call for courts to recognize, in a nuanced fashion, the role and norms of social institutions in determining the constitutionality of laws regulating professional speech, suggests that courts

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[96] *Id.*

[97] In reaching this conclusion, Halberstam reviews and ultimately rejects several of the leading rationales for the protection of speech, including its role in facilitating markets, respect for individual liberty, and its importance to the political process. None of these rationales, he claims, are adequate to explain the protection of commercial and professional speech. *See id.* at 775–76.

[98] *Id.* at 857.

[99] *Id.* at 865.

[100] Halberstam, *supra* note 94, at 857.

[101] *Id.* at 865.

[102] *Id.* at 867.

[103] *Id.* at 850–51. Here, Halberstam seems to follow Paul Horwitz who argues that "First Amendment institutions are *self-regulating*." PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 15 (2013).

[104] *See* Halberstam, *supra* note 94, at 869. Halberstam focuses much of his discussion on Rust v. Sullivan, 500 U.S. 173 (1991), and government-funded speech. *See supra* text accompanying notes 39–42. The application of the First Amendment to state-funded speech, and the contours of the related unconstitutional conditions doctrine to health-related speech, are beyond the scope of this paper.

should engage in an intermediate level of review, similar to that applied by the Third Circuit in *King*[105] and the en banc Eleventh Circuit in *Wollschlaeger*.[106] Such an approach exhibits neither the broad deference of rational basis review, nor the harshness of strict scrutiny.[107]

Although Robert Post rejects Halberstam's institutional focus,[108] he reaches strikingly similar conclusions. Post begins by recalling that the Constitution establishes a democratic polity in which the people determine the laws by which they are to be governed.[109] In order to realize this vision and to enable "the people" to decide upon their laws, government must not hamper the formation of public opinion.[110] Thus, to Post, the speech clause "protects the communicative processes" through which the public decides upon policy choices, a function which he argues is critical to democratic legitimation.[111]

The formation of public opinion, however, requires more than electoral discourse. It also demands the "expert knowledge" on matters related to public policy that disciplines develop through the formation and exercise of their own methodologies and norms.[112] The "formation" of this professional knowledge, Post argues, should be outside of state control lest the state dictate public opinion.[113] This leads Post to conclude that the speech that occurs between professionals and their own patients or clients in the course of their professional practice, even when it is behind closed doors and not directly tied to public debate, is entitled to some First Amendment protection.[114]

Still, because such "private speech" does not directly contribute to public debates, Post argues it is entitled to less robust First Amendment protection than professionals' public speech.[115] Yet in contrast to those courts such as the Ninth Circuit in *Pickup*,[116] which have treated some regulations of private professional speech as the regulation of conduct, Post concludes that professional speech should be treated in a manner similar to commercial speech.[117] Like Halberstam,

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[105] King v. Governor of N.J., 767 F.3d 216, 234 (3d Cir. 2014).

[106] Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1309 (11th Cir. 2017).

[107] Although Halberstam criticizes the Court for applying the *Central Hudson* test in a "quantitative" fashion, the type of nuanced analysis he recommends is far closer to the Court's application of *Central Hudson* in the 1990s than to its treatment of commercial speech regulations in more recent years, which, as noted above, has effectively morphed into strict scrutiny. *See supra* note 14 and accompanying text.

[108] POST, *supra* note 92, at 13–18, 43.

[109] *Id.* at 14.

[110] *Id.* at 14–15.

[111] *Id.* at 40–43.

[112] *Id.* at 43.

[113] *Id.* at 43–44.

[114] POST, *supra* note 92. For a different viewpoint, see, for example, Scott W. Gaylord, *A Matter of Context:* Casey *and the Constitutionality of Compelled Physician Speech*, 43 J.L. MED. & ETHICS 35, 47 (2015).

[115] *See* POST, *supra* note 92, at 23–25.

[116] Pickup v. Brown, 740 F.3d 1208, 1230–31 (9th Cir. 2014).

[117] POST, *supra* note 92, at 43.

Post also argues that the scope of protection for private professional speech should be based on the rationale for protecting such speech in the first place—the necessity of allowing professional communities to create their own methodologies and norms so as to enhance knowledge and thereby inform (even indirectly) public discourse.[118] For Post, this means that when the private speech of professionals strays from or contradicts professional norms, it can be restricted.[119] This suggests that because the common law of informed consent and the law of malpractice generally track professional norms, they should survive First Amendment review. Conversely, laws that impose messages that contradict the profession's own consensus (such as FOPA and some of the abortion informed-consent laws), should not pass muster.[120]

In her recent contributions, Claudia E. Haupt seeks to develop a "comprehensive theory of professional speech."[121] According to Haupt, professions are "knowledge communities," which she defines as "network[s] of individuals who share common knowledge and experience as a result of training and practice."[122] These communities allow for the "generation and exchange of insights."[123] They also require "shared notions of validity."[124] Like Post and Halberstam, Haupt points to these shared notions in determining the boundaries for the protection of professional speech. But while recognizing the relevance of the nature of the relationship between the professional and client, and the norms and practices of the profession, Haupt emphasizes the profession's own capacity to formulate knowledge and communicate its insights.[125] She writes, "[i]f state regulation aims to interfere with and alter professional knowledge, the First Amendment should protect the client's as well as the professional's interest in accurate communication of the knowledge community's insights when a professional speaks."[126] This leads her to criticize the en banc decision in

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[118] *See id.* at 40–44.

[119] *See, e.g.*, Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 989–90 (2007).

[120] *Id.*

[121] Haupt, *Professional Speech*, *supra* note 2, at 1241; *see also* Haupt, *Content-Neutrality*, *supra* note 2, at 150–57. In other works, Haupt explores the speech of those she calls "outliers," members of a profession whose views stand outside the profession's own consensus. This has particular ramifications, in her view, when professionals raise claims of religious liberty. *See* Claudia E. Haupt, *Religious Outliers: Professional Knowledge Communities, Individual Conscience Claims, and the Availability of Professional Services to the Public*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 173, 173 (Holly Fernandez Lynch et al. eds., 2017) [hereinafter Haupt, *Religious Outliers*]; Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. (forthcoming 2017) [hereinafter Haupt, *Unprofessional Advice*], https://ssrn.com/abstract=2827762 [https://perma.cc/5GYJ-ACWD] .

[122] Haupt, *Professional Speech*, *supra* note 2, at 1250–51.

[123] *Id.* at 1251.

[124] *Id.*

[125] *Id.* at 1279.

[126] *Id.* at 1303.

Wollschlaeger for a "new form of aggressive content neutrality."[127] Rather than subjecting all professional speech to heightened scrutiny, as the Eleventh Circuit suggested in *Wollschlaeger*, Haupt would have courts focus on how laws regulating professional speech "map onto the content of professional advice as determined by the profession."[128]

Although Haupt's understanding of the role of professions in setting the bounds of First Amendment protection for professional speech is relatively similar to those of Halberstam and Post, her analysis differs from theirs in several important ways. First, she grounds the protection of professional speech on multiple constitutional interests, including the autonomy of both professionals and the listeners, the marketplace of ideas, and self-governance.[129] Second, while acknowledging that the regulation of commercial speech raises some similar issues to the regulation of professional speech, she ultimately rejects the analogy as failing to recognize the unique attributes and import of professional speech.[130] She also rejects the notion that laws that regulate the content of professional speech should always be subject to heightened scrutiny.[131] For Haupt, it is the close relationship between professional speech, knowledge communities, and multiple constitutional values, not any single doctrinal test, that is critical in determining the scope of the speech clause.

Still, Haupt concurs with Halberstam and Post in three important ways: first, the constitutional status of professional speech must be understood in relationship to values underlying the speech clause; second, the nature and attributes of professional speech help to bound it; and third, at least within its boundaries, professional speech is no less worthy of constitutional protection than commercial speech.[132] These points of agreement help us to understand how courts should analyze regulations of health-related speech.

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[127] Haupt, *Content-Neutrality*, *supra* note 2, at 151. Like Judge Tjoflat in his dissent in Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1330–31 (11th Cir. 2017) (Tjoflat, J., dissenting), Haupt traces this approach to the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

[128] Haupt, *Content-Neutrality*, *supra* note 2, at 171.

[129] Haupt, *Professional Speech*, *supra* note 2, at 1268–71, 1276.

[130] *Id.* at 1264–68. Haupt also notes that Post recognizes some important distinctions between commercial and professional speech. *Id.* at 1268.

[131] Haupt, *Content-Neutrality*, *supra* note 2, at 150–68. Although Haupt criticizes the Eleventh Circuit for concluding that FOPA's lack of content neutrality required heightened scrutiny, the approach she argues can easily be viewed as a form of heightened scrutiny. In asking courts to decide whether the regulation of professional speech comports with the profession's own understanding of the appropriate content for professional advice, she is asking the court to reject either the radical deference to the legislature that usually marks rational basis review, or the highly skeptical stance generally associated with strict scrutiny.

[132] Smolla rejects the analogy between professional speech and commercial speech, arguing that professional speech laws should receive strict scrutiny. Smolla, *supra* note 93, at 88–93. His vision of strict scrutiny, however, appears to be less stringent and more flexible than is traditionally recognized. *See id.* at 106 ("First Amendment challenges to these basic rules [of informed consent and malpractice law] governing doctors and lawyers would in most cases appropriately be deemed frivolous. That frivolous quality, however, does not

IV. PUBLIC HEALTH AS A CONSTITUTIONAL VALUE

As discussed in Part III, leading First Amendment theorists have emphasized that the scope of First Amendment protection for both commercial and professional speech must be determined in light of the goals that underlie the speech clause as well as the relationship between those goals and the specific nature of the speech at issue. What theorists have failed to consider is that it matters for First Amendment purposes whether the speech relates to or affects health.[133] Or, to put it another way, theorists thus far have not appreciated that the protection of health is itself a constitutional value, one that is both embodied within and complementary to other First Amendment values, including autonomy and self-governance.

At first blush, the claim that the protection of health is a constitutional value seems strained. After all, the term "health" is not mentioned anywhere in the Constitution's text. Further, the Supreme Court has rejected any suggestion of a "right to health," insisting that the Constitution is a charter of negative liberties.[134] On closer examination, however, it is apparent that protection of public health is indeed a constitutional value, one closely associated to the values underlying the speech clause.[135]

First Amendment scholars point to both autonomy[136] and self-governance[137] as key First Amendment values. Both are also closely associated with public health for several reasons. First, without some degree of health, individuals cannot fulfill their own aspirations or exercise their own autonomy. Thus to the extent that the Constitution seeks to preserve individual autonomy, it must value health.[138] Second, to a far greater extent than is commonly recognized, the health of individuals depends less on the choices they make, or

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exist because the communications are not 'speech,' or because the First Amendment does not 'apply' to these settings, or because the regulation is not content-based, or because the setting of speech within a regulated industry justifies lower scrutiny, but rather because even applying strict scrutiny, the government's compelling justifications in such classic instances are already established, obvious, and incontrovertible."). Smolla, however, never explains how his analysis comports with established understandings of strict scrutiny. *See id.*

[133] In emphasizing the constitutional importance of health, we do not mean to reject the claim of other scholars that professional relationships and knowledge can have independent constitutional significance in contexts that do not pertain to health. For example, the speech between lawyers and clients serves important constitutional goals. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001) (arguing that a law restricting the speech of legal services lawyers "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source"); s*ee also supra* notes 94–132 and accompanying text.

[134] *E.g.*, Harris v. McRae, 448 U.S. 297, 318 (1980).

[135] *See infra* notes 138–94 and accompanying text.

[136] MARTIN H. REDISH, THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY 10–11 (2013).

[137] *See* POST, *supra* note 92, at 17.

[138] *See* PARMET, *supra* note 3, at 116.

even the genes they are born with, than on the social, environmental, and even legal conditions, often coined the social determinants of health, to which the populations they are part of are exposed.[139] Further, health is a partial public good, and often depends upon collective action.[140] This is most visible in the case of infectious diseases. For example, a woman's likelihood of contracting the Zika virus and giving birth to a child with microcephaly depends significantly on the prevalence of the infection in the human and mosquito populations in which she comes into contact.[141] A woman can take some steps to reduce her risk (for example by wearing mosquito repellant or staying inside as much as possible), but her probability of infection remains largely determined by factors outside of her control.[142]

These so-called population-level factors that lie outside an individual's control and affect broad groups of people are also highly relevant to a wide range of other types of health threats. For example, a driver's risk of experiencing a motor vehicular fatality depends not only on her own driving skill, but the driving habits of others with whom she shares the road, as well as the safety of the cars that are driven, and the design of the roads. Likewise, an individual is less likely to smoke, and thus face smoking-related death, if she comes of age in a community in which smoking is relatively rare and cigarettes are expensive and difficult to purchase.[143]

The important role of social determinants and the public-goods nature of health means that population level factors are critical to the exercise of individual autonomy. Thus, the nature and efficacy of collective action (which is often, but not always, undertaken by law) helps to determine an individual's ability to exercise her autonomy. (The pregnant woman who lives in Miami during a Zika outbreak has far less autonomy to spend her days outside as she might hope to if the government has failed to implement an effective mosquito control program.)[144]

It is for this reason that theorists have argued that the protection of public health is closely aligned with the social compact and our constitutional system

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[139] Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1649, 1649–51 (2011).

[140] *See* Parmet, *supra* note 11, at 885–86. *See also* Patricia Illingworth & Wendy E. Parmet, *The Right to Health: Why It Should Apply to Immigrants*, 8 PUB. HEALTH ETHICS 148, 152–54 (2015) (explaining that health is a public good because it is largely non-rivalrous and non-excludable).

[141] *E.g.*, *Zika Virus*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/zika/pregnancy/ [https://perma.cc/CA8J-A4MS].

[142] *Id.*

[143] U.S. DEP'T OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS (2012), https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf [https://perma.cc/W2UK-B46V].

[144] Roni Caryn Rabin, *In Florida, Pregnant Women Cover Up and Stay Inside Amid Zika Fears*, N.Y. TIMES (Aug. 19, 2016), http://www.nytimes.com/2016/08/19/well/in-florida-pregnant-women-cover-up-and-stay-inside-amid-zika-fears.html?_r=0 [https://perma.cc/38ZX-6Y7X].

of self-governance.[145] As the Supreme Court recognized in *Jacobson v. Massachusetts*, the protection of public health was one underlying motivation for the social compact.[146] People form governments in part to protect their health, which is a prerequisite to their exercise of autonomy. Public health laws thus form one rationale for self-governance.[147] They also represent an exercise of self-governance. At least in some circumstances, public health laws are an important means by which "we the people" act to protect "our" health.[148] In this sense, public health laws, even those that implicate speech, can be supportive of or detrimental to both the autonomy and the self-governance that the First Amendment nurtures.

Without question, public health laws may also threaten autonomy as well as individual and population health, as is apparent when inappropriate quarantines restrain individual freedom and undermine infection control measures.[149] This points to a central, if not the primary, challenge for both public health law and constitutional theory: how to empower self-governance to protect health and autonomy without undermining either.[150]

The close alignment between public health, autonomy, and self-governance helps to explain the key role that public health plays in the constitutional design. This role was most evident in pre-New Deal cases discussing the police power. But as we shall see, it is also implicit in more recent First Amendment cases.

That the Constitution recognizes that the states have the authority to protect public health was accepted by the Supreme Court as far back as 1824, when Chief Justice Marshall explained in *Gibbons v. Ogden* that the Constitution left "quarantine laws, [and] health laws of every description" to the states.[151] Tellingly, Marshall wrote these words early in the nineteenth century, long before the modern regulatory state.[152] But even then, states enacted a wide range of laws that aimed to protect their populations from a variety of health threats,

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[145] *E.g.*, LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 8–9 (3d ed. 2016).

[146] Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905).

[147] *See* Parmet, *supra* note 11, at 911–12.

[148] This is not to say that all public health laws should be so viewed. Some probably don't protect public health. Others may lack the attributes of self-governance. For a further discussion, see *id.* at 912–16 (discussing criteria for determining when public health laws constitute acts of self-governance).

[149] Health officials made this point about the use of travel bans during the 2014 Ebola outbreak. *See, e.g.*, Tom Frieden, *CDC Director: Why I Don't Support a Travel Ban To Combat Ebola Outbreak*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 13, 2014), https://blogs.cdc.gov/global/2014/10/13/cdc-director-why-i-dont-support-a-travel-ban-to-combat-ebola-outbreak/ [https://perma.cc/P23P-MG5U].

[150] *Cf.* FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.").

[151] Gibbons v. Ogden, 22 U.S. 1, 203 (1824).

[152] *Id.*

including the epidemics that commonly ravaged cities in the late eighteenth and early nineteenth centuries.[153] Marshall and the early Supreme Court understood that the Constitution presupposed that states would act to protect health, and that it was designed to allow those actions to continue.[154]

In the years after *Gibbons*, the Court continued to see a close, if not defining, relationship between state health laws and the police power.[155] In early cases, the Court looked to whether a law protected health in order to determine whether or not the law fell within the domain of the federal government or the states.[156] After Reconstruction, and until the New Deal, this same association played a pivotal role in ascertaining the scope of state authority under the Fourteenth Amendment.[157] As a result, the Court accepted that the states had wide berth in regulating the practice of medicine.[158] Thus, despite "the right of every citizen" to pursue "[a] lawful calling," the Court in *Dent v. West Virginia* upheld the state's medical licensing law.[159] Or as the Third Circuit noted in *King*, "[o]ver 100 years ago, the Supreme Court deemed it 'too well settled to require discussion' that the 'police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health.'"[160]

The Court's recognition that the state's power to protect health establishes limits upon the rights granted by the Fourteenth Amendment was also evident in the two 1905 cases of *Jacobson v. Massachusetts*[161] and *Lochner v. New York.*[162] In *Jacobson*, the Court rejected a Fourteenth Amendment challenge to a state law mandating smallpox vaccination, stating:

> [A] fundamental principle of the social compact [is] that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for "the common good," and that government

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[153] *See, e.g.*, Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 285–301 (1993). *See generally* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (Thomas A. Green & Hendrik Hartog eds., 1996) (describing the wide array of regulations in nineteenth-century America).

[154] *See Gibbons*, 22 U.S. at 203; Parmet, *supra* note 153, at 271–72.

[155] Parmet, *supra* note 153, at 313 n.339.

[156] Although early doctrine treated health as within the province of the states, the federal government was active in protecting public health even in the late eighteenth century. *See id.* at 323–25.

[157] *See* PARMET, *supra* note 3, at 37–45.

[158] *Id.*

[159] Dent v. West Virginia, 129 U.S. 114, 121–23 (1889).

[160] King v. Governor of N.J., 767 F.3d 216, 229 (3d Cir. 2014) (citing Watson v. Maryland, 218 U.S. 173, 176 (1910)).

[161] Jacobson v. Massachusetts, 197 U.S. 11, 26–27 (1905).

[162] Lochner v. New York, 198 U.S. 45, 53 (1905).

> is instituted "for the common good, for the protection, safety, prosperity and happiness of the people . . . ."[163]

A few weeks later, in *Lochner v. New York*, the Court struck down a maximum hours law, holding that it violated the Fourteenth Amendment in part because it failed, as the Court saw it, to protect public health.[164] In both cases, the perceived health impact of the law helped to establish the boundary between state authority and individual rights.[165]

Without question, the Court's approach to Fourteenth Amendment challenges under the police power has changed since the New Deal, and health's role in the determination of constitutional boundaries has become less visible.[166] Nevertheless, the Court continues to treat health as highly relevant to the demarcation of constitutional rights and authorities under the Fourteenth Amendment.[167] This was most recently evident in *Whole Woman's Health v. Hellerstedt*, which upheld a due process challenge to a Texas abortion law.[168] In finding that the law created an undue burden on a woman's right to an abortion, the Court evaluated the evidence supporting the state's claim that the law aimed to protect women's health.[169] The fact that the state's evidence failed to support the claim helped the Court to conclude that the law imposed an undue burden.[170] This suggests that the health impact of the law affected the scope of the state's authority over abortion: the state could have imposed a greater burden on a woman's access to abortion if doing so protected her health.[171] Health helped to delineate the scope of the state's regulatory authority.[172]

Health plays a similar role when courts attempt to demarcate the lines between legitimate exercises of the police power and the speech clause. As noted previously, the Supreme Court first accorded First Amendment protection to commercial speech by noting the potential value of such speech to the public's ability to make choices related to their health.[173] In these cases, the protection of speech was enhanced in part because it furthered public health. In

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[163] *Jacobson*, 197 U.S. at 27.

[164] *Lochner*, 198 U.S. at 57–59.

[165] *See id.*; *Jacobson*, 197 U.S. at 29.

[166] PARMET, *supra* note 3, at 42–45.

[167] Christina Ho argues that the Court implicitly recognizes a "right to health." Christina S. Ho, *Are We Suffering from an Undiagnosed Health Right?*, 42 AM. J.L. & MED. 743, 745 (2016); *see also* Abigail R. Moncrieff, *The Freedom of Health*, 159 U. PA. L. REV. 2209, 2211–12 (2011) (arguing that there is an implicit "freedom to health").

[168] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

[169] *Id.* at 2311–12, 2314–16.

[170] *Id.* at 2310–18.

[171] Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 YALE L.J.F. 149, 149–50 (2016).

[172] *Id.* at 150.

[173] Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976); Bigelow v. Virginia, 421 U.S. 809, 822–29 (1975).

later commercial speech cases, courts have continued to recognize that health matters.[174] For example, courts have accepted without question that the protection of public health constitutes a "substantial governmental interest" as that term is used in the third prong of the *Central Hudson* test.[175]

Even in *Sorrell*, the Court did not question that the state has a substantial interest in protecting public health.[176] To the contrary, the Court cited "the fields of medicine and public health, where information can save lives" as a rationale for imposing heightened scrutiny.[177] In contrast, in his dissent, Justice Breyer saw the state's traditional role in protecting health as a justification for granting the state greater deference.[178]

Hence, even as the commercial speech doctrine has moved to one demanding greater scrutiny, courts continue to accept that protection of health is an important state goal.[179] What they have increasingly come to question is whether the laws before them, especially those that are not content-neutral, are in fact well suited to advance the state's health goals.[180] Still, the health impact matters in speech cases.

Health's salience to the scope of First Amendment protections is also increasingly evident in professional speech cases. As commentators have noted, one of the central challenges in professional speech cases arises from the fact that everyone assumes (with good reason) that the speech clause does not override the common law of informed consent, which seeks to protect both the autonomy and health of patients.[181] Moreover, the First Amendment must coexist with the states' authority to regulate the practice of medicine, which invariably involves communications between physicians and patients.[182] Thus, while the courts have struggled to formulate a coherent doctrinal approach to laws regulating the speech of health professionals, they have understood that the

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[174] *E.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 367–69 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 528 (2001).

[175] *E.g.*, *Thompson*, 535 U.S. at 367–69; *Lorillard Tobacco*, 533 U.S. at 528.

[176] Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011).

[177] *Id.*

[178] *Id.* at 580–82, 596 (Breyer, J., dissenting).

[179] *See supra* notes 20–35 and accompanying text.

[180] *See supra* notes 20–35 and accompanying text.

[181] *See* POST, *supra* note 92, at 45. *See also* David Orentlicher, *Abortion and Compelled Physician Speech*, 43 J.L. MED. & ETHICS 9, 10 (2015). The existence of the common law of informed consent should not alter the outcome as the First Amendment applies to tort cases. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 443 (2011) (applying First Amendment to claim for intentional infliction of emotional harm). A more relevant distinction between informed consent and laws such as those in *Wollschlaeger* and *King* is that the former compels speech, while the latter suppress it. *See generally* Wollschlaeger v. Governor of Fla., 848 F.3d 1293 (11th Cir. 2017) (en banc); King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014). As noted above, there is reason to think that laws compelling speech should receive more deferential review than laws that ban speech. *See supra* notes 29–30 and accompanying text.

[182] *See* POST, *supra* note 92, at 45; Orentlicher, *supra* note 181, at 11.

challenge is so daunting precisely because weight must be given to both the protection of health and freedom of speech.

Although the courts' attempt to meet that challenge has resulted in case law that is less than crystal clear, courts have largely agreed with commentators that the state has a significant interest in regulating the professional speech of health care workers. This point was first articulated, albeit cryptically, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*'s citation to *Whalen v. Roe*, a due process case that upheld the state's power to collect prescribing information.[183] Although the *Casey* Court did not fully explore or explain the application of the First Amendment to professional speech, its reference to *Whalen* suggested that principles applicable to due process police power cases were relevant to the analysis.[184]

More recent decisions by the courts of appeals in professional speech cases evince an enhanced appreciation that the state's health goals matter in professional speech cases. For example, in *National Institute of Family and Life Advocates*, the Ninth Circuit held that the state "has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services."[185] Likewise, in deciding that intermediate scrutiny was appropriate, the *King* court noted that the state's regulatory authority "is particularly important when applied to professions related to mental and physical health."[186] The court then went on to cite Post for the proposition that "[t]o handcuff the State's ability to regulate a profession whenever speech is involved would therefore unduly undermine its authority to protect its citizens from harm."[187] Equally, in applying intermediate scrutiny, the court stated that its task was to determine if the state law advanced its interest in "prohibiting a professional practice that poses serious health risks to minors."[188] That the state had such an interest, and that it qualified as sufficiently substantial to withstand intermediate strict scrutiny, was never questioned.[189]

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[183] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (citing Whalen v. Roe, 429 U.S. 589 (1977)).

[184] *See supra* notes 44–46 and accompanying text.

[185] Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 841 (9th Cir. 2016), *cert. granted sub nom.* Nat'l Inst. of Family & Life Advocates v. Becerra, No. 16-1140, 2017 WL 5240894 (Nov. 13, 2017). This holding suggests that the court would uphold the constitutionality of the common law of informed consent.

[186] *King*, 767 F.3d at 232. To be sure, the *King* court did not claim that its conclusion regarding the level of scrutiny was applicable solely to health professionals. *Id.* Much of the language of the opinion spoke more generally about the role of professionals qua professionals. Nevertheless, as noted above, the court made clear that intermediate scrutiny was especially important with respect to laws regulating the speech of health professionals. *Id.*

[187] *Id.* (citing Post, *supra* note 119, at 950).

[188] *King*, 767 F.3d at 238.

[189] *Id.* at 237.

The en banc court in *Wollschlaeger* also treated health as a substantial state interest, noting that "[a]t an abstract level of generality, Florida does have a substantial interest in regulating professions like medicine."[190] The court further recognized patient privacy and ensuring access to health care without discrimination as substantial state interests.[191] And although Judge Pryor argued in his concurrence that strict scrutiny should be applied, he was even more emphatic about the importance of health, stating "[h]ealth-related information is more important than most topics because it affects matters of life and death."[192]

While courts and commentators have accepted that the protection of health is a substantial interest with relevance to the determination of First Amendment claims, they have often failed to appreciate the complementary relationship between health and the values that underlie the speech clause.[193] Yet, once we understand that health is essential to autonomy and self-governance, it becomes clear that the protection of health is not simply a counter-weight to the autonomy valued by the speech clause, it is supportive of that autonomy. Perhaps even more importantly, because the protection of health is both a motivation for and a manifestation of self-governance, it is closely aligned with, and indeed forms, one rationale for the First Amendment's support of self-governance. This point becomes even more salient once we consider that speech can safeguard health in a number of ways: consider health-promoting speech within the physician-patient relationship, or warning labels on foods and drugs. Speech can also harm health, as occurs in misleading drug advertising or tobacco marketing. The regulation of speech can thus thwart health and autonomy; or it can promote both.

This argument suggests that the application of the speech clause to health-related speech must be guided by an appreciation of the relationship between public health protection, autonomy, self-governance, and the speech clause itself. Commercial and professional speech related to health are protected not only because they are expressions of autonomy and facilitative of democratic governance, but also because they provide a means by which individuals and populations may protect their health, which itself is tied to First Amendment goals. In effect, laws that regulate speech for health-related reasons should be viewed as one means by which populations protect their autonomy and exercise their right of self-governance to protect their health. This does not mean that all health-related speech should be immune from regulation. But it does suggest that the impact of the regulation of speech on health must matter to the constitutional analysis in much the same way that commentators have claimed that professional norms or expertise bound free speech. If it did not, the goals

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[190] Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1316 (11th Cir. 2017). The court then went on, however, to conclude that the state had not demonstrated that the interest justified the regulation. *Id.*

[191] *Id.* at 1314.

[192] *Id.* at 1328 (Pryor, J., concurring).

[193] *See supra* notes 20–35 and accompanying text.

that underlie the First Amendment would be thwarted. As Robert Post and Amanda Shanor explain in critiquing the commercial speech doctrine: "If we were to attribute the prerogatives of autonomy appropriate for self-governance to commercial speech, we could never govern ourselves at all."[194] In other words, if we read the protection of speech so broadly as to invalidate all laws implicating speech, we risk hollowing out self-governance.[195] The speech clause would then help enable people to select their government, but it would also disable the governments they select from carrying out their policy goals. As we have seen, these goals often include the protection of health, which depends upon government action and indeed constitutes one of the reasons why there is a constitution in the first place.

This analysis suggests that health-related speech should generally be subject to a nuanced form of heightened scrutiny in which health evidence matters. To some extent, the Third Circuit in *King*,[196] the Ninth Circuit in *National Institute of Family and Life Advocates*,[197] and the en banc court in *Wollschlaeger*,[198] applied such an approach, albeit using different labels. In *King*, for example, the court stated that its task was to determine "whether the legislature has 'drawn reasonable inferences based on substantial evidence.'"[199] It then looked to the state's evidence demonstrating that "well-known, reputable professional and scientific organizations have publicly condemned the practice of SOCE, expressing serious concerns about its potential to inflict harm."[200] Likewise in *Wollschlaeger*, the court struck down most of FOPA's provisions in large part because the state's evidence was merely anecdotal and insufficient to satisfy heightened scrutiny.[201]

Still, although heightened, the scrutiny applied in these cases differed considerably from strict scrutiny, as that term is usually understood.[202] Under strict scrutiny, the state must show that its regulation is narrowly tailored to a compelling state interest.[203] Moreover, as the Ninth Circuit explained in *National Institute of Family and Life Advocates*, "[u]nlike when evaluating a

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[194] Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 172 (2015).

[195] *Id.*

[196] King v. Governor of N.J., 767 F.3d 216, 238–40 (3d Cir. 2014).

[197] Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 841–42 (9th Cir. 2016), *cert. granted sub nom.* Nat'l Inst. of Family & Life Advocates v. Becerra, No. 16-1140, 2017 WL 5240894 (Nov. 13, 2017).

[198] Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1314–16 (11th Cir. 2017).

[199] *King*, 767 F.3d at 238.

[200] *Id.*

[201] *Wollschlaeger*, 848 F.3d at 1312.

[202] As noted above, Smolla argues that strict scrutiny is required in professional speech cases, but he then goes on to contend that courts can and should take into account the evidence supporting or undermining a state's regulatory claims. *See* Smolla, *supra* note 93, at 112. This is not the typical approach in strict scrutiny First Amendment cases. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).

[203] *Reed*, 135 S. Ct. at 2226.

law under strict scrutiny, under intermediate scrutiny, a law need not be the least restrictive means possible."[204] Hence regulations that are under, or over, inclusive cannot pass muster under strict scrutiny.[205] In health cases, this is a standard that is almost impossible to meet, as empirical evidence regarding the impact of regulations is seldom complete and conclusive.[206] Indeed science simply doesn't work that way.[207] As a result, under strict scrutiny, important public health goals, even when backed by the weight of scientific evidence, are constitutionally vulnerable.[208]

In contrast, in heightened scrutiny cases, such as *King* and *Wollschlaeger*, the science matters. Where the state can show that it has "drawn reasonable inferences based on substantial evidence," it will prevail.[209] Conversely, where, as in *Wollschlaeger*, the state relies solely on anecdotal evidence to impose a regulation contrary to the weight of professional, expert advice, free speech triumphs.[210] This respect for the evidence, and for expert opinion, is required because only by reviewing a restriction of health-related commercial or professional speech for its actual impact on health can a court determine whether the law actually has the potential for advancing the state's public health goals.

V. IMPLICATIONS

We have argued that health is a First Amendment value that helps to define the scope of permissible regulation and freedom for health-related speech. In this Part, we briefly sketch out some of the implications of this recognition, as well as some of the challenges that remain.[211]

Initially, it is important to note that the approach we have suggested comports with, and indeed builds upon, prior scholarship relating to professional speech as well as the emerging consensus in the federal courts of appeals regarding the application of intermediate scrutiny to laws regulating the speech

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204 Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 842 (9th Cir. 2016), *cert. granted sub nom.* Nat'l Inst. of Family & Life Advocates v. Becerra, No. 16-1140, 2017 WL 5240894 (Nov. 13, 2017).

205 *Id.*; McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014).

206 PARMET, *supra* note 3, at 231–35.

207 *Id.*

208 *E.g.*, R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1205 (D.C. Cir. 2012).

209 King v. Governor of N.J., 767 F.3d 216, 238 (3d Cir. 2014) (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997)).

210 *See supra* notes 79–91 and accompanying text. Even when the science is settled regarding the health impact of a particular harm, such as cigarette smoking, the evidence is usually not settled regarding the effect of a regulatory intervention, such as adding graphic labeling onto cigarette packages. Given the difficulties of conducting randomized control trials regarding regulatory interventions, the evidence of their efficacy will almost always be subject to limitations and uncertainties, making it effectively impossible for public health laws to survive strict scrutiny.

211 We hope to do so more fully in a later piece.

of health care professionals.[212] As discussed in Part III, scholars have argued that professional speech should be subject to intermediate scrutiny, and is bounded by the knowledge, norms, or expertise of the professional community.[213] They have also pointed out the similarities between commercial and professional speech, and the standards that should apply when courts review restrictions on such speech. Our analysis concurs, but offers two important clarifications. First, restrictions on health-related speech should be similarly bounded whether they arise in the context of commercial or professional speech. In both cases, the key fact is that the speech affects health, and thus implicates values of autonomy and self-governance.[214] Hence the paradox discussed in Part I is problematic not because professional speech is given less berth than commercial speech, but because both forms of speech demand the same level of review when they implicate health. Likewise, in both cases a regulation's capacity to fulfill its purported aim and protect health should be crucial to determining its constitutionality. As noted above, this requires courts to engage in a form of heightened scrutiny that is sensitive to the empirical evidence that supports or undermines the regulation's putative health effect.[215]

Second, the knowledge, norms, and expertise of health professionals are important to the analysis not because the Constitution prizes professionals' relationships to patients, nor even because the Constitution accords a privilege to knowledge communities qua knowledge communities. Rather, the knowledge, norms, and expertise of health professionals are critical because they are often the best guide we have to knowing whether laws that restrict speech in the name of public health are well-suited to meeting that constitutionally-sanctioned goal. It is for this reason that legislatures, as the *King* court noted, "[A]re entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review . . . ."[216] Similarly, because courts cannot be expected to be experts in epidemiology and medicine, they must invariably rely on experts to ascertain whether the regulation of professional or commercial speech in the name of health has a close fit to those health goals. This helps to explain why the approaches of the Fifth Circuit in *Lakey* and the vacated decisions of the Eleventh Circuit panel in *Wollschlaeger*

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[212] Importantly, it is not yet clear that this approach will apply when states regulate abortion-related speech. These cases may continue to be influenced by *Casey* and the conflation of its undue burden standard with First Amendment issues. *See supra* notes 39–52 and accompanying text.

[213] *See supra* notes 93–131 and accompanying text.

[214] Although beyond the scope of this paper, the calculus and approach undertaken by the court should shift when states try to regulate core political speech relating to health. *See* POST, *supra* note 92, at 46–55 (noting the distinction between professional speech and public speech by professionals and stating that the latter receives the highest form of First Amendment protection).

[215] *See supra* notes 196–210 and accompanying text.

[216] King v. Governor of N.J., 767 F.3d 216, 238 (3d Cir. 2014).

appear so troubling.[217] In these cases, in the absence of scientific evidence to the contrary, the courts deferred to state claims regarding public health that were contrary to expert consensus.[218] Thus, in contrast to the en banc court's approach in *Wollschlaeger*,[219] some courts have at times taken state public health claims at face value, without assessing their plausibility, thereby allowing the power to protect public health to endanger both speech and health.

In some commercial speech cases, courts have made the similar mistake of giving too little weight to expertise and empirical evidence. For example, in *R.J. Reynolds*, the D.C. Circuit engaged in a highly skeptical review of the scientific evidence supporting the FDA's regulations.[220] As in the professional speech cases, the court should have understood that although expert knowledge alone should not be dispositive in First Amendment cases involving speech, courts should recognize that the expertise of health agencies is entitled to substantial weight in determining whether a restriction on speech is well tailored to achieve the state's purported health goals.

Several challenges remain. One relates to an issue recently explored by Haupt: how should courts treat the claims of professionals who dissent from the prevailing view within their own profession?[221] We agree with much of her analysis, but offer one caveat: the ultimate question is whether the regulation of health-related speech protects health, not whether the outlier adheres to the profession's own perspectives and methodologies. These are relevant only because they often offer our best way of ascertaining the former. When the state, however, can meet its burden to demonstrate that the empirical evidence validates the outlier's position, the state is free to regulate in contradiction to professional consensus. A law prohibiting physicians from urging patients to smoke by claiming that smoking was good for their health, for example, would pass muster even if the AMA recommended otherwise.[222]

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[217] *See supra* notes 48–49, 73–77 and accompanying text.

[218] *See supra* notes 48–49, 73–77 and accompanying text. Interestingly, in *American Beverage Ass'n*, the Ninth Circuit looked to statements by the FDA and the American Dental Association in rejecting San Francisco's law requiring warnings on advertisements for sugar-sweetened beverages. Am. Beverage Ass'n v. City & Cty. of S.F., Nos. 16-16072, 16-16073, 2017 WL 4126944, at *7 (9th Cir. Sept., 19, 2017).

[219] *See supra* notes 79–91 and accompanying text.

[220] R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1218–22 (D.C. Cir. 2012); *see also Am. Beverage Ass'n*, 2017 WL 4126944, at *7–8 (finding that San Francisco ordinance requiring a warning label on advertisements for sugar-sweetened beverages was misleading and questioning whether sugar-sweetened beverages are less healthy than other sources of sugar). For a further discussion of the commercial speech cases, see *supra* notes 13–35 and accompanying text.

[221] *See* Haupt, *Professional Speech*, *supra* note 2, at 1240–41, 1291–1302.

[222] One may argue that such a law would be upheld because it bars speech that is false. Of course, when it comes to public, political speech, there is no such thing as a falsehood. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974). More importantly for present purposes, we only know that the speech is false because of the overwhelming scientific evidence establishing that cigarette smoking is harmful to health.

A more vexing question arises from the fact that almost all laws affect health.[223] Arguably, our claim regarding health's role in First Amendment analysis could be applied to all free speech cases. For now, we do not take it so far. Rather, we believe that health must matter only in those commercial and professional speech cases in which the state relies on its powers to protect the public health to justify its regulation of speech. In effect, health matters when the state claims it matters. Given the centrality of public health to our constitutional design, and its relationship to autonomy, self-governance, and the very reasons why we protect speech, the validity of that claim has to make a difference. Both commercial and professional speech can be limited when they endanger health, but only when there is good reason to believe that they truly do.

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[223] *See* PARMET, *supra* note 3, at 31–35.