

Expert Knowledge in First Amendment Theory and Doctrine

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## ABSTRACT

### Expert Knowledge in First Amendment Theory and Doctrine

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In this dissertation, through three separately published articles, I interrogate the role of expert knowledge in First Amendment theory and doctrine. I argue that expert knowledge ought to play a prominent role in answering doctrinally relevant empirical questions, as in the case of incorporating a scientifically grounded understanding of visual perception into Establishment Clause inquiries concerning religious symbols. Moreover, the generation and dissemination of expert knowledge itself is worthy of First Amendment protection, for example in protecting professional speech. And expert knowledge should determine the scope of First Amendment protection for professional advice. There is, in other words, a close but often underappreciated connection between expert knowledge and the First Amendment.

In *Active Symbols*, I challenge the assumption sometimes articulated in Establishment Clause case law involving religious symbols that visual representations of religious symbols are merely “passive” as compared to textual (spoken or written) religious references. Drawing on one relevant body of expert knowledge—cognitive neuroscience—I argue that images are at least as “active” as text. The lack of judicial expertise on the empirical question of how visual images, as opposed to spoken or written words, communicate has led to a distortion in the development of Establishment Clause doctrine. This distortion can be remedied by taking relevant expert knowledge into consideration where such knowledge can answer germane empirical questions that are doctrinally relevant but tend to be outside the realm of judicial expertise.

*Professional Speech* argues that the First Amendment protects the communication of expert knowledge by a professional to a client—within a professional-client relationship for the purpose

of giving professional advice. The First Amendment thus provides a shield against state interference that seeks to prescribe or alter the content of professional speech. The key to understanding professional speech, I suggest, lies in the concept of the learned professions as knowledge communities. First Amendment protection for professional speech can be justified on all traditional grounds: autonomy interests of the speaker and listener, marketplace interests, and democratic self-government.

*Unprofessional Advice* provides a theory to identify the range of valid professional advice for First Amendment purposes. Building on the concept of the professions as knowledge communities, this article explores the range of professional advice that may be given consistent with the professional knowledge community's common ways of knowing and reasoning and the respective profession's agreed upon methodology. Because knowledge communities are not monolithic, there is a range of knowledge that is accepted as good professional advice. Advice falling within this range should receive robust First Amendment protection. Advice not within this range, however, is subject to malpractice liability, and the First Amendment provides no defense.

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## I. INTRODUCTION

The role of expertise and facts in First Amendment theory and doctrine remains underexplored.<sup>1</sup> Robert Post, for example, has suggested that because expert knowledge is generated in venues other than the paradigmatic marketplace of ideas, it is seemingly disconnected from contemporary First Amendment theory.<sup>2</sup> In this dissertation, through three separately published articles, I interrogate the role of expert knowledge in First Amendment theory and doctrine. I argue that expert knowledge ought to play a prominent role in tailoring doctrine to adequately address relevant empirical questions, such as by incorporating a scientifically grounded understanding of visual perception into Establishment Clause analyses of religious symbols. Moreover, the generation and dissemination of expert knowledge itself is worthy of First Amendment protection, as I argue in the context of professional speech. The scope of protection for professional advice, finally, can be properly delineated by reference to knowledge communities generating the underlying expertise. There is, in other words, a close but often underappreciated connection between expert knowledge and the First Amendment.

Each of the three articles of this dissertation offers a distinctive account of how expert knowledge interacts with and informs First Amendment theory and doctrine. Taking an internal view of First Amendment doctrine, *Active Symbols* and *Unprofessional Advice* each chart pathways to introduce more empirical accuracy into existing or developing doctrinal frameworks by drawing upon bodies of relevant expert knowledge. Taking an external view, *Professional Speech* argues for First Amendment protection for professional speech to avoid distortions of

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<sup>1</sup> See, e.g., Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010) (“What has received considerably less theoretical and doctrinal attention is the relationship of the First Amendment to questions of hard fact, and the extent to which, if at all, the standard First Amendment theories, slogans, and doctrines are applicable to questions of demonstrable truth, and, conversely, demonstrable falsity.”).

<sup>2</sup> See ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* xiv (2012).

professional knowledge caused by outside interference. First Amendment protection of professional advice-giving thus ensures the reliable communication of expertise from the professional to the client within the professional-client relationship. Building on this basis, *Unprofessional Advice* offers a theory to delineate the scope of professional advice deserving of First Amendment protection. So doing, it draws a comparison with the treatment of expert knowledge in tort law and evidence. The range of accurate, reliable, and therefore—from the client’s perspective—useful professional advice is to be determined by the knowledge community through its shared methodology.

### ***The Role of Expert Knowledge in Existing First Amendment Doctrine***

The first article offers a new perspective on the role of expert knowledge within existing Establishment Clause doctrine. In *Active Symbols*, I challenge the assumption sometimes articulated in Establishment Clause case law involving religious symbols that visual representations of religious symbols are merely “passive” as compared to textual (spoken or written) religious references. Scientific research shows that in so designating visual representations of religious symbols, the courts have it exactly backwards. Visual images, in fact, are more “active” in their communication than words. Quite notably, this seemingly reflexive misconception is in marked contrast to the Free Speech Clause, where judges have begun more seriously to grapple with the difference between the textual and the visual.<sup>3</sup> A more accurate understanding of how visual images communicate, based on scientific insights generated by an expert community, should likewise inform Establishment Clause doctrine.

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<sup>3</sup> See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 819-21 (2011) (Alito, J., concurring in the judgment) (discussing the difference between written materials and violent video games); *id.* at 851-53 (Breyer, J., dissenting) (distinguishing video games from more passive forms of media).

The role of visual communication has received increasing attention in the literature, and the scholarly analysis of courts' treatment of images across different legal areas likewise applies to Establishment Clause theory and doctrine. Take Rebecca Tushnet's exploration of images in copyright law as an example.<sup>4</sup> She detects a "baseline expectation that text will be the unit of analysis."<sup>5</sup> But, she notes, "[i]mages are more vivid and engaging than mere words," "we process images so quickly," and images "are perceived more as gestalt, while texts appear to the reader in a set sequence, most of all of which needs to be processed for the whole to be understood."<sup>6</sup> These empirical observations concerning visual communication also resonate in the Establishment Clause context.

In Establishment Clause doctrine, the treatment of the high school graduation prayer in *Lee v. Weisman*<sup>7</sup> on the one hand and the Seventh Circuit's apparent difficulty in deciding a case involving a high school graduation held in a church where religious various symbols—including a very large Latin cross—were present<sup>8</sup> on the other illustrates the problem. The lack of judicial expertise on the empirical question of how visual images, as opposed to spoken or written words, communicate has led to a distortion in the development of Establishment Clause doctrine. Thus, I suggest "that characterizing religious symbols as passive is descriptively inaccurate, doctrinally incoherent, and analytically unsound. Nevertheless, this remains a common approach in the courts. As an empirical matter, judges erroneously ascribe a passive quality to visual displays; this is largely based on incorrect assumptions about how visual images communicate."<sup>9</sup> Within

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<sup>4</sup> Rebecca Tushnet, *Worth A Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012).

<sup>5</sup> *Id.* at 688.

<sup>6</sup> *Id.* at 690-91.

<sup>7</sup> 505 U.S. 577 (1992).

<sup>8</sup> *Doe ex rel. Doe v. Elmbrook Sch. Dist. (Elmbrook I)*, 658 F.3d 710 (7th Cir. 2011), *rev'd en banc*, 687 F.3d 840 (7th Cir. 2012).

<sup>9</sup> Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 822 (2013).



the current doctrinal Establishment Clause framework, judges can correct these assumptions by taking relevant expert knowledge into consideration.

To demonstrate how expert knowledge can usefully inform judicial decision-making in order to answer the important empirical question of how images communicate (as distinct from what the symbolic religious message means), I draw on one such body of expert knowledge, the neuroscience of visual perception. Cognitive neuroscience teaches that images are at least as “active” as text. How does this expert knowledge enter into the existing doctrinal framework? I suggest that a focus on communicative impact, as already exists in the Free Speech realm, provides a ready mechanism to introduce an empirically sound approach to Establishment Clause analysis. Justice Breyer’s dissent in the violent video games case has already demonstrated that courts are institutionally able to appreciate these scientific insights.<sup>10</sup> Assessing messages in a medium-neutral manner can reverse the doctrinal distortions caused by erroneously treating religious visual symbols as “passive.”

The implications are potentially much broader than domestic Establishment Clause doctrine. The European Court of Human Rights was faced with a similar question concerning the visual impact of religious symbols in the Italian classroom crucifix case.<sup>11</sup> Thus, the insights gained from expert knowledge regarding the way in which visual religious symbols communicate can inform discussions of the legal treatment of visual religious symbols more generally.<sup>12</sup> And, to

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<sup>10</sup> *Entm’t Merchs. Ass’n*, 564 U.S. at 852 (Breyer, J., dissenting) (explicitly referencing neuroscience research).

<sup>11</sup> *See, e.g.*, Claudia E. Haupt, *Transnational Nonestablishment*, 80 GEO. WASH. L. REV. 991, 1024-31 (2012) (discussing *Lautsi v. Italy*).

<sup>12</sup> *See, e.g.*, Frederick Mark Gedicks & Pasquale Annicchino, *Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confessional Symbols*, 13 FIRST AMEND. L. REV. 71 (2014) (“Based on a review of U.S. Establishment Clause decisions, Claudia Haupt has cogently argued that government display of visual religious symbols is no less problematic than its use of religious texts, and that finding a religious symbol constitutionally acceptable because it is “merely passive” overlooks that the government’s display of such symbols often violates the Establishment Clause by coercing viewers to violate their personal beliefs or by communicating strong government endorsement of religion.”).

make the potential area of application even broader, the cultural shift from textual to visual communication is not confined to religious symbols.<sup>13</sup>

Beyond the First Amendment, an emergent body of literature has turned to investigating the role of images in traditionally text-based legal argument and federal rulemaking.<sup>14</sup> As Elizabeth Porter notes, “[w]e are on the cusp of an analytic shift toward a more vibrant, yet potentially troubling, visual legal discourse.”<sup>15</sup> She suggests that judges and lawyers “don’t take images seriously,” and, as a consequence, “we currently lack tools to deal with . . . risks” associated with their increasing use.<sup>16</sup> “The biggest risk of failing to take images seriously,” Porter contends, “is that . . . law lacks tools and traditions for mitigating the risks of image-driven communication.”<sup>17</sup> As a result, “we have no grammar, no syntax, no canons of interpretation for the visual. We lack the ingrained institutionalized skepticism that we bring to text.”<sup>18</sup> Therefore, she diagnoses a tendency of lawyers and courts to “fall prey to naïve realism—the tendency to believe that images are transparent conveyors of a single truth—and implicit biases.”<sup>19</sup> This naïve realism, according to Porter, manifests itself in a range of areas and distorts legal analysis.<sup>20</sup>

Ultimately, an internal view of Establishment Clause doctrine concerning visual religious symbols must account for the empirical question of how images communicate. The answer can

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<sup>13</sup> See, e.g., Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 787 (2001) (noting the “rapid transmission of pictures and symbols around the globe” and its “sweeping consequences for mass societies, far beyond its effects on law in general, or upon the small corner of Religion Clause law in particular.”).

<sup>14</sup> See, e.g., Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687 (2014); Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183 (2016).

<sup>15</sup> Porter, *Taking Images Seriously*, *supra* note 14, at 1693.

<sup>16</sup> *Id.* at 1694.

<sup>17</sup> *Id.* at 1756.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1758 (“Rebecca Tushnet has convincingly shown that naïve realism infects copyright cases, because ‘excessive judicial self-confidence’ results in decisions that assess artistic works according to unacknowledged and unsophisticated aesthetic judgments. Claudia Haupt has argued that the same lack of visual skepticism has damaged First Amendment doctrine in cases about religious symbols.”).

be provided by expert knowledge. This type of interaction between doctrine and expertise is a point I return to in *Unprofessional Advice*.

### ***A First Amendment Theory to Protect Professional Advice as Expert Knowledge***

*Professional Speech* provides a theory of First Amendment protection for professional speech. The conceptual core of this theory is an understanding of the professions as knowledge communities whose main reason for existence is the generation and dissemination of knowledge. While the concept of “the professions” remains contested, I argue that “knowledge” is the defining character of the learned professions. The professional’s advice is valuable to the client because the client gains access to a body of knowledge that she would not otherwise have. Therefore, I argue, the learned professions are best understood as knowledge communities. Members of these knowledge communities share common ways of knowing and reasoning, that is, a shared methodology, as a result of training and practice. By drawing on a shared body of knowledge, they solve similar problems in their professional practice.

Taking professional knowledge communities as a conceptual starting point, I argue that the First Amendment protects the communication of expert knowledge by a professional to a client, thus providing a shield against state interference that seeks to prescribe or alter the content of professional speech.

The article makes the case for understanding the values underlying professional speech as distinct from those underlying other forms of speech.<sup>21</sup> It rejects the analogy made with

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<sup>21</sup> See, e.g., Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 75 (2016) (“The impulse to treat professional speech as a distinct category is further buttressed by impressive theoretical arguments regarding the distinctive nature of professional speech, particularly when one focuses on the learned professions, a distinctiveness largely marked by the unique training and expertise of such professionals. One of the strongest and most imposing efforts along these lines is Claudia Haupt’s argument that the professional speech doctrine is justified because of professionals’ inherent character as ‘knowledge communities’ or ‘communities whose principal raison d’être is the generation and dissemination of knowledge.’”).

commercial speech, arguing that the underlying interests are fundamentally different.<sup>22</sup> Instead, it suggests that the normative basis of professional speech is best considered on its own terms. Without taking a position regarding the best justification for First Amendment protection of speech generally,<sup>23</sup> I suggest that professional speech protection can be justified under all standard theories. In this approach, this article differs from a leading account of the interaction between expert knowledge and the First Amendment, provided by Post, which emphasizes the role of “democratic legitimation” and “democratic competence.”<sup>24</sup> This mirrors Post’s general First Amendment theory that ascribes a “lexical priority” to participatory democracy theory.<sup>25</sup> This article, by contrast, places equal emphasis on autonomy interests of the speaker and listener. So doing, it builds on the importance of the fiduciary duty between professional and client.<sup>26</sup> In short, listener autonomy can only be served if the professional communicates knowledge that is comprehensive, accurate, and personally tailored to the specific situation of the client. Importantly in professional settings, the ultimate decision rests with the client. Speaker autonomy in this context is not the autonomy to speak one’s own mind, as is the case in public discourse, but to communicate professional insights in accordance with the knowledge community. This is also the fundamental assumption of the tort regime where the benchmark for malpractice liability is exercise of the profession according to skill of a reasonably well-qualified professional.

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<sup>22</sup> See, e.g., Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1349 (2015) (noting that “Halberstam and Post both suggest that professional speech merits protection roughly analogous to that provided for commercial speech. Haupt would peg protection for professional speech to the state of the art in the relevant ‘knowledge community.’ Under her approach, any professional speech that does not follow the discipline’s standard of care, as determined by the expert community, would not be entitled to free speech protection.”).

<sup>23</sup> Cf. Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 119-20 (1986) (suggesting that there is not one exclusive approach to justifying First Amendment protection).

<sup>24</sup> Post, *supra* note 2, at xii-xiii.

<sup>25</sup> See Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2373 (2000).

<sup>26</sup> Cf. Jack M. Balkin, *Information Fiduciaries*, 49 U.C. DAVIS L. REV. 1183, 1218 n.147 (2016) (discussing First Amendment rights within professional relationships).

The article contributes to the larger debate over whether professional speech is a distinctive form of speech,<sup>27</sup> a question that has gained doctrinal significance as the federal appellate courts are in marked disagreement regarding its treatment.<sup>28</sup> For example, a panel of the Eleventh Circuit issued three consecutive conflicting opinions in the same case, highlighting the profound difficulties courts face in analyzing the underlying theoretical and doctrinal questions.<sup>29</sup>

### ***Tailoring First Amendment Doctrine Based on Expert Knowledge***

*Unprofessional Advice* provides a theory to identify the range of valid professional advice for First Amendment purposes. Building on the concept of the professions as knowledge communities, this article explores the range of professional advice that may be given consistent with the professional knowledge community's common ways of knowing and reasoning and the agreed upon methodology. A central question here is where First Amendment protection for professional speech ends and malpractice liability begins. Because knowledge communities are not monolithic, there is a range of knowledge that is accepted as good professional advice. Advice falling within this range should receive robust First Amendment protection. Advice

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<sup>27</sup> Compare *id.* at 68 (“The purpose of this Article is to arrest the momentum of the professional speech doctrine, and urge its rejection.”) with Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 843 (1999); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 947 (conceptualizing “professional speech” as speech “uttered in the course of professional practice” distinct from “speech . . . uttered by a professional.”). I adopt Halberstam’s and Post’s approach, see Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1240 n.1 (2016).

<sup>28</sup> Compare *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (upholding California conversion therapy law as a permissible regulation of *conduct*) with *King v. Christie*, 767 F.3d 216 (3d Cir. 2014) (upholding New Jersey conversion therapy law as permissible regulation of *speech*).

<sup>29</sup> See *Wollschlaeger v. Florida*, 760 F.3d 1195 (11th Cir. 2014) (upholding Florida law prohibiting doctors from inquiring about gun ownership as “a legitimate regulation of professional conduct.”) *vacated and superseded on reh’g* *Wollschlaeger v. Florida*, 797 F.3d 859 (11th Cir. 2015) (upholding the Florida law as “a permissible restriction on physician speech.” The court reached its decision applying “a lesser level of scrutiny” commonly applied in commercial speech cases) *vacated and superseded on reh’g* *Wollschlaeger v. Florida*, 2015 WL 8639875 (11th Cir. Dec 14, 2015) (upholding the Florida law as “a permissible restriction on physician speech.” This time, however, the court applied strict scrutiny.) The Eleventh Circuit then decided the case *en banc*, striking down three of the four provisions of the Florida law, affording professional speech “heightened scrutiny.” See *Wollschlaeger v. Florida*, 2017 WL 632740 (11th Cir. Feb. 16, 2017).

outside of this range, however, is subject to malpractice liability, and the First Amendment provides no defense.

In a move akin to that in *Active Symbols*, this article suggests incorporating expert knowledge into existing doctrine. So doing, it draws on insights from tort law and evidence to provide a theoretical basis for distinguishing good and bad professional advice. Conceptualizing the professions as knowledge communities introduces the idea of a shared methodology.

Knowledge communities, to reiterate, are not monolithic, but their shared notions of validity limit the range of acceptable opinions found within them. With respect to the emphasis on methodology, the article is in conversation with a larger body of literature concerning the role of science in law and policy.<sup>30</sup> Extending protection to good professional advice and imposing malpractice liability on bad advice requires a normative and doctrinal defense for excluding outliers from First Amendment protection when their professional advice diverges too much from the profession's consensus. The question of consensus in turn ties in to this larger discussion of uses of science in law.<sup>31</sup> The profession's "consensus," notwithstanding some epistemic relativism, means that "[i]f most or all members of the relevant thought collective are in agreement, then that collective judgment surely demands a high degree of respect from society in general and the law more particularly."<sup>32</sup>

On this basis, I suggest that the justification for professional advice must be grounded in shared methodology. Those who do not base their advice on the profession's shared methodology place themselves outside of the knowledge community; they are thus *external*

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<sup>30</sup> See, e.g., Symposium: Science Challenges for Law and Policy, 93 TEX. L. REV. 1631 (2015).

<sup>31</sup> As a leading scholar of Science and Technology Studies notes, "the argument is not that science has been able to access unvarnished truth, but rather that scientific communities have been able to set aside all theoretical and methodological disagreements to come together on a shared position." Sheila Jasanoff, *Serviceable Truths: Science for Action in Law and Policy*, 93 TEX. L. REV. 1723, 1741 (2015).

<sup>32</sup> *Id.*

outliers. Those who base their professional advice upon the profession’s shared methodology, but are outside of the profession’s consensus are *internal* outliers. In accordance with the existing tort regime, whether their advice clears the malpractice bar is for the profession itself to decide.

Ultimately, “grounding First Amendment protection of professional speech in the protection of knowledge communities . . . provides a powerful basis for resisting”<sup>33</sup> intrusive state regulation that seeks to alter the content of professional advice. The implications resonate in a number of ways across different professions.<sup>34</sup>

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Through the lens of these three separate but complementary inquiries, I examine the role of expert knowledge in various First Amendment contexts. A tension seems to exist between expert knowledge and the values underlying the First Amendment; Post, in identifying this tension, suggested that “[e]xpert knowledge requires exactly what normal First Amendment doctrine prohibits.”<sup>35</sup> Indeed, the treatment of expert knowledge in First Amendment theory exposes important differences to public discourse. Two aspects stand out: listener interests and speaker

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<sup>33</sup> Carl Coleman, *Reconciling the First Amendment with the Regulation of Professional-Client Communications*, JOTWELL (January 27, 2017) (reviewing Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. (forthcoming 2017)) <http://health.jotwell.com/reconciling-the-first-amendment-with-the-regulation-of-professional-client-communications/> (“By grounding First Amendment protection of professional speech in the protection of knowledge communities, Haupt provides a powerful basis for resisting efforts to prevent physicians from asking the kind of questions that their professional standards require. At the same time, it leaves ample room for regulating professional communications that fall outside professional norms.”).

<sup>34</sup> See, e.g., 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 (Holly F. Lynch, I. Glenn Cohen & Elizabeth Sepper eds., Cambridge University Press forthcoming 2017) (applying analytical framework to health professions); Claudia E. Haupt, *Professional Ethics, Personal Conscience, and Public Expectations*, 27 J. CLINICAL ETHICS 233 (2016) (commenting on American Medical Association policy statement on physician exercise of conscience); Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, 19 U. PA. J. CONST. L. ONLINE \_\_ (forthcoming 2017) (analyzing American Bar Association Model Rule of Professional Conduct 8.4(g)).

<sup>35</sup> Post, *supra* note 2, at 9 (noting that “[i]f content and viewpoint neutrality is ‘the cornerstone of the Supreme Court’s First Amendment jurisprudence,’ the production of expert knowledge rests on quite different foundations.”).

inequality. Both remain generally underexplored in First Amendment theory though they are of foundational importance in the context of professional speech.

The predominant perspective in First Amendment doctrine tends to focus primarily on speaker interests. But in the professional context, this focus is misplaced. Likewise, First Amendment jurisprudence traditionally has been firmly committed to speaker equality in public discourse. The underlying justification is based in democratic theory: a fundamental belief in equality of speakers in public discourse is necessary for equal participation, which in turn forms the basis of democracy. This strong notion of equality of speakers and opinions pervades the First Amendment.

The justifications underlying professional speech protection, however, run opposite to these assumptions. The very purpose of professional speech is to provide useful advice *to the client*. A focus solely on the speaker is misplaced because within the professional-client relationship, the perspective of the listener—who receives access to knowledge from the speaker—is essential. Moreover, the professional deploying her expert knowledge within the professional-client relationship affirmatively is *not equal* to other, non-professional speakers. The existence of a professional-client relationship is key: in public discourse, expert knowledge is just another opinion.<sup>36</sup> But professional advice is *not* just another opinion.

Taken together, these three independent yet related articles illustrate the importance of expert knowledge and its potential for interacting with and informing First Amendment theory and doctrine.

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<sup>36</sup> See Post, *supra* note 2, at 44 (“Within public discourse, traditional First Amendment doctrine systematically transmutes claims of expert knowledge into assertions of opinion.”).



# ACTIVE SYMBOLS

CLAUDIA E. HAUPT\*

**Abstract:** Visual representations of religious symbols continue to puzzle judges. Lacking empirical data on how images communicate, courts routinely dismiss visual religious symbols as “passive.” This Article challenges the notion that symbols are passive, introducing insights from cognitive neuroscience research to Establishment Clause theory and doctrine. It argues that visual symbolic messages can be at least as active as textual messages. Therefore, religious messages should be assessed in a medium-neutral manner in terms of their communicative impact, that is, irrespective of their textual or visual form. Providing a new conceptual framework for assessing religious symbolic messages, this Article reconceptualizes coercion and endorsement—the dominant competing approaches to symbolic messages in Establishment Clause theory—as matters of degree on a spectrum of communicative impact. This focus on communicative impact reconciles the approaches to symbolic speech in the Free Speech and Establishment Clause contexts and allows Establishment Clause theory to more accurately account for underlying normative concerns.

## INTRODUCTION

*It's no help to the cause of constitutional interpretation that religion is an emotional subject and that there is no systematic evidence of the social, political, psychological, cultural, ethical, or indeed religious consequences of the display of religious symbols in today's United States. Here as elsewhere evidence-based law remains a dream.*

—Judge Richard Posner<sup>1</sup>

Consider two public school graduation ceremonies. During the first ceremony, held at the school, an invited member of the clergy steps onto the stage

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<sup>1</sup> Doe *ex rel.* Doe v. Elmbrook Sch. Dist. (*Elmbrook II*), 687 F.3d 840, 873 (7th Cir. 2012) (en banc) (Posner, J., dissenting).

and offers an invocation and benediction—both are nonsectarian.<sup>2</sup> The second graduation ceremony is held not in the school building but rather “in the main sanctuary of . . . a local Christian evangelical and non-denominational” church where “[a]n enormous Latin cross, fixed to the wall, hangs over the dais and dominates the proceedings.”<sup>3</sup> But none of the participants engage in prayer or make any reference to the cross, other religious symbols present in the church, or religion generally.

The U.S. Supreme Court held that the first scenario was unconstitutional as a violation of the Establishment Clause in *Lee v. Weisman*.<sup>4</sup> The second scenario, conversely, was initially upheld by a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit—the first federal appellate court to rule on the constitutionality of the practice of holding public school graduation ceremonies in houses of worship—against an Establishment Clause challenge.<sup>5</sup> The Seventh Circuit later reversed en banc, but over strong dissents from judges Ripple, Easterbrook, and Posner.<sup>6</sup>

Do religious *symbols* communicate messages differently than religious *words* in prayer or scripture? Courts have repeatedly dismissed visual representations of religious symbols as merely “passive,” crafting a distinction between the visual and the textual that significantly underestimates the communicative power of the former. This suggests that courts deem visual religious displays less powerful, and therefore, less constitutionally suspect than textual religious messages. Are religious visual symbols more benign than prayer because they are merely “passive”? This question—fundamentally important both for Establishment Clause theory and doctrine—remains underexplored in the literature.

This Article argues that characterizing religious symbols as passive is descriptively inaccurate, doctrinally incoherent, and analytically unsound. Nevertheless, this remains a common approach in the courts. As an empirical matter, judges erroneously ascribe a passive quality to visual displays; this is largely based on incorrect assumptions about how visual images communicate.<sup>7</sup> Courts

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<sup>2</sup> *Lee v. Weisman*, 505 U.S. 577, 581–84 (1992).

<sup>3</sup> *Doe ex rel. Doe v. Elmbrook Sch. Dist. (Elmbrook I)*, 658 F.3d 710, 712–13, 715 (7th Cir. 2011), *rev'd en banc*, 687 F.3d 840 (7th Cir. 2012).

<sup>4</sup> *Lee*, 505 U.S. at 586.

<sup>5</sup> *See Elmbrook I*, 658 F.3d at 712.

<sup>6</sup> *Elmbrook II*, 687 F.3d at 843; *id.* at 861 (Ripple, J., dissenting); *id.* at 869 (Easterbrook, C.J., dissenting); *id.* at 872 (Posner, J., dissenting).

<sup>7</sup> *See infra* notes 138–238 and accompanying text. Assessing the difference between the textual and the visual is not just an Establishment Clause concern. *See, e.g.*, Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. (forthcoming 2014) (manuscript at 2), available at <http://ssrn.com/abstract=2258742>, archived at <http://perma.cc/7DD7-TAE9> (discussing “the new trend of compelled visual speech” and its First Amendment implications). Beyond the First Amendment, the role of the visual recently has received attention in areas such as evidence, copyright, and trademark law.

tend to assume a lower intensity of communicative impact when religious symbols are at issue than when spoken or written religious words are at issue, manifesting a hierarchical binary: text is presumed active and privileged over images which are merely passive.<sup>8</sup> In doing so, this Article argues, the courts have it exactly backwards.

In contrast to the Establishment Clause context, courts have made incipient efforts in the speech context to evaluate the distinctions between the textual and the visual.<sup>9</sup> The notion that certain visual expressions are “passive” is challenged in the speech cases, putting into stark contrast the recognized power of images in these cases with the “passive” designation in cases involving visual religious symbols. To moderate that disconnect, this Article makes the case for more symmetry within the First Amendment as it concerns empirical claims regarding the perception of visual symbols.

The novelty of the approach to visual symbols presented in this Article lies in the insight that by neglecting the difference between the textual and the visual, Establishment Clause theory and doctrine overlook a distinction that is important for assessing the communicative impact of the message. Unlike other approaches that prefer to textualize the symbols or do not explicitly distinguish between the visual and the textual,<sup>10</sup> this Article argues that the inquiry best starts with the visual image. First, as an empirical matter, how do images—and, by extension, visual representations of religious symbols—communicate? Second, as a matter

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*See, e.g.*, NEAL FEIGENSON & CHRISTINA SPIESEL, *LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT* 104 (2009) (discussing the role of visuals in evidence law); Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1385–86 (2011) (discussing the purposes of visual symbols in the context of trademark law); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009) (discussing the effects of “competing factual perceptions” in evidence law); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 687 (2012) (discussing images in the context of copyright law).

<sup>8</sup> *See generally* JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak, trans., The Johns Hopkins Univ. Press, rev. ed. 1998) (1967) (discussing the historical hierarchical binaries that dominate Western thought, including that between the active and the passive). Scholars have observed this phenomenon in other speech contexts as well. *See, e.g.*, Corbin, *supra* note 7, at 24–25 (discussing compelled speech and the reason/emotion binary).

<sup>9</sup> *See, e.g.*, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2750–51 (2011) (Alito, J., concurring in the judgment) (discussing the difference between written materials and violent video games); *id.* at 2768–69 (Breyer, J., dissenting) (distinguishing video games from more passive forms of media); *see also* *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1211–13 (D.C. Cir. 2012) (discussing textual and visual warning statements on cigarette packages).

<sup>10</sup> *See, e.g.*, B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 493 (2005) (textualizing visual images); Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1016 (2005) (initially focusing on the religious objects and symbols); Mark Strasser, *Passive Observers, Passive Displays, and the Establishment Clause*, 14 LEWIS & CLARK L. REV. 1123, 1130–34 (2010) (not explicitly distinguishing between the visual and the textual).

of cultural interpretation, what do symbols mean? This second step of the analysis draws from the existing literature on the interpretation of religious symbols.<sup>11</sup> Although some have observed that courts fail to appreciate the power of symbols, placing them at “the bottom of the speech hierarchy,”<sup>12</sup> the visual nature of religious symbols remains underexamined. Scholars have occasionally criticized the characterization of religious symbols as “passive.”<sup>13</sup> But what is noticeably absent from the literature critical of the “passive” characterization is an empirical assessment of whether it is descriptively accurate; this Article concludes that it is not.

That religious symbolic images are powerful is not a new insight; the bouts of iconoclasm during the Protestant Reformation in the sixteenth century, for instance, suggest as much. But engaging the power of images and the power of words equally in what this Article calls a “medium-neutral approach” is necessary to strike the correct normative balance in Establishment Clause theory.

This Article proceeds from the normative premise that the State may not adopt a religious identity; it may neither determine its own religious preference nor communicate such a preference to its citizens.<sup>14</sup> The underlying concern is to avoid harm resulting from excluding groups of citizens from fully engaging in democratic participation, an interest grounded in political theory considerations. All citizens, regardless of religious affiliation or lack thereof, will rely on the state’s responsiveness to their concerns. In the free speech context, Robert Post articulated the value of participatory democracy as allowing citizens to “experience the value of self-government.”<sup>15</sup> Similar considerations obtain with respect to nonestablishment: “[e]very group must be able to compete for political influence and participate in determining a society’s identity and goals and the means to achieve them.”<sup>16</sup> This is particularly important in a democratic society with increasing religious pluralism, both among religious groups and

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<sup>11</sup> See *infra* notes 239–299 and accompanying text.

<sup>12</sup> Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2394 (2004).

<sup>13</sup> See, e.g., Ravitch, *supra* note 10, at 1016 (asserting that “there is no such thing as a ‘passive’ religious object or symbol”); Strasser, *supra* note 10, at 1124 (criticizing the lack of clarity in judicial uses of the term).

<sup>14</sup> See Charles Taylor, *The Meaning of Secularism*, HEDGEHOG REV., Fall 2010, at 23, 23 (stating that “no religious outlook or (religious or areligious) *Weltanschauung* can enjoy a privileged status, let alone be adopted as the official view of the state”).

<sup>15</sup> Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 483 (2011). The objective of participation under this theory is “making government responsive to their views.” *Id.* at 484. Each citizen must equally have the opportunity to participate; indeed, this equal opportunity is deemed “vital to the legitimacy of the entire legal system.” James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 498 (2011).

<sup>16</sup> Claudia E. Haupt, *Transnational Nonestablishment*, 80 GEO. WASH. L. REV. 991, 1061 (2012).

between religion and nonreligion. When the State assumes its own religious identity, it jeopardizes this fundamental value.

This Article proceeds in a descriptive, an empirical-analytic, and a prescriptive part. Part I explicates the two dominant approaches to Establishment Clause questions involving symbolic communicative acts—coercion and endorsement.<sup>17</sup> The prevailing current theory conceives of coercion and endorsement as different in kind. This Part then explains how the notion of “passive” symbols maps onto these two central theories. It demonstrates that the passive quality courts ascribe to religious symbols operates in a constitutionally relevant manner. But the notion that visual religious symbols are passive—in contrast to textual religious messages—is based on a misconception about the communicative power of images. Judicial assessments of visual religious symbols are missing important empirical information about how visual images communicate. Yet, empirical evidence is readily available.

Part II imports cognitive neuroscience literature<sup>18</sup>—both as primary source material and as applied to other areas of the law (in what is sometimes described as the emerging field of “neurolaw”<sup>19</sup>)—into Establishment Clause theory.<sup>20</sup> As this Part explains, empirical evidence from the field of cognitive neuroscience teaches us that the human brain processes words and images differently. Images are processed at higher rates than textual components and they are more directly linked to emotion than text.<sup>21</sup> Visual symbolic messages

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<sup>17</sup> See *infra* notes 24–137 and accompanying text.

<sup>18</sup> Cognitive neuroscience emerged in the 1990s as a result of combining psychology with the functional analysis of the brain made possible by technological advances in brain imaging. See Oliver R. Goodenough & Micaela Tucker, *Law and Cognitive Neuroscience*, 6 ANN. REV. L. & SOC. SCI. 61, 63–65 (2010).

<sup>19</sup> Neurolaw is the combined study of law and neuroscience. *Id.* at 63–65 (providing a brief overview of the development of neurolaw). Insights from neuroscience are increasingly playing a role in the legal field, both in case law and legal academic literature. See, e.g., *Entm't Merchs. Ass'n*, 131 S. Ct. at 2768 (Breyer, J., dissenting) (discussing neuroscience data); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (discussing “brain science”); Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States*, 62 STAN. L. REV. 1119, 1134–35 (2010); Nita A. Farahany, *Incriminating Thoughts*, 64 STAN. L. REV. 351, 366–68 (2012); Amanda C. Pustilnik, *Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law*, 97 CORNELL L. REV. 801, 815–16 (2012); Erez Reuveni, *Copyright, Neuroscience, and Creativity*, 64 ALA. L. REV. 735, 738 (2013); Frederick Schauer, *Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond*, 95 CORNELL L. REV. 1191, 1203–04 (2010); Lois A. Weithorn, *Developmental Neuroscience, Children's Relationships with Primary Caregivers, and Child Protection Policy Reform*, 63 HASTINGS L.J. 1487, 1537–41 (2012); Dominique J. Church, Note, *Neuroscience in the Courtroom: An International Concern*, 53 WM. & MARY L. REV. 1825, 1831–40 (2012). See generally NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE (Brent Garland ed., 2004) (providing a report and commissioned papers discussing the relationship between neuroscience and the law); Kevin Davis, *Brain Trials*, A.B.A. J., Nov. 2012, at 37, 42 (providing a perspective on neuroscience in the courtroom).

<sup>20</sup> See *infra* notes 151–187 and accompanying text.

<sup>21</sup> See *infra* notes 151–187 and accompanying text.

therefore can be at least as active as textual symbolic messages. Further, this Part analyzes how these characteristics of visual images implicate constitutional analysis in the speech context. There, several Supreme Court opinions display a—largely intuitive—assessment of the visual and textual that indicates a higher sensitivity to the communicative power of images than in the Establishment Clause context. Finally, this Part distinguishes the empirical claim—how images communicate—from the cultural interpretation of what symbols mean.

Part III explains what these insights mean as a prescriptive matter for Establishment Clause theory and, more broadly, First Amendment approaches to visual symbols.<sup>22</sup> It makes three discrete contributions to First Amendment theory, both in the Free Speech and the Establishment Clause context. First, the theoretical and doctrinal approach to religious symbols ought to be reassessed in light of the empirical evidence on how images communicate. The characterization of religious symbols as “passive” is inaccurate, so at a minimum, the prescriptive lesson is to abandon it and treat visual representations of religious symbols the same as spoken or written religious texts. Second, contributing to greater symmetry within the First Amendment, this Part moves to reconcile the treatment of visual symbolic messages in Free Speech and Establishment Clause theory by shifting the focus to communicative impact. Third, having abandoned the active/passive distinction, the evaluation of religious symbolic messages—like that of textual messages—ought to be conceptualized according to their communicative impact, irrespective of the medium by which they are conveyed. This Part provides a novel conceptual framework for doing so. Within the communicative impact framework, in which endorsement and coercion are reconceptualized as matters of degree rather than kind, the medium-neutral focus on communicative impact allows us to more accurately account for the underlying theoretical concerns of the Establishment Clause. The foundational normative concern is that the State may not take on its own religious identity, and therefore may also not communicate its own religious preference. For such a communicative act expressing the state’s religious identity or preference, the medium used to convey the message is secondary to its communicative impact.

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<sup>22</sup> See *infra* notes 300–364 and accompanying text.

## I. FROM WORDS TO IMAGES

Although law traditionally has been mostly concerned with texts,<sup>23</sup> the cultural—and therefore also legal—significance of visuals has increased quite dramatically.<sup>24</sup> This increased significance of visuals is reflected in the Establishment Clause context. The two graduation scenarios used in the introductory example illustrate a shift in Establishment Clause litigation over time: from a focus on words to images; from a focus on the textual to the visual.<sup>25</sup>

In the Supreme Court, the first Establishment Clause cases were about money,<sup>26</sup> then spoken prayers and devotional Bible readings.<sup>27</sup> Over time, disputes increasingly involved public displays of religious messages. Among these were textual displays, such as the Ten Commandments, and nontextual displays.<sup>28</sup> The first two iconic Supreme Court cases involving nontextual religious imagery in Christmas displays, decided in the 1980s, were *Lynch v. Donnelly* and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*.<sup>29</sup> More recently, the Supreme Court confronted the display of a Latin cross directly in

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<sup>23</sup> See Christina Spiesel, *Reflections on Reading: Words and Pictures and Law*, in LAW, MIND AND BRAIN 391, 391 (Michael Freeman & Oliver R. Goodenough eds., 2009) (“[Law] has thought of itself as pre-eminently about the use of words and their linear logics.”).

<sup>24</sup> FEIGENSON & SPIESEL, *supra* note 7, at 10 (asserting that “our culture, and increasingly now the law as well—has gone visual”); Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 787 (2001) (discussing the “rapid transmission of pictures and symbols around the globe” and its “sweeping consequences for mass societies, far beyond its effect on law in general, or upon the small corner of Religion Clause law in particular”).

<sup>25</sup> *Cf.* Lupu, *supra* note 24, at 788 (“In a fast-moving political culture in which visual images dominate public focus, public controversy over matters of government speech about religion can be expected to take precedence over issues of government money in support of religion.”).

<sup>26</sup> See *Bradfield v. Roberts*, 175 U.S. 291, 292–93 (1899) (holding that congressional funding for a Roman Catholic hospital in Washington, D.C. was permissible).

<sup>27</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985) (holding that state law authorizing a one-minute period of silence for prayer or meditation at the beginning of the school day violated the Establishment Clause); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963) (holding that a state action requiring Bible passages be read at the opening of the school day violated the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421, 422–24 (1962) (holding that public school prayer violated Establishment Clause).

<sup>28</sup> *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 858 (2005) (holding unconstitutional a Ten Commandments display in a courthouse); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (plurality opinion) (holding constitutional a Ten Commandments display on the grounds of the Texas Capitol); *Stone v. Graham*, 449 U.S. 39, 40 (1980) (per curiam) (holding unconstitutional a Ten Commandments display in school classrooms); see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (holding that no First Amendment claim to forum access existed for a religious display in a park that contained Ten Commandments).

<sup>29</sup> *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 579 (1989) (holding unconstitutional a Christmas display featuring crèche in a courthouse, while holding constitutional a Christmas display featuring a Christmas tree and menorah on public property); *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (holding constitutional a Christmas display featuring a crèche on public property).

a case involving a veterans' memorial in the Mojave Desert.<sup>30</sup> The Court has since denied certiorari in two other cases involving the Latin cross.<sup>31</sup>

As the role of religious symbols became more controversial, such cases became more salient.<sup>32</sup> But the approach to visual symbols remains under-theorized and subject to criticism.<sup>33</sup> The Supreme Court most recently revisited the Establishment Clause in a textual speech case, upholding the practice of legislative prayer at town board meetings.<sup>34</sup> The resulting doctrinal parameters must take account of symbolic messages in future cases. Indeed, a challenge in the *Elmbrook* graduation-at-church case is already before the Court.<sup>35</sup> Disputes over symbols will continue to arise, forcing courts to engage the power of visuals.

### A. Coercion and Endorsement as Distinct in Kind

The key divide in theoretical and doctrinal approaches to the Establishment Clause remains that between coercion and endorsement.<sup>36</sup> The doctrinal fundamentals with respect to religious symbols are relatively simple, but increasingly contested. The primary doctrinal basis remains the three-part test articulated by the Supreme Court in *Lemon v. Kurtzman*.<sup>37</sup> Justice Sandra Day

<sup>30</sup> *Salazar v. Buono*, 559 U.S. 700, 706 (2010); see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (holding that a First Amendment claim to forum access existed for a cross display).

<sup>31</sup> See *Mount Soledad Mem'l Ass'n v. Trunk (Trunk IV)*, 132 S. Ct. 2535, 2535 (2012) (denying certiorari on a case where the Ninth Circuit held that the Mount Soledad war memorial violated the Establishment Clause); *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 12 (2011) (denying certiorari where the Tenth Circuit held that memorial crosses next to highways were unconstitutional).

<sup>32</sup> Cf. 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 74 (2008) (suggesting as the underlying reason that cases involving religious texts and symbols in public places did not reach the Supreme Court until 1980 "that various long-standing practices reflecting a Christian point of view have grown to seem more problematic than they had to earlier generations").

<sup>33</sup> See, e.g., *Utah Highway*, 132 S. Ct. at 22 (Thomas, J., dissenting from denial of cert.) (noting in the context of Establishment Clause cases involving religious symbols, that "it is difficult to imagine an area of the law more in need of clarity").

<sup>34</sup> See *Town of Greece v. Galloway*, No. 12-696, slip op. at 1 (U.S. May 5, 2014).

<sup>35</sup> See Petition for a Writ of Certiorari at 1, *Elmbrook II*, 687 F.3d 840 (No. 12-755), 2012 WL 6693652, at \*1. One of the questions presented in the *Elmbrook* petition to the Supreme Court is: "[w]hether the government 'coerces' religious activity . . . where there is no pressure to engage in a religious practice or activity, but merely exposure to religious symbols." *Id.* at \*i.

<sup>36</sup> There are other tests and standards used in Establishment Clause adjudication. See 2 GREENAWALT, *supra* note 32, at 157–93. This Article focuses on coercion and endorsement because they are the predominant approaches to communicative acts. The active/passive distinction is most salient for the two categories—coercive action and symbolic endorsement—created by these inquiries. For a discussion of the tests and standards used, see 2 GREENAWALT, *supra* note 32, at 157–93.

<sup>37</sup> 403 U.S. 602, 612–13 (1971). The classic formula of this three-prong test states: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government



O'Connor subsequently conceived the endorsement test as a clarification of the *Lemon* test in cases involving visual religious displays, such as a nativity scene and a Latin cross.<sup>38</sup> But the coercion and endorsement approaches also constitute larger, competing theories underlying the Establishment Clause. Thus far, Establishment Clause theory typically treats coercion and endorsement as different in kind.<sup>39</sup>

The endorsement test inquires whether—from the perspective of a reasonable observer—the State endorses (or condemns) a religious practice.<sup>40</sup> Its normative basis is grounded in political theory: the harm against which the Establishment Clause is designed to protect is “send[ing] a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>41</sup>

The other major approach is the coercion inquiry. Justice Antonin Scalia in *McCreary County v. ACLU of Kentucky* and Justice Anthony Kennedy in *County of Allegheny* expressed a preference for applying a coercion theory in cases involving religious symbols.<sup>42</sup> But the coercion inquiry has taken different forms depending on the interpretive scope of coercion. Michael McConnell has described “religious coercion as the fundamental evil against which the [Establishment] [C]lause is directed.”<sup>43</sup> The coercion inquiry will find a practice with “coercive impact”<sup>44</sup> unconstitutional, and for some, only a coercive practice will violate the Establishment Clause.<sup>45</sup> Christmas displays, for exam-

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entanglement with religion.” *Id.* at 612–13 (citations omitted) (internal quotation marks omitted). Though much maligned, the Court never explicitly overruled the *Lemon* test; it did, however, choose not to employ the test in several cases involving religious displays. *See, e.g., Utah Highway*, 132 S. Ct. at 21 (Thomas, J., dissenting from denial of cert.) (asserting that “five sitting Justices have questioned or decried the *Lemon*/endorsement test’s continued use”); *McCreary Cnty.*, 545 U.S. at 861 (declining to abandon the *Lemon* test); *Van Orden*, 545 U.S. at 686–87 (plurality opinion) (noting that the *Lemon* test is “not useful in dealing with the . . . passive monument”).

<sup>38</sup> *See Pinette*, 515 U.S. at 772 (O’Connor, J., concurring) (discussing the endorsement test in a case concerning a Latin cross); *Lynch*, 465 U.S. at 688–89 (O’Connor, J., concurring) (discussing the endorsement test in a case concerning a nativity scene). Although the endorsement test as originally proposed combines the first two prongs of the *Lemon* test, it has since arguably developed into a competing theory. *See* 2 GREENAWALT, *supra* note 32, at 46.

<sup>39</sup> *See infra* notes 40–59 and accompanying text.

<sup>40</sup> *See Pinette*, 515 U.S. at 780–81 (O’Connor, J., concurring); *Cnty. of Allegheny*, 492 U.S. at 620.

<sup>41</sup> *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

<sup>42</sup> *McCreary Cnty.*, 545 U.S. at 908–09 (Scalia, J., dissenting); *Cnty. of Allegheny*, 492 U.S. at 662 (Kennedy, J., concurring in part and dissenting in part).

<sup>43</sup> Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 939 (1986).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 937 (“If Madison’s explanations to the First Congress are any guide, compulsion is not just an element, it is the essence of an establishment.”).

ple, though “manifestations of religion in public life,” are constitutional under this theory because they “entail no use of the taxing power and have no coercive effect.”<sup>46</sup> The coercion theory arguably is on the rise in the Supreme Court.<sup>47</sup> The problem, of course, is to determine the meaning of “coercion.”<sup>48</sup>

Contrasting Justice Kennedy’s majority opinion and Justice Scalia’s dissent in *Lee*, the school prayer case used in the introductory example, illustrates the possible scope of coercion. Starting from the premise that the Establishment Clause prohibits coercion into participation or support of “religion or its exercise,”<sup>49</sup> Justice Kennedy’s interpretation of coercion encompasses “public pressure” and “peer pressure” on students attending a graduation ceremony to stand silently during prayer.<sup>50</sup> By contrast, Justice Scalia’s dissent rejects the idea of “psychological coercion.”<sup>51</sup> He suggests that the historical understanding of the Establishment Clause prohibited “coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.”<sup>52</sup> In addition, Justice Scalia deems impermissible state endorsement of divisive sectarian positions; nondenominational prayers, however, are permissible.<sup>53</sup> Importantly, he points out that in *Lee* “no one [was] legally coerced to recite [prayers]” — thus making compelled activity of the audience a key element of his understanding of coercion.<sup>54</sup> For a majority of the Supreme Court Justices and scholars, however, a lack of coercion does not necessarily result in a finding of constitutionality.<sup>55</sup>

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<sup>46</sup> *Id.* at 939.

<sup>47</sup> See, e.g., Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211, 1252 (2011) (“The Court’s new majority may be edging towards a holding that government is free to promote Christianity as long as it does so noncoercively.”); cf. *Greece*, No. 12-696, slip op. at 21–22 (relying primarily on the coercion theory). The decision in *Town of Greece v. Galloway* displayed a difference in the definition of coercion between the opinion for the Court authored by Justice Kennedy—joined in relevant Part II-B by Chief Justice John Roberts and Justice Samuel Alito—and the concurrence authored by Justice Clarence Thomas and joined, in relevant Part II, by Justice Scalia. Compare *id.* at 22 (noting that coercion does not arise when the prayers at question “neither chastised dissenters nor attempted lengthy disquisition on religious dogma”), with *id.* at 7 (Thomas, J., concurring) (defining coercion in the Establishment Clause context as “actual legal coercion . . . not the ‘subtle coercive pressures’ allegedly felt by respondents in this case”). This reflects Justice Kennedy’s and Justice Scalia’s diverging understandings of coercion. See *infra* notes 49–59 and accompanying text.

<sup>48</sup> Cf. *McConnell*, *supra* note 43, at 941 (declining to offer a definition).

<sup>49</sup> *Lee*, 505 U.S. at 587.

<sup>50</sup> *Id.* at 593 (“This pressure, though subtle and indirect, can be as real as any overt compulsion.”).

<sup>51</sup> *Id.* at 636–39 (Scalia, J., dissenting).

<sup>52</sup> *Id.* at 640.

<sup>53</sup> *Id.* at 641.

<sup>54</sup> *Id.* at 641–42.

<sup>55</sup> See *id.* at 604 (Blackmun, J., concurring) (“The Court has repeatedly recognized that a violation of the Establishment Clause is not predicated on coercion.”); 2 GREENAWALT, *supra* note 32, at 157.

Coercion as envisioned by Justice Scalia is a different category of infringement than endorsement. Justice Scalia's version arguably makes the Establishment Clause redundant because the types of infringement he discusses—compelled church attendance, disadvantages for dissenters, and the like<sup>56</sup>—are impermissible as a matter of free exercise.<sup>57</sup> This is a categorically different harm than that caused by state endorsement of religion that does not violate an individual's right to free exercise. As the contrast between Justice Kennedy's and Justice Scalia's interpretations of coercion in *Lee* shows, coercion can indicate a wider or narrower category of state actions prohibited under the Establishment Clause. Although Justice Kennedy expressed a preference for an underlying theory of coercion,<sup>58</sup> it is difficult to uphold a categorical distinction between coercion and endorsement in light of his interpretation. Indeed, Justice Kennedy's interpretation of coercion approximates endorsement, whereas Justice Scalia maintains that there is “no warrant for expanding the concept of coercion beyond acts backed by threat of penalty.”<sup>59</sup> These variations are only necessary if one follows the theory that Establishment Clause violations are only possible as a matter of coercion and that coercion and endorsement are different in kind. But even if this line can be drawn with some clarity, the resulting categories do not pay sufficient respect to the subtle shifts in communicative impact that religious messages can have.

### B. Visual Communication and Passivity

What do courts mean when they characterize a visual religious symbol as “passive”? Is “passive” always synonymous with “noncoercive”? Courts, as a doctrinal matter, typically use the endorsement test for evaluating religious symbolic displays.<sup>60</sup> But a close reading of the relevant cases reveals that judges are most likely to use the “passive” label in opinions upholding the displays in question, signaling in their reasoning that they are adopting a type of coercion inquiry that may or may not be made explicit.<sup>61</sup> This paradox—explicit use of the endorsement test and implicit assertion of noncoerciveness by applying the “passive” label—has significant traction in cases involving “passive symbols” and perhaps explains some of the confusion and unpredictability of outcomes in this area of the law. The distinction in kind between endorsement

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<sup>56</sup> See *Lee*, 505 U.S. at 640–41 (Scalia, J., dissenting).

<sup>57</sup> See *id.* at 621 (Souter, J., concurring) (arguing that this approach “would render the Establishment Clause a virtual nullity”).

<sup>58</sup> See *id.* at 587 (majority opinion); *Cnty. of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part).

<sup>59</sup> *Lee*, 505 U.S. at 642 (Scalia, J., dissenting).

<sup>60</sup> See, e.g., *Cnty. of Allegheny*, 492 U.S. at 620 (employing the endorsement test).

<sup>61</sup> See *infra* notes 62–137 and accompanying text.

and coercion invites discarding visual images as passive, and the relevant case law indicates that courts are often amenable to this invitation.

Following an underlying coercion theory, judges will likely make a distinction between active and passive, where passive denotes “noncoercive.” Following an endorsement theory, however, such a distinction would be largely irrelevant. Thus, to the extent that “passive” merely is synonymous with “noncoercive,” it signals that the judge’s underlying Establishment Clause theory is in doctrinal opposition to the endorsement approach. But as one scholar notes, “[t]he psychological pressure to remain respectfully silent in the face of a symbol one finds objectionable” may in fact also have a “subtle coercive effect” on the observer.<sup>62</sup> This also suggests that the label “passive” is unlikely to describe the audience in a constitutionally relevant manner, because the audience is always free to remain silent (passive), as seen in *Lee*.<sup>63</sup> The basic idea of coercion is that individuals cannot be compelled to act; thus, it is unlikely that “passive” means passivity of the observer. It is more likely that it refers to the manner in which the symbol communicates its message.

It is difficult to discern how much analytical weight courts actually place on the designation of visuals as “passive.” A skeptic might contend that the term has no independent, constitutionally relevant meaning. If “passive” indeed served no purpose beyond embellishment, courts ought to immediately abandon it. A related line of criticism might suggest that the term “passive” does not neatly align with “visual.” As will be shown, more often than not, it does. And in any event, the underlying problem—the disparate treatment of textual and visual communication where courts assume a hierarchy that privileges the former—remains.

The following discussion proceeds from the premise that “passive” has independent meaning. The sheer frequency of its use and its pervasiveness in cases involving religious symbols—not only domestically but also abroad<sup>64</sup>—

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<sup>62</sup> Mark L. Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, 1 OXFORD J.L. & RELIGION 1, 5 (2012).

<sup>63</sup> *Lee*, 505 U.S. at 593; cf. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding unconstitutional a compulsory flag salute).

<sup>64</sup> See *Lautsi v. Italy*, App. No. 30814/06, at \*1, \*29 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>, archived at <http://perma.cc/Q4D3-ZMLZ>. Though this Article focuses solely on domestic developments, it is worth noting that foreign courts have also used the language of “passive symbols,” most prominently perhaps the European Court of Human Rights in 2011, in *Lautsi v. Italy*, where the court allowed classroom crucifixes in Italian public schools. See *id.* at \*31–32.

The Italian government argued that “[w]hatever the evocative power of an ‘image’ might be . . . it was a ‘passive symbol,’ whose impact on individuals was not comparable with the impact of ‘active conduct.’” *Id.* at \*16. Referencing an earlier decision of the German Federal Constitutional Court, the applicants conversely argued “[a]s to the assertion that it was merely a ‘passive symbol,’ this ignored the fact that like all symbols—and more than all others—it gave material form to a cognitive, intuitive and emotional reality which went beyond the immediately perceptible.” *Id.* at \*18. The Grand Cham-

suggest that it does. Indeed, “passive” is used to discard the communicative power of visuals. This hierarchical understanding of words and images, this Article argues, is ill-conceived.

The following Subsections explore how courts analyze visual religious iconography in comparison to textual religious messages in three contexts: religious imagery in public displays, the use of religious buildings for government-sponsored secular purposes, and the use of religious imagery in expressions of government identity.<sup>65</sup> The discussion reveals that the “passive” designation can plausibly function in two ways—alternatively or cumulatively—in order to justify disparate treatment of visuals and text. First, “passive” can denote an empirical claim regarding the manner in which visual images communicate. Passivity in this sense suggests less ability to communicate effectively than textual speech. Second, “passive” can denote a bundle of factors, including brief exposure to the symbol, a vague notion of minimal offensiveness, or other characteristics of the symbol that result in its presumed noncoerciveness. But these notions, unlike the empirical claim, go to the context and cultural meaning of the symbol. The empirical claim is false;<sup>66</sup> the cultural claim is complex and the “passive” designation is at best an ambiguous and misleading label.<sup>67</sup>

### 1. Religious Imagery in Public Displays

In *Lynch*—the progenitor case of visual symbolic religious displays—the Supreme Court upheld a holiday display on public property that featured a

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ber explicitly addressed the active/passive distinction, stating that a crucifix on a wall is an “essentially passive symbol and this point is of importance in the Court’s view, particularly having regard to the principle of neutrality. It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.” *Id.* at \*29.

Several concurring opinions also addressed the designation of the crucifix as a “passive” symbol. *See id.* at \*34–37 (Rozakis, J., concurring); *id.* at \*38–43 (Bonello, J., concurring); *id.* at \*44–46 (Power, J., concurring). The concurring opinion of Judge Ann Power agreed with the majority’s assessment of the crucifix as a passive symbol “insofar as the symbol’s passivity is not in any way coercive,” but her assessment was more nuanced. *See id.* at \*45 (Power, J., concurring). She “concede[d] that, in principle, symbols (whether religious, cultural or otherwise) are carriers of meaning. They may be silent but they may, nevertheless, speak volumes without, however, doing so in a coercive or in an indoctrinating manner.” *See id.* As she framed it, the question thus is not whether symbols can communicate like textual language—she asserts they can—but whether the message communicated is one that violates the negative religious freedom of the observer under the Convention. *See id.*; *see also* Haupt, *supra* note 16, at 1024–32 (discussing *Lautsi*).

<sup>65</sup> *See infra* notes 68–102 and accompanying text (religious imagery in public displays); *infra* notes 103–123 and accompanying text (religious buildings for government-sponsored secular purposes); *infra* notes 124–137 and accompanying text (religious imagery in expressions of government identity).

<sup>66</sup> *See infra* notes 151–187 and accompanying text.

<sup>67</sup> *See infra* notes 239–299 and accompanying text.

crèche among various other (nonreligious) elements.<sup>68</sup> Chief Justice Warren Burger stated “[t]he crèche, like a painting, is passive; admittedly it is a reminder of the origins of Christmas.”<sup>69</sup> Further, he stated:

To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while Congress and Legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings.<sup>70</sup>

In short, if spoken and sung textual messages are allowed, a “passive” visual message ought to be permissible as well. But comparing the crèche to a painting suggests that its visual nature plays some role. Although it might refer to the aesthetic interest the town might have in displaying the crèche—similar to the interest in displaying a painting<sup>71</sup>—it would be rather nonobvious to describe this aesthetic interest as “passive.”

In *County of Allegheny*, another Christmas display case, Justice Kennedy stated that “where the government’s act of recognition or accommodation is passive and symbolic . . . any intangible benefit to religion is unlikely to present a realistic risk of establishment. Absent coercion, the risk of infringement on religious liberty by passive or symbolic accommodation is minimal.”<sup>72</sup> In this context, “passive” describes the government’s posture towards the symbols; it does not describe the way the symbols communicate or the effect they have on observers.<sup>73</sup> But in the same case, Justice Kennedy uses “passive” to describe the display itself; this is more closely related to the visual character of the symbol.<sup>74</sup> Further, Justice Kennedy noted that “[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.”<sup>75</sup> In this instance, the passive nature seems to indicate that the display itself does not “speak” and that the observer can easily avert exposure to its message.

<sup>68</sup> 645 U.S. at 685.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 686.

<sup>71</sup> *Cf.* 2 GREENAWALT, *supra* note 32, at 76 (offering this interpretation but finding it likewise unconvincing).

<sup>72</sup> 492 U.S. at 662 (Kennedy, J., concurring in part and dissenting in part).

<sup>73</sup> *See id.* at 662–63 (“Noncoercive government action within the realm of flexible accommodation or passive acknowledgement of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.”).

<sup>74</sup> *Id.* at 664 (“The crèche and the menorah are purely passive symbols of religious holidays.”).

<sup>75</sup> *Id.*

Thus, there are at least two (somewhat related) ways in which the “passive” designation operates: (1) to describe the relationship between the government and the symbol, indicating the manner in which the government recognizes religion (here, acknowledgment of religious practice); and (2) to describe the relationship between the symbol and its viewer (presumably, “not speaking”). The two are related to the extent that one assumes mere acknowledgment—rather than coercion or at least proselytizing—occurs when there is no textual message. In other words, visual messages, under this view, do not result in coercion. This designation, then, likely contains an empirical claim regarding the communicative power of images. Moreover, it is also possible to conceive different levels of “activity” of the visual symbolic message. And while it may be possible to avoid the message of a holiday display,<sup>76</sup> this is less easily accomplished in other settings.<sup>77</sup> This distinction hints at the different degrees of communicative impact that a symbolic message may have.<sup>78</sup>

The “passive” designation also appeared in the Supreme Court’s Ten Commandments cases. In *Stone v. Graham*, the Court found insignificant “that the Bible verses involved in this case are merely posted on the wall, rather than read aloud.”<sup>79</sup> Without overstating the significance of the distinction, it is interesting to note that text “read aloud” and text “posted on the wall” —the latter a more visual display<sup>80</sup>—are contrasted. This reference might allude to a difference in quality that the Court detects between spoken and silent (that is, “merely posted”) texts.<sup>81</sup> More importantly, then-Justice William Rehnquist referred in dissent to an earlier Decalogue case in which the Tenth Circuit characterized the monument as “passive,” which the court described as “involving no compulsion.”<sup>82</sup>

Almost twenty five years later, in *Van Orden*, Chief Justice Rehnquist picked up the “passive” characterization in upholding “[t]he placement of the Ten Commandments on the Texas State Capitol grounds,” which he described as “a far more passive use of those texts than was the case in *Stone*, where the

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<sup>76</sup> See *id.* Though some would dispute that this is possible at all. See *infra* notes 185–186 and accompanying text.

<sup>77</sup> See, *Stone*, 449 U.S. at 42 (holding unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in public school rooms).

<sup>78</sup> See *infra* notes 328–339 and accompanying text.

<sup>79</sup> *Stone*, 449 U.S. at 42.

<sup>80</sup> Cf. Disc. *Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 (6th Cir. 2012) (discussing printed text as graphic), *cert. denied*, 133 S. Ct. 1996 (2013).

<sup>81</sup> See *Stone*, 449 U.S. at 42.

<sup>82</sup> See *id.* at 46 (Rehnquist, J., dissenting) (“It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era.” (quoting *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (10th Cir. 1973))).

text confronted elementary school students every day.”<sup>83</sup> The use of “passive” in this context seems to take on a temporal dimension, in contrast to exposure “every day.”<sup>84</sup> This, however, is a rather nonobvious meaning of the term.<sup>85</sup> Conceivably, the intent to influence the students in *Stone* is much more direct than is the intent to influence the (occasional or frequent) passerby in *Van Orden*; yet, the monument remained in place whether observers walked past it or not. This difference might make sense in distinguishing a permanent display from a temporary display. But it is not immediately apparent what role characterizing the monument as “more passive” plays in distinguishing two permanent displays featuring identical textual messages.<sup>86</sup> The Chief Justice also distinguished the Ten Commandments monument in *Van Orden* from Bible reading and prayer in schools;<sup>87</sup> this aligns with an interpretation of text as active and visual images as passive. Moreover, he compared the monument to a wide variety of visual representations, all presumably as “passive” as the monument.<sup>88</sup> Judge J. Harvie Wilkinson III criticized the Chief Justice’s reliance on the characterization of the monuments as “passive,” stating that “Chief Justice Rehnquist’s adoption of ‘passivity’ as the plurality’s test for upholding public religious messages is no model of clarity.”<sup>89</sup>

In his dissent in *McCreary County*, Justice Scalia asserted that “[t]he passive display of the Ten Commandments, even standing alone, does not begin to [proselytize or advance any one faith or belief or apply some level of coercion].”<sup>90</sup> “Passive” here means “noncoercive.” He cited Justice Kennedy in *County of Allegheny* to illustrate the role of “passive” symbols.<sup>91</sup> But Justice Kennedy’s analysis in *County of Allegheny* made the connection between “pas-

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<sup>83</sup> 545 U.S. at 691 (plurality opinion).

<sup>84</sup> See *id.*

<sup>85</sup> Cf. Strasser, *supra* note 10, at 1157 (criticizing the temporal dimension).

<sup>86</sup> See *Van Orden*, 545 U.S. at 712 (Stevens, J., dissenting). In his *Van Orden* dissent, Justice John Paul Stevens likewise asserted that “[t]he monolith displayed on Texas Capitol grounds cannot be discounted as a passive acknowledgement of religion.” See *id.* Additionally, in addressing the Chief Justice’s comparison with *Stone*, Justice David Souter stated that “[p]lacing a monument on the ground is not more ‘passive’ than hanging a sheet of paper on a wall when both contain the same text to be read by anyone who looks at it.” *Id.* at 745 (Souter, J., dissenting).

<sup>87</sup> *Id.* at 691 (plurality opinion).

<sup>88</sup> See *id.* at 688–89 (comparing the monument in *Van Orden* to varied depictions of the Ten Commandments at numerous locations throughout Washington, D.C., including at the Supreme Court).

<sup>89</sup> J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1989 (2006); see also Dan M. Kahan, *The Supreme Court 2010 Term, Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 68–69 (2011) (focusing on the passive designation in distinguishing outcomes in *Van Orden* and *McCreary County*).

<sup>90</sup> *McCreary Cnty.*, 545 U.S. at 909 (Scalia, J., dissenting).

<sup>91</sup> *Id.* at 909 (citing *Cnty. of Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in part and dissenting in part)).



sive” and “noncoercive” less forcefully than did Justice Scalia. This, again, reflects Justice Kennedy’s wider understanding of coercion as seen in *Lee*.<sup>92</sup>

In the lower courts, the qualitative distinction between textual and visual messages—frequently dismissing the latter as passive—has likewise taken root.<sup>93</sup> Though some courts are suspicious of the “passive” designation, they find it empirically unclear how religious symbolic communication works and in which instances it constitutes a constitutional violation.<sup>94</sup> The long-running litigation involving the Mt. Soledad Cross in San Diego provides an illustration.<sup>95</sup> In its most recent iteration, the U.S. Court of Appeals for the Ninth Circuit held that the memorial’s current arrangement—which has a large Latin cross as its centerpiece—violated the Establishment Clause.<sup>96</sup> But it was the district court’s usage of the “passive” designation that is particularly illuminating.<sup>97</sup> After concluding that the Mt. Soledad Cross satisfied the *Lemon* test, the court conducted an inquiry into what it identified as one relevant factor: “whether [the monument] is passive or proselytizing in its effect.”<sup>98</sup> The “passive” designation was used in various other ways throughout the decision, including to describe the City of San Diego as an “absent and passive recipient” of the monument donated by a private group.<sup>99</sup> Yet, it is irrelevant to the message of the monument whether the municipality was “active” or “passive” in receiving the monument, except for the question of attribution of the message.<sup>100</sup> That determination does nothing to make the religious symbol itself

<sup>92</sup> See *supra* notes 49–50 and accompanying text.

<sup>93</sup> See, e.g., *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1110 (10th Cir. 2010) (Gorush, J., dissenting) (dissenting from denial of hearing en banc and characterizing the highway crosses at issue as “passive public displays”); *Donnelly v. Lynch*, 525 F. Supp. 1150, 1176 (D.R.I. 1981) (characterizing the nativity scene at issue as “passive”), *aff’d*, 691 F.2d 1029 (1st Cir. 1982), *rev’d*, 465 U.S. 668 (1984).

<sup>94</sup> See, e.g., *Smith v. Lindstrom*, 699 F. Supp. 549, 567 (W.D. Va. 1988) (acknowledging that “the effect of well-crafted symbolic speech is anything but passive, quiet, or ineffective”).

<sup>95</sup> See *Trunk v. City of San Diego (Trunk I)*, 568 F. Supp. 2d 1199, 1203 (S.D. Ca. 2008), *rev’d*, *Trunk v. City of San Diego (Trunk II)*, 629 F.3d 1099 (9th Cir. 2011), *reh’g en banc denied*, *Trunk v. City of San Diego (Trunk III)*, 660 F.3d 1091 (9th Cir. 2011), *cert. denied sub nom.*, *Mount Soledad Mem’l Ass’n v. Trunk (Trunk IV)*, 132 S. Ct. 2535 (2012).

<sup>96</sup> *Trunk II*, 629 F.3d at 1129.

<sup>97</sup> See *Trunk I*, 568 F. Supp. 2d at 1218. The district court interpreted Ninth Circuit precedent—in particular the 2009 decision *Card v. City of Everett*—to extend the *Van Orden* holding beyond the Ten Commandments context to other passive displays. See *id.* at 1204, 1206 (citing *Card v. City of Everett*, 520 F.3d 1009, 1204 (9th Cir. 2008)). However, the district court’s reliance on *Card* is confounding; there is no clear indication that the *Card* opinion purports to extend *Van Orden* beyond its immediate context. See *Card*, 520 F.3d at 1018 (discussing the scope of *Van Orden*).

<sup>98</sup> *Trunk I*, 568 F. Supp. 2d at 1218.

<sup>99</sup> *Id.* at 1223.

<sup>100</sup> See Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571, 601–06 (2011) (discussing attribution of speech in cases of donation of religious monuments to municipalities).

passive. Turning finally to the assessment of “passive or proselytizing effect,” the district court distinguished the “passive” monuments in *Van Orden* from “other more confrontational displays which were meant to indoctrinate.”<sup>101</sup> The court noted that “[t]he gist of this observation is that passive monuments are less likely to violate the Establishment Clause.”<sup>102</sup> The court’s former observation suggests a noncoercive effect; the latter is circular, simply equating “passive” with “likely to pass constitutional muster.” Thus, what becomes clear is that the “passive” designation used by courts obfuscates rather than clarifies the manner in which visual religious symbols communicate.

## 2. Religious Buildings Used for Secular Purposes

Sometimes, secular functions are brought to sites dominated by religious symbols.<sup>103</sup> In several district court cases, school districts were barred from holding graduation ceremonies in churches.<sup>104</sup> The issue of high school graduations in church buildings has just now percolated through the federal courts. The Seventh Circuit decisions in *Elmbrook*, used in the introductory example, were the first time a federal appeals court addressed the issue.<sup>105</sup> A three-judge panel initially upheld the district court’s decision holding that the practice was constitutional under the Establishment Clause, but the Seventh Circuit reversed after rehearing en banc.<sup>106</sup> The initial panel decision suggested that if individuals proselytize (verbal) or distribute literature (textual), the outcome would

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<sup>101</sup> *Trunk I*, 568 F. Supp. 2d at 1224.

<sup>102</sup> *Id.*

<sup>103</sup> Churches have been used as venues for a variety of secular purposes. Examples include the use of church property as public school classrooms, *see, e.g.*, *Porta v. Klagholz*, 19 F. Supp. 2d 290, 292–93 (D.N.J. 1998); *Spacco v. Bridgewater Sch. Dept.*, 722 F. Supp. 834, 834 (D. Mass. 1989); *Thomas v. Schmidt*, 397 F. Supp. 203, 205 (D.R.I. 1975); *State of Neb. ex rel. Sch. Dist. of Hartington v. Neb. State Bd. of Educ.*, 195 N.W.2d 161, 162 (Neb. 1972); or other school events, *see, e.g.*, *ACLU-TN v. Sumner Cnty. Bd. of Educ.*, No. 03-11-0408, 2011 WL 1675008, at \*1–2 (M.D. Tenn. May 3, 2011); the use of churches as polling places, *see, e.g.*, *Otero v. State Election Bd. of Okla.*, 975 F.2d 738, 739 (10th Cir. 1992); *Berman v. Bd. of Elections*, 420 F.2d 684, 684 (2d Cir. 1969) (*per curiam*); and the use of a church as a post office, *see Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 484 (2d Cir. 2009).

<sup>104</sup> *See Does v. Enfield Pub. Sch.*, 716 F. Supp. 2d 172, 175 (D. Conn. 2010) (finding a public school graduation at a Christian church to be impermissible); *Lemke v. Black*, 376 F. Supp. 87, 88 (E.D. Wis. 1974) (finding a public school graduation at a Roman Catholic church to be impermissible). *But see Musgrove v. Sch. Bd. of Brevard Cnty.*, 608 F. Supp. 2d 1303, 1305–06 (M.D. Fla. 2005) (finding a likelihood of success on the merits with respect to Establishment Clause challenge to graduation at a church “display[ing] a giant cross” but ultimately denying a preliminary injunction based on public interest considerations).

<sup>105</sup> *See Elmbrook II*, 687 F.3d at 842; *Elmbrook I*, 658 F.3d at 712–13.

<sup>106</sup> *Elmbrook II*, 687 F.3d at 843.

likely be different than if they were exposed to imagery.<sup>107</sup> And, indeed, this was exactly what the en banc majority focused on.<sup>108</sup>

The panel stated that “graduates are not forced—even subtly—to participate in any religious exercise ‘or other sign of religious devotion,’ or in any other way to subscribe to a particular religion or even to religion in general.”<sup>109</sup> It thus applied a theory of coercion to evaluate the religious imagery’s effect. Further, the panel stated that graduation attendees

are not forced to take religious pamphlets, to sit through attempts at proselytization directed by the state or to affirm or appear to affirm their belief in any of the principles adhered to by the Church or its members. Instead, the encounter with religion here is purely passive and incidental to attendance at an entirely secular ceremony.<sup>110</sup>

Characterizing the encounter as passive results from the absence of coercion to participate in religious activity; “passive” denotes noncoercion. But in *Lee*, the graduation prayer case used in the introductory example, the Supreme Court found coercion where no active participation in the prayer was required.<sup>111</sup> Thus, the only distinction plausibly left for the Seventh Circuit en banc review was the textual (prayer) in *Lee* as opposed to the visual (Latin cross) in *Elmbrook*.

In reviewing the *Elmbrook* case en banc, the Seventh Circuit concluded that having the graduation ceremony in a church violated the Establishment Clause.<sup>112</sup> Unlike the panel, the en banc majority applied a standard that did not focus solely on coerced activity, but rather combined coercion and endorsement.<sup>113</sup> In doing so, the majority focused on the textual elements—the religious literature and banners with religious messages—present in the church.<sup>114</sup> Though the majority did discuss the cross “[l]iterally and figuratively towering over the graduation proceedings,” it pointed out that “Elmbrook Church’s sizeable cross was not the only vehicle for conveying religious mes-

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<sup>107</sup> *Elmbrook I*, 658 F.3d at 733 & n.21.

<sup>108</sup> *Elmbrook II*, 687 F.3d at 843–44.

<sup>109</sup> *Elmbrook I*, 658 F.3d at 727.

<sup>110</sup> *Id.*

<sup>111</sup> *Lee*, 505 U.S. at 592–93.

<sup>112</sup> *Elmbrook II*, 687 F.3d at 843.

<sup>113</sup> *Id.* at 855 (“Although *Lee* and *Santa Fe* focus on the problem of coerced religious activity, it is a mistake to view the coercion at issue in those cases as divorced from the problem of government endorsement of religion in the classroom generally.”).

<sup>114</sup> *Id.* at 850 (holding that a public school graduation ceremony in a church violated the Establishment Clause because the church “among other things featured staffed information booths laden with religious literature and banners with appeals for children to join ‘school ministries’” (emphasis added)).

sages to graduation attendees.”<sup>115</sup> Returning to the textual, the court stressed the presence of religious pamphlets, literature, and banners in the church.<sup>116</sup> Pointing to “the sheer religiosity of the space,” the majority invoked both “the presence of religious iconography and literature.”<sup>117</sup> But the court’s emphasis seemed to be heavily on the textual elements.

While the majority did not use the active/passive distinction to describe either the display or the observers, Judge Ripple—in a dissent joined by then-Chief Judge Easterbrook and Judge Posner—used it to describe both.<sup>118</sup> Judge Ripple’s dissent discussed the majority’s application of *Lee* as well as the Supreme Court’s decision in *Santa Fe Independent School District v. Doe*—which held unconstitutional the practice of student-led prayer at football games.<sup>119</sup> The dissent argued that the prayers in *Lee* and *Santa Fe* “amounted to state sponsorship of religious activity and coerced the attending students to participate, at least passively, in that religious prayer activity. There, the state had affirmatively sponsored, endorsed and coerced participation in a specific religious activity.”<sup>120</sup>

The dissent distinguished the “religious activity” of prayer from “the mere presence of religious iconography and similar furnishings.”<sup>121</sup> The active/passive distinction in this instance is applied both to the prayer (“activity”) and symbols (“mere presence”) as well as the audience (“participate, at least passively”).<sup>122</sup> This obscures which active/passive distinctions matter and how they matter. The dissent argued that “it certainly cannot be maintained that, like in *Lee* and in *Santa Fe*, they were coerced into participating, actively or passively, in any religious ceremony or activity.”<sup>123</sup> But despite this finding of noncoercion, the role of the “passive” label here, too, is inconsistent at best.

### 3. Religious Imagery in Official Expressions of Identity

Religious text,<sup>124</sup> religious symbols,<sup>125</sup> or a combination of both<sup>126</sup> are frequently used in expressions of federal, state, or municipal identity. For in-

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<sup>115</sup> *Id.* at 852.

<sup>116</sup> *Id.* at 852–53.

<sup>117</sup> *Id.* at 853.

<sup>118</sup> *Id.* at 861 (Ripple, J., dissenting).

<sup>119</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000); *Elmbrook II*, 687 F.3d at 863 (Ripple, J., dissenting).

<sup>120</sup> *Elmbrook II*, 687 F.3d at 862 (Ripple, J., dissenting).

<sup>121</sup> *Id.* at 863.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 864.

<sup>124</sup> See, e.g., *Saladin v. City of Milledgeville*, 812 F.2d 687, 689 (11th Cir. 1987) (word “Christianity” in city seal).

<sup>125</sup> See, e.g., *King v. Richmond Cnty., Ga.*, 331 F.3d 1271, 1274 (11th Cir. 2003) (outline of stone tablets representing Ten Commandments in superior court clerk’s seal); *Robinson v. City of Edmond*,

stance, the national motto “In God We Trust,” the Court’s opening call including the phrase “God save the United States and this Honorable Court,” and the reference to God in the Pledge of Allegiance are textual; so is the practice of legislative prayer. Yet none of these textual expressions have been considered to violate the Establishment Clause.<sup>127</sup> While the religious content of the textual expressions has not been called into question—and they are not “passive” — they are thought not to violate the Establishment Clause mostly on the theory that these statements no longer have “force as an endorsement of belief in God.”<sup>128</sup> The practice of legislative prayer is constitutional under the Establishment Clause on account of its historical permissibility since the first Congress.<sup>129</sup> Visual symbolic representations in expressions of identity might be thought of in a similar way—either lacking religious valence or embodying historical representations—though in some of these cases, too, the textual/visual distinction suggests that courts tend to ascribe a stronger communicative force to text.

To illustrate, consider *King v. Richmond County, Georgia*, where the U.S. Court of Appeals for the Eleventh Circuit held constitutional a superior court clerk’s use of a seal featuring an outline of the Ten Commandments.<sup>130</sup> The image was “a depiction of a hilt and tip of a sword, the center of which is overlaid by two rectangular tablets with rounded tops.”<sup>131</sup> Rather than portraying the text of the Ten Commandments, “Roman numerals I through V are listed vertically on the left tablet; the right lists numerals VI to X.”<sup>132</sup> The district court found no Establishment Clause violation, instead finding “that a depiction without the text would not lead a reasonable observer to conclude that re-

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68 F.3d 1226, 1228 (10th Cir. 1995) (Latin cross in city seal); *Murray v. City of Austin, Tex.*, 947 F.2d 147, 149 (5th Cir. 1991) (cross in city seal); *Harris v. City of Zion*, 927 F.2d 1401, 1403–04 (7th Cir. 1991) (Latin cross as well as Latin cross, shield, sword, scepter, dove and crown, respectively, in city seals); *Weinbaum v. Las Cruces Pub. Sch.*, 465 F. Supp. 2d 1182, 1185 (D.N.M. 2006) (three crosses in seal on school district’s maintenance vehicles); *Webb v. City of Republic*, 55 F. Supp. 2d 994, 995 (W.D. Mo. 1999) (fish symbol in city seal); *ACLU of Ohio v. City of Stow*, 29 F. Supp. 2d 845, 847 (N.D. Ohio 1998) (cross in city seal).

<sup>126</sup> See, e.g., *Johnson v. Bd. of Cnty. Comm’rs of Bernalillo Cnty.*, 528 F. Supp. 919, 920 (D.N.M. 1981) (cross and motto), *rev’d sub nom. Friedman v. Bd. of Cnty. Comm’rs of Bernalillo Cnty.*, 781 F.2d 777 (10th Cir. 1985).

<sup>127</sup> See generally B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705 (2010) (detailing the constitutional challenges to each).

<sup>128</sup> See *id.* at 710.

<sup>129</sup> *Greece*, No. 12-696, slip op. at 1 (upholding prayer in town board meetings); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (upholding prayer in state legislature); see also *supra* note 34 and accompanying text; *infra* notes 357–364 and accompanying text (discussing legislative prayer).

<sup>130</sup> *King*, 331 F.3d at 1273.

<sup>131</sup> *Id.* at 1274 (“Appellees conceded that the pictograph in the center of the Seal resembles depictions of the Ten Commandments.”).

<sup>132</sup> *Id.*

ligion was endorsed.”<sup>133</sup> Although the court did not use the active/passive distinction, it did find the distinction between a textual and a nontextual representation relevant. The Eleventh Circuit likewise placed great weight on the absence of the text from the symbolic representation.<sup>134</sup> In particular, the court concluded that “[b]ecause the words ‘Lord thy God’ and the purely religious mandates (commandments one through four) do not appear on the Seal, a reasonable observer is less likely to focus on the religious aspects of the Ten Commandments.”<sup>135</sup> This suggests that the text, rather than the visual symbolic representation, communicates the Decalogue’s religious message.

Courts in similar cases dealing with religious iconography in municipal seals have referenced the passivity of symbols.<sup>136</sup> One district court concluded that “it would be palatably unreasonable to require the removal of the passive and benign symbols of the cross and the motto [‘con esta vencemos’] from the seal.”<sup>137</sup> While the absence of the text from the Ten Commandments illustration presumably can be understood as the absence of a religious message, it is more difficult to see the cross as devoid of religious content. Thus, “passive and benign” cannot indicate the absence of a religious message. It more likely means that the visual of the cross, like the visual of the Decalogue without text, is comparatively less capable of conveying a religious message than religious text. The communicative impact of visuals without the text, therefore, is deemed less powerful.

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Courts tend to use the “passive” designation in Establishment Clause cases involving visual religious symbols in two ways—either simultaneously or alternatively. To the extent the “passive” label functions as an empirical assertion, it is based on an erroneous understanding of how visual images communicate. This misconception is perpetuated in Establishment Clause doctrine. It allows conceiving religious visual messages as constitutionally less troublesome and provides an avenue to discard them without fully engaging with the images’ communicative power. And when the passive label is used as shorthand for a bundle of factors that go to the cultural interpretation and context of the symbol, the designation is misleading and therefore not particularly useful.

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<sup>133</sup> *Id.* at 1275 (internal quotation marks omitted).

<sup>134</sup> *Id.* at 1285–86 (noting the absence of text material).

<sup>135</sup> *Id.* at 1285.

<sup>136</sup> See, e.g., *Johnson*, 528 F. Supp. at 925; see also *Murray*, 947 F.2d at 154–55 (discussing the noncoercive passivity of a cross in the city seal, which served primarily to identify city activity and property and to promote Austin’s “unique role and history”); *Id.* at 169 (Goldberg, J., dissenting) (“The cross is not a ‘passive’ symbol . . .”).

<sup>137</sup> *Johnson*, 528 F. Supp. at 925.

## II. HOW IMAGES COMMUNICATE

To rectify misconceptions and remedy the misguided approach to visual religious symbols illustrated in Part I, Establishment Clause theory must better account for the way in which visual images communicate.<sup>138</sup> By failing to carefully consider the way in which visual images communicate, we are missing important empirical information that is relevant for assessing the communicative impact of symbolic messages. Section A of this Part will therefore introduce empirical evidence to refute the text/image hierarchy based on visual perception.<sup>139</sup> Cognitive neuroscience research shows that images are by no means less able to communicate messages than text. Indeed, visual representations in some instances may have a greater impact on the audience than spoken or written words. Visual representations of religious symbols can be just as active as—if not, in fact, sometimes more active than—written or spoken textual religious messages. They are, eponymously, “active symbols.”

Courts, as demonstrated, make little effort to account for the visual nature of religious symbols or, worse yet, dismiss such symbols as merely “passive.”<sup>140</sup> The focus on the textual has prevented the full appreciation of the visual nature of religious symbols as images. Giving short shrift to the visual happens in other contexts as well; copyright law is but one example.<sup>141</sup> Tracing the courts’ aversion to images, one commentator even detected “in the history of the development of English law a conscious wall built against images, es-

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<sup>138</sup> This Article uses the term “image” to describe a two- or three-dimensional visual representation that exists as a physical thing in the real world (i.e., not merely cognitive, mental images that exist only in our heads). Cf. FEIGENSON & SPIESEL, *supra* note 7, at 5 (“In common usage, a ‘visual image’ can refer to an artifact, such as the snapshot you hold in your hand and look at; to your mental image of that photo; or to your visual memories drawn from your experience of looking at the photo or the thing that the photo depicts.”); Christina Spiesel, *More Than a Thousand Words in Response to Rebecca Tushnet*, 125 HARV. L. REV. F. 40, 40 n.2 (2012), <http://harvardlawreview.org/2012/02/more-than-a-thousand-words-in-response-to-rebecca-tushnet/>, archived at <http://perma.cc/5UFV-FAS8> (expressing preference for the term “picture” over “image”). Of course, these designations are arbitrary; others use different definitions. See, e.g., FEIGENSON & SPIESEL, *supra* note 7, at 5 (noting that “we will use ‘pictures’ to mean visually perceived artifacts, external visual representations, reserving ‘image’ for mental imagery (that is, internal, immaterial visual representations)”). Another scholar categorizes pictures as “all representations, including written or printed words.” *Id.* (referring to Richard Benson, former dean of the Yale School of Art). In the First Amendment context, Timothy Zick distinguishes between “oral symbols (words) and nonverbal symbolic gestures.” Zick, *supra* note 12, at 2390. Frederick Schauer distinguishes linguistic and nonlinguistic communicative acts. Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 200. In the context of religious symbols, Kent Greenawalt distinguishes “signs with religious words” and “religious symbols.” 2 GREENAWALT, *supra* note 32, at 69. Likewise, my primary distinction is between textual and nontextual.

<sup>139</sup> See *infra* notes 151–187 and accompanying text.

<sup>140</sup> See *supra* notes 60–137 and accompanying text.

<sup>141</sup> See Tushnet, *supra* note 7, at 688.

entially shutting itself off from pictures.”<sup>142</sup> Perhaps indicative of this lack of appreciation of the symbolic is Justice Robert Jackson’s observation that “[s]ymbolism is a primitive but effective way of communicating ideas.”<sup>143</sup> By contrast, verbal expression is considered less primitive.<sup>144</sup> In other words, texts enjoy privileged status in the law.<sup>145</sup> One scholar observes that “[t]he preference for text over image” in the First Amendment context “is often assumed and rarely explained.”<sup>146</sup> The courts are not alone; “there is a strong cultural bias that thinking is accomplished only with words because language is the medium of thought.”<sup>147</sup> Yet, in other First Amendment contexts, as Section B of this Part illustrates, “[v]isual images are frequently perceived as more powerful and less controllable than verbal speech.”<sup>148</sup> This characterization is clearly at odds with the notion of “passive” religious symbols.

Moreover, as Section C of this Part argues in further detail, we must distinguish between visual perception of the message and the meaning of the symbolic content of the message irrespective of the medium.<sup>149</sup> How images communicate is an objective empirical question. The answer can be provided by cognitive neuroscience. The way communication via images is processed is the same for all human brains. By contrast, the question of what images—and in particular, religious symbols—mean is context-dependent and subjective. The empirical data on visual perception thus is of only limited use in constructing a more responsive conceptual framework.<sup>150</sup>

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<sup>142</sup> Spiesel, *supra* note 23, at 403; *see also* Zick, *supra* note 12, at 2398 (asserting that judges display “a general disrespect for symbolism”).

<sup>143</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

<sup>144</sup> *See* Zick, *supra* note 12, at 2273.

<sup>145</sup> *See* FEIGENSON & SPIESEL, *supra* note 7, at 4 (contending that law identifies rationality and virtue with texts rather than pictures); Spiesel, *supra* note 23, at 404 (discussing how law has depended on written texts for its development); Zick, *supra* note 12, at 2300 n.205 (arguing that the First Amendment protects verbal speech more than nonverbal gestures).

<sup>146</sup> Amy Adler, *The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship*, 103 W. VA. L. REV. 205, 210 (2000).

<sup>147</sup> *See* Spiesel, *supra* note 23, at 392.

<sup>148</sup> *See* Adler, *supra* note 146, at 217; *infra* notes 188–238 and accompanying text. Concerns about the power of images pervade other areas of the law as well. *See, e.g.*, Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 403–04 (2008) (discussing the admissibility of fetal images in tort and criminal law); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE: PRACTICE UNDER THE RULES 186* (4th ed. 2012) (discussing the court’s “authority under Federal Rules of Evidence 403 and 611(a) to minimize the emotional impact” of photographic evidence); Neal Feigenson, *Visual Evidence*, 17 PSYCHONOMIC BULL. & REV. 149, 149–53 (2010) (providing an overview of studies of visual evidence on legal decision making).

<sup>149</sup> *See infra* notes 239–299 and accompanying text.

<sup>150</sup> *See infra* 300–364 and accompanying text (providing a new conceptual framework for Establishment Clause inquiries).



### A. The Neuroscience of Visual Perception

The human brain, as a generalizable matter, processes images and words each in a particular way. Empirical evidence of brain functioning comes from two different kinds of studies. First, on the input side, functional magnetic resonance imaging (“fMRI”) can measure the difference in blood oxygen level dependent (“BOLD”) signals at resting and stimulus conditions.<sup>151</sup> Second, on the output side, responses to stimuli offered in several modes can be measured using a variety of ways that do not necessitate fMRI examination. For example, in traditional psychological research, the likelihood of remembering negative versus neutral textual information can be tested using questionnaires,<sup>152</sup> and the processing of picture-word stimuli can be examined in a similar manner.<sup>153</sup>

At this point, three preliminary observations are in order. First, an important caveat: law and science differ considerably in their methodology and interpretation of materials.<sup>154</sup> Legal scholars must therefore exercise particular caution when using neuroscience literature. Likewise, the translation of primary sources into the legal literature must be viewed with caution as the secondary literature (including the “neurolaw” literature) is likely to make more generalized statements than can be derived from experimental data as reported in scientific primary literature. This also explains in part why this Article uses neuroscience data to refute the empirical claim courts make with respect to visual perception of images, but not to fashion a new approach. Second, a word about what is *not* at issue in this discussion: the veracity of the visual representation. Much of the literature on neuroscience and the law concerns the descriptive value and “truth” of images, in particular photographs or video.<sup>155</sup> The descriptive aspect of images—whether the picture is an accurate representation of reality, as may be important in the law of evidence—is not

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<sup>151</sup> RICHARD B. BUXTON, INTRODUCTION TO FUNCTIONAL MAGNETIC RESONANCE IMAGING: PRINCIPLES AND TECHNIQUES 7 (2d ed. 2009); Arno Villringer, *Physiological Changes During Brain Activation*, in FUNCTIONAL MRI 3, 3–7 (C.T.W. Moonen & Peter A. Bandettini eds., 2000). Some of the studies discussed below employ positron emission tomography (“PET”) rather than fMRI. *See generally* Marcus E. Raichle & Mark A. Mintun, *Brain Work and Brain Imaging*, 29 ANN. REV. NEUROSCI. 449 (2006) (discussing the development of PET and fMRI BOLD imaging).

<sup>152</sup> *See, e.g.*, Elizabeth A. Kensinger & Suzanne Corkin, *Memory Enhancement for Emotional Words: Are Emotional Words More Vividly Remembered Than Neutral Words?*, 31 MEMORY & COGNITION 1169, 1171 (2003).

<sup>153</sup> *See, e.g.*, Yoav Ariei & Daniel Algom, *Processing Picture-Word Stimuli: The Contingent Nature of Picture and of Word Superiority*, 28 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 221, 222–23 (2002).

<sup>154</sup> *See* Goodenough & Tucker, *supra* note 18, at 65–66 (providing an overview of concerns).

<sup>155</sup> *See* FEIGENSON & SPIESEL, *supra* note 7, at 9–11 (discussing reality and depiction); *see also* Dan M. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 900–01 (2012) (using “cognitive illiberalism” to explain how people perceive “truth” to generate conclusions in line with their own values); Kahan et al., *supra* note 7, at 903–04 (same).

the subject of this discussion. Indeed, the cases discussed here do not involve the veracity of photographs at all.<sup>156</sup> Nonetheless, that body of literature is useful beyond the question of veracity. Third, with respect to the difference between photographs and other visual images—such as religious symbolic representations—it is significant to point out that many of the studies referenced in the following Subsections have employed a variety of visual stimuli, including photos and videos, but also drawings and other visual representations.

Initially, “words and pictures as perceptions both represent just dataflow coming in from outside to be understood by the brain and processed for meaning.”<sup>157</sup> The difference results from what the brain does with the sensory inputs in different areas of the brain.<sup>158</sup> Four aspects, discussed in turn, seem especially important in this context: speed of processing textual and visual information, connection to emotion, effect on memory, and persuasiveness.

### 1. Speed

First, the human brain processes visual images more quickly than words.<sup>159</sup> In fact, the speed at which the brain can process images substantially exceeds the speed at which it processes words.<sup>160</sup> There is an immediacy of reception connected with images that we do not have with words.

Some studies combine words and pictures to test the speed at which our brains process images and words. In one study involving word-picture compounds (e.g., the drawing of an apple with the word “lemon” written across it),

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<sup>156</sup> Frequently the opinions themselves do contain photographs of the religious symbols at issue. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 706 (2005) (Breyer, J., concurring); *id.* at 736 (Stevens, J., dissenting); *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 622 (1989); *Trunk II*, 629 F.3d 1099, 1126–27 (9th Cir. 2011); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1125–27 (10th Cir. 2010). But veracity of the image is not questioned. See generally Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704 (1997) (discussing the dangers of incorporating photographs and other images into Supreme Court opinions because the neutrality and accuracy of the images are routinely presumed).

<sup>157</sup> Spiesel, *supra* note 23, at 393.

<sup>158</sup> See *id.*; see also Elizabeth A. Kensinger & Daniel L. Schacter, *Processing Emotional Pictures and Words: Effects of Valence and Arousal*, 6 COGNITIVE, AFFECTIVE & BEHAV. NEUROSCI. 110, 123 (2006) (finding that words are processed in the left amygdala and pictures bilaterally).

<sup>159</sup> FEIGENSON & SPIESEL, *supra* note 7, at 9 (explaining that—due to the fact that sensory inputs are registered farthest from the frontal lobe where delayed response occurs—our brains process direct sensory inputs quicker than they process “language-mediated thoughts” involving reflection, critique, and suspicion); Christina M. Leclerc & Elizabeth A. Kensinger, *Neural Processing of Emotional Pictures and Words: A Comparison of Young and Older Adults*, 36 DEVELOPMENTAL NEUROPSYCHOL. 519, 520 (2011); Tushnet, *supra* note 7, at 691.

<sup>160</sup> FEIGENSON & SPIESEL, *supra* note 7, at 7 (explaining that while both our eyes and brain can process visual information quicker than the conscious mind can notice, humans are able to “get the gist” of visual displays in less than a third of a second but take relatively longer to process the semantic equivalent when received verbally).

it is interesting to note that participants named the word component faster than the image.<sup>161</sup> But they categorized the pictures faster than the words.<sup>162</sup> Another study of word-picture compounds found that the evaluation of pictures was faster than that of words and the negative pictures were named faster than positive ones.<sup>163</sup>

## 2. Emotion

Second, images have a closer connection to emotion than words do.<sup>164</sup> Indeed, “pictures are especially well suited for conveying meaning through associational logic, often infused with emotions that are triggered beneath our conscious awareness.”<sup>165</sup> The appeal of images to emotion is not explicit.<sup>166</sup> Ultimately, one might argue, the source of “legal discomfort with images is the fear that they will make people feel rather than think.”<sup>167</sup>

The proximity of perception and emotion, a result of the anatomy of the human brain, makes visual images particularly powerful.<sup>168</sup> The valence-dependent responses—meaning the perception of something as positive or

<sup>161</sup> Arieh & Algom, *supra* note 153, at 221–22.

<sup>162</sup> *Id.*

<sup>163</sup> Jan De Houwer & Dirk Hermans, *Differences in the Affective Processing of Words and Pictures*, 8 COGNITION & EMOTION 1, 16 (1994).

<sup>164</sup> Corbin, *supra* note 7 at 26 (stating that “images . . . often have an emotional impact in ways that words do not”); Leclerc & Kensinger, *supra* note 159, at 520–21 (“[P]ictures elicit activity within emotion processing regions at earlier time points than do words. Pictures also are believed to be more salient, and to activate emotional responses more easily than words.”); Tushnet, *supra* note 7, at 691 (“[P]ictures can trigger emotions more reliably than words can.”).

<sup>165</sup> FEIGENSON & SPIESEL, *supra* note 7, at 7–8 (“Words of course, can also prompt emotional associations, but pictures do this more rapidly.”); *see also* Annekathrin Schacht & Werner Sommer, *Time Course and Task Dependence of Emotion Effects in Word Processing*, 9 COGNITIVE, AFFECTIVE & BEHAV. NEUROSCI. 28, 40 (2009) (discussing emotional content of verbal stimuli).

<sup>166</sup> Tushnet, *supra* note 7, at 696.

<sup>167</sup> *Id.* at 695. This concern is also evident in recent discussions concerning emotion and judging. *See, e.g.*, Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1947 (2012).

<sup>168</sup> FEIGENSON & SPIESEL, *supra* note 7, at 8; Spiesel, *supra* note 23, at 393. Feigenson and Spiesel further explain:

The same areas of the brain that process visual perceptions are also responsible for mental imagery, and these are connected to the amygdala and other areas of the brain critical for emotion. And, because visual information acquires emotional valence before that information ever gets to the cortex, the whole picture passes along its emotional colors even as we begin to decode its parts. The initial emotional loading can occur nearly immediately and may influence further readings of the picture quite apart from any later contribution that cortical reflection makes.

FEIGENSON & SPIESEL, *supra* note 7, at 393; *see also* K. Luan Phan et al., *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331, 331, 344 (2002) (reviewing 55 PET and fMRI studies investigating emotion).

negative—are more pronounced for pictures than for words.<sup>169</sup> These results show that the brain responds more intensely to pictures than words. This statement is measurable by the intensity of the activation shift, made visible by means of fMRI. Importantly, this fMRI research confirms earlier findings of traditional psychological research that pictures have a closer connection to emotion than words and are processed faster than words for emotional information.<sup>170</sup> Because “religion is an emotional subject,”<sup>171</sup> visual perception of religious symbols likewise is connected to emotion.

### 3. Memory

Third, related also to the previous point concerning emotion, is the observation that individuals remember emotional experiences more than non-emotional ones.<sup>172</sup> In fact, memory is “[t]he cognitive domain where the influence of emotion is best understood.”<sup>173</sup> Traditional psychological research with respect to textual information confirms the commonsensical notion that “[i]ndividuals are more likely to remember negative information than neutral information.”<sup>174</sup> This finding is confirmed by fMRI evidence.<sup>175</sup> With respect to pictures, fMRI re-

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<sup>169</sup> Kensinger & Schacter, *supra* note 158, at 123 (finding a shift in localization of the response from the lateral prefrontal cortex to the medial prefrontal cortex); *see also* Leclerc & Kensinger, *supra* note 159, at 519, 533 (showing this to be true for different age groups of adults). *See generally* R.J. Davidson & W. Irwin, *Functional MRI in the Study of Emotion*, in FUNCTIONAL MRI, *supra* note 146, at 487 (discussing data from fMRI studies to assess human emotion).

<sup>170</sup> De Houwer & Hermans, *supra* note 163, at 1 (finding support for their hypothesis “that pictures have privileged access to a semantic network containing affective information”).

<sup>171</sup> *Elmbrook II*, 697 F.3d 840, 873 (7th Cir. 2012) (Posner, J., dissenting).

<sup>172</sup> Turhan Canli et al., *Event-Related Activation of the Human Amygdala Associates with Later Memory for Emotional Experience*, 20 J. NEUROSCI. 1, 1 (2000) (discussing two PET studies and one fMRI study that “reported significant correlations between amygdala activation related to emotional stimuli and subsequent memory.”). Of the three studies mentioned, one PET study used film clips, *see* Larry Cahill et al., *Amygdala Activity at Encoding Correlated With Long-Term, Free Recall of Emotional Information*, 93 PROC. NAT’L ACAD. SCI. U.S. 8016, 8016 (1996); another PET study used pictures, *see* Stephan B. Hamann et al., *Amygdala Activity Related to Enhanced Memory for Pleasant and Aversive Stimuli*, 2 NATURE NEUROSCI 289, 289 (1999); and the fMRI study also used pictures, *see* Turhan Canli et al., *fMRI Identifies a Network of Structures Correlated with Retention of Positive and Negative Emotional Memory*, 27 PSYCHOBIOLOGY 441, 441 (1999).

<sup>173</sup> R.J. Dolan, *Emotion, Cognition, and Behavior*, 298 SCI. 1191, 1192 (2002).

<sup>174</sup> Kensinger & Corkin, *supra* note 152, at 1169; *see also* Elizabeth A. Kensinger & Suzanne Corkin, *Effect of Negative Emotional Content on Working Memory and Long-Term Memory*, 3 EMOTION 378, 378 (2003) (finding that negative information is better remembered than neutral information).

<sup>175</sup> Matthias H. Tabert et al., *Differential Amygdala Activation During Emotional Decision and Recognition Memory Tasks Using Unpleasant Words: An fMRI Study*, 39 NEUROPSYCHOLOGIA 556, 556 (2001).

search found that positive and negative images are more easily remembered than neutral ones.<sup>176</sup>

Irrespective of emotional content, importantly, pictures are more likely to be remembered than words.<sup>177</sup> This is known as the “picture superiority effect”<sup>178</sup> for which the literature offers different theoretical accounts.<sup>179</sup> In sum, if emotionally charged content is easier to remember than neutral content, and pictures are easier to remember than words, it logically follows that emotionally charged pictures are particularly easy to remember. If it is true that religious content of religious visual symbols qualifies as emotionally charged, the insight that emotionally charged visual information is easier to remember appears particularly salient. In particular, nonadherents or nonbelievers might have negative emotions associated with certain religious symbols.<sup>180</sup>

#### 4. Persuasiveness

Finally, images “persuade without overt appeals to rhetoric”; this relates to the perception of text as rational and/or factual and images as irrational and/or nonfactual.<sup>181</sup> One reason for the law’s bias in favor of text may be the association of the textual with “rationality” and “objectivity” and the association of the visual with “irrationality” and “subjectivity.”<sup>182</sup> The connection between text and rationality and images and irrationality accounts for a threat associated with the visual: “Images seem especially dangerous because their power is irrational.”<sup>183</sup> The neuroscience evidence bears out the distinction between text as rational and images as irrational to some extent. Though the data of a text or a visual image is received in the same way, the image’s message is processed differently in the brain than a textual message. As compared with words, “for pictures, the effect of emotion might be in evidence immediately

<sup>176</sup> Florin Dolcos et al., *Dissociable Effects of Arousal and Valence on Prefrontal Activity Indexing Emotional Evaluation and Subsequent Memory: An Event-Related fMRI Study*, 23 *NEUROIMAGE* 64 (2004); see also Cahill et al., *supra* note 172, at 8016 (relying on a PET study to find this to be true for film clips).

<sup>177</sup> Miriam Z. Mintzer & Joan Gay Snodgrass, *The Picture Superiority Effect: Support for the Distinctiveness Model*, 112 *AM. J. PSYCHOL.* 113, 113 (1999); Tushnet, *supra* note 7, at 691 (stating that pictures “are easier to remember than (roughly equivalent denotational) words”).

<sup>178</sup> Mintzer & Snodgrass, *supra* note 172, at 113 (“The picture superiority effect is the highly consistent empirical finding that stimuli presented for study in picture form are more likely to be recalled on a subsequent free recall test and to be discriminated from nonstudied stimuli on a subsequent recognition memory test than stimuli presented in word form.” (citations omitted)).

<sup>179</sup> *Id.* at 113–17.

<sup>180</sup> See *infra* note 253 and accompanying text (discussing how nonadherents or nonbelievers may perceive religious symbols differently).

<sup>181</sup> Tushnet, *supra* note 7, at 692.

<sup>182</sup> See *id.* at 693–94.

<sup>183</sup> Adler, *supra* note 146, at 213 (“[B]y bypassing reason and appealing directly to the senses, images fail to participate in the marketplace of ideas.”); see Tushnet, *supra* note 7, at 694.

and might be evoked relatively automatically, whereas activation of emotional responses for word stimuli may require more in depth and controlled processing.”<sup>184</sup> Indeed, this is likely to disprove “the First Amendment truism that those who do not like a visual sign can avoid it ‘simply by averting their eyes.’”<sup>185</sup> If the perception of a visual symbol occurs all at once,<sup>186</sup> it cannot be retroactively averted. Yet, this was one of the arguments that Justice Kennedy made in the *County of Allegheny* crèche case.<sup>187</sup>

### B. Judging the Visual and Textual

Despite this empirical data on visual perception, judges largely rely on intuition when it comes to evaluating images.<sup>188</sup> In the *Elmbrook* graduation-at-church case, Judge Posner in dissent lamented the lack of constitutional or social science guidance for evaluating visuals.<sup>189</sup> Judge Posner noted that the absence of either causes “judges [to] inevitably fall back on their priors, that is, on beliefs based on personality, upbringing, conviction, experience, emotions, and so forth that people bring to a question they can’t answer by the methods of logic and science or some other objective method.”<sup>190</sup> Thus, as an initial step to allay these concerns, courts should take empirical neuroscience data into account. When approaching cases involving visual symbolic representations, courts cannot dismiss visuals; instead, they must fully engage with their power.

Since “pictures, like words, can make meanings symbolically,”<sup>191</sup> considering First Amendment speech cases proves instructive. In past speech cases, the Supreme Court has displayed a considerably more nuanced approach to visual symbolic communication than in cases involving visual religious symbols.<sup>192</sup> This suggests that concerns regarding the institutional competence of courts to properly account for the role of the visual are negligible once the prevailing resistance to dealing with visual matters is overcome.<sup>193</sup> Judges, a critic’s argument might go, are good at dealing with words, but not necessarily with images. But despite the interpretive difficulties attached to symbols, re-

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<sup>184</sup> Leclerc & Kensinger, *supra* note 159, at 521.

<sup>185</sup> Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1770 (1996) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

<sup>186</sup> *Id.* (“There is an ‘all-at-onceness’ to the perception of the symbol that gives it a stronger presence . . .”).

<sup>187</sup> See *supra* note 75 and accompanying text.

<sup>188</sup> See *infra* notes 189–238 and accompanying text.

<sup>189</sup> *Elmbrook II*, 687 F.3d at 873 (Posner, J., dissenting).

<sup>190</sup> *Id.*

<sup>191</sup> FEIGENSON & SPIESEL, *supra* note 7, at 7.

<sup>192</sup> See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (plurality opinion) (cross burning); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *United States v. O’Brien*, 391 U.S. 367 (1968) (draft card burning).

<sup>193</sup> See Zick, *supra* note 12, at 2340.

covering the symbolic meaning of a message is not beyond the judiciary's capabilities.<sup>194</sup> For instance, citing the Supreme Court cross burning case, *Virginia v. Black*, "as an exception to the general doctrines of interpretive indifference and avoidance," Timothy Zick asserts that the case "holds out the possibility that symbolic meaning can be recovered judicially" and calls the decision a "methodological success."<sup>195</sup>

The First Amendment speech cases provide sufficient evidence that judges are in fact capable of assessing the communicative impact of images.<sup>196</sup> In speech cases involving symbolic expression, such as draft card burning,<sup>197</sup> flag burning<sup>198</sup> or cross burning,<sup>199</sup> the Supreme Court routinely had to consider the "communicative impact"<sup>200</sup> of visual representations. In these cases, the Court decided that expressive conduct is sufficiently analogous to "actual speech" to warrant First Amendment protection.<sup>201</sup> As this Article argues in Part III, focusing the inquiry on communicative impact better accounts for the underlying normative concerns of the Establishment Clause and, as a side effect, contributes to greater First Amendment symmetry as well.<sup>202</sup>

In speech cases, the Court does not explicitly discuss the distinction between the textual and the visual beyond the observation that symbolic speech is speech for First Amendment purposes.<sup>203</sup> But the Court's discussion nonetheless appears relatively more attentive to the observations regarding the nature of visual communication than in the Establishment Clause context. In *Black*, for example, Justice O'Connor observed that "[i]ndividuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner."<sup>204</sup> It is to a great extent the visual element of the "symbolic expression" that makes this form of communication so "effective and dramatic."<sup>205</sup>

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<sup>194</sup> *See id.*

<sup>195</sup> *See id.* at 2340, 2347 (citing *Black*, 538 U.S. at 343).

<sup>196</sup> *See, e.g., Black*, 538 U.S. at 360; *Johnson*, 491 U.S. at 406; *O'Brien*, 391 U.S. at 382.

<sup>197</sup> *O'Brien*, 391 U.S. at 367.

<sup>198</sup> *Johnson*, 491 U.S. at 397.

<sup>199</sup> *Black*, 538 U.S. at 347; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992).

<sup>200</sup> *See, e.g., United States v. Eichman*, 496 U.S. 310, 317–18 (1990) (communicative impact of flag burning); *Johnson*, 491 U.S. at 412 (same); *O'Brien*, 391 U.S. at 382 (noncommunicative impact of draft card burning).

<sup>201</sup> *See, e.g., Black*, 538 U.S. at 358 ("The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech."); *see also Johnson*, 491 U.S. at 404 ("The First Amendment literally forbids the abridgement only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word."). *But see Adler, supra* note 30, at 210 (arguing that the First Amendment provides more protection for verbal speech rather than visual).

<sup>202</sup> *See infra* notes 300–364 and accompanying text.

<sup>203</sup> *See Black*, 538 U.S. at 360; *Johnson*, 491 U.S. at 406; *O'Brien*, 391 U.S. at 382.

<sup>204</sup> *Black*, 538 U.S. at 360.

<sup>205</sup> *Id.* at 361.

Scholars, accordingly, have carefully examined the burning cross as a visual representation.<sup>206</sup> The burning cross “communicates at a sensual, non- or pre-rational level, appealing to emotion and noncognitive understanding or interpretation.”<sup>207</sup> This indicates that there is a difference between the visual and the textual; the former is “less susceptible to the cooling impact of cognitive expression and reason.”<sup>208</sup> In other words, although reading about a burning cross allows us to reflect rationally, witnessing a burning cross incites an automatic, irrational response.<sup>209</sup> Likewise, it is the image of the burning flag that causes “serious offense.”<sup>210</sup> And it is the effect of that image on the observer that makes it different—contra Chief Justice Rehnquist—from someone “mak[ing] any verbal denunciation of the flag.”<sup>211</sup>

Notably, neither the cross in the cross burning cases nor the flag in the flag burning cases were designated as “passive,” even though there is little that distinguishes those symbols from religious symbols deemed “passive.”<sup>212</sup> Indeed, “symbols of State often convey political ideas just as religious symbols come to convey theological ones.”<sup>213</sup> And before they are symbols, they are visual images.<sup>214</sup> In the flag cases, like in the cross burning cases just discussed, “the power of the symbol itself operates at a nonrational level.”<sup>215</sup>

To be sure, there are profound differences between these cases involving flag burning and cross burning and those involving religious imagery.<sup>216</sup> There are two layers of symbolism: the meaning of the symbol itself, and the symbolic meaning of the act of burning the symbol. The cross was not just sitting there—it was burning. Aside from the obvious differences in substantive content, the message of destruction carries a specific connotation in the flag and cross burning cases. But the manner in which visual perception operates is the same. And while visual representations in the Establishment Clause context

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<sup>206</sup> See, e.g., RANDALL P. BEZANSON, *ART AND FREEDOM OF SPEECH* 218 (2009).

<sup>207</sup> See *id.* at 239; see also *Black*, 538 U.S. at 400 (Thomas, J., dissenting) (“That cross burning subjects its targets, and, sometimes, an unintended audience, to extreme emotional distress, and is virtually never viewed merely as ‘unwanted communication,’ but rather, as a physical threat, is of no concern to the plurality.” (citations omitted)).

<sup>208</sup> BEZANSON, *supra* note 206, at 252 (noting that “it is an entirely different experience to read about a burning cross than to witness it firsthand or see its image on film or canvas”).

<sup>209</sup> See *id.*; Tushnet, *supra* note 7, at 691.

<sup>210</sup> *Johnson*, 491 U.S. at 411.

<sup>211</sup> *Id.* at 431 (Rehnquist, C.J., dissenting).

<sup>212</sup> See, e.g., *Black*, 538 U.S. at 360; *Johnson*, 491 U.S. at 397.

<sup>213</sup> See *Barnette*, 319 U.S. at 632.

<sup>214</sup> See Adler, *supra* note 146, at 214 (“[T]he flag’s message is . . . conveyed solely through its visual image. It is a wordless pattern of stars, stripes, and colors.”).

<sup>215</sup> Kent Greenawalt, *O’er the Land of the Free: Flag Burning as Speech*, 37 UCLA L. REV. 925, 944 (1990); see *Black*, 538 U.S. at 360; *Johnson*, 491 U.S. at 406.

<sup>216</sup> See *Black*, 538 U.S. at 360; *Johnson*, 491 U.S. at 406.



have been deemed “passive,” the Court seems to be aware of their “activity” in the free speech context.

Beyond the symbolic speech context, the most instructive examples of grappling with the textual and the visual are the opinions of Justices Samuel Alito and Stephen Breyer in *Brown v. Entertainment Merchants Ass’n*—the case involving violent video games.<sup>217</sup> Justice Alito closely examined the interactivity associated with video games; he seemed troubled by the majority’s equation of the textual and the visual experience.<sup>218</sup> Whereas Justice Scalia contended for the majority—citing Judge Posner—that “all literature is interactive,”<sup>219</sup> Justice Alito, joined in concurrence by Chief Justice John Roberts, suggested that “the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before.”<sup>220</sup> The degree of interactivity Justice Alito attributed to video games does not correspond exactly to the breakdown of the textual and the visual; in his assessment, there is a quality of active engagement in playing video games that exceeds exposure to images in movies or on television.<sup>221</sup> But, however the lines may be drawn, the immediacy of video games depends in large part on the visual stimuli provided to the player.<sup>222</sup> As compared to literature, thus, “video games are far more concretely interactive”; in addition to sound and touch elements, the visual element contributes significantly to the more vivid experience.<sup>223</sup>

Justice Breyer focused on the harm that extremely violent video games can cause in children; in doing so, he used the active/passive distinction.<sup>224</sup> Video games, in Justice Breyer’s view, “can cause more harm . . . than can typically passive media, such as books or films or television programs.”<sup>225</sup> As in Justice Alito’s concurrence, Justice Breyer’s alignment of active (video games) and passive (books, films, and television) does not correspond to the visual

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<sup>217</sup> See 131 S. Ct. 2729, 2742–51 (2011) (Alito, J., concurring in the judgment); *id.* at 2761–71 (Breyer, J., dissenting).

<sup>218</sup> *Id.* at 2750–51 (Alito, J., concurring in the judgment) (disagreeing with the majority’s assessment that literature was as interactive as the violent video games at issue).

<sup>219</sup> *Id.* at 2738 (“As Judge Posner has observed, all literature is interactive . . . . ‘Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.’” (quoting *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001))); see also Tushnet, *supra* note 7, at 745–47 (discussing Judge Posner’s assessment of the textual and visual in other cases).

<sup>220</sup> *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2748 (Alito, J., concurring in the judgment).

<sup>221</sup> See *id.* at 2742. But see Tushnet, *supra* note 7, at 698 (suggesting that the lines may be drawn differently).

<sup>222</sup> *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2748 (Alito, J., concurring in the judgment) (discussing the high quality and realistic appearance of images).

<sup>223</sup> *Id.* at 2750 (citations omitted) (internal quotation marks omitted).

<sup>224</sup> *Id.* at 2768 (Breyer, J., dissenting).

<sup>225</sup> *Id.*

versus textual breakdown.<sup>226</sup> Moreover, the “passive” label shifts between describing the medium itself and the viewer.<sup>227</sup> Though less pronounced than in Justice Alito’s concurrence, the visual component in Justice Breyer’s dissent likely plays a significant role as well.<sup>228</sup> Whether these opinions signal a new trend in Supreme Court opinions assessing visual experience on observers is unclear. But it seems worth noting that at least three justices seem aware of the potential importance of evaluating the power of visual images.

In another context, two recent decisions concerning graphic warnings on cigarette packages illustrate how the distinction between the rational or factual associated with text and the irrational or nonfactual associated with images plays out. In one decision, the U.S. Court of Appeals for the Sixth Circuit held constitutional the U.S. Food and Drug Administration’s (FDA) graphic warning requirements.<sup>229</sup> In doing so, the court considered the visual images to be subjective and acknowledged the “inherently persuasive character” of visual images.<sup>230</sup> The dissent, moreover, elaborated on the emotional aspect of the images.<sup>231</sup> In another decision, the U.S. Court of Appeals for the D.C. Circuit vacated the FDA’s graphic warning requirements on cigarette packages.<sup>232</sup> In doing so, the D.C. Circuit addressed the distinction between textual warnings and visual graphic warnings.<sup>233</sup> The panel majority and the dissent disagreed on whether the emotive nature of graphic images could render otherwise factual accompanying text nonfactual or controversial.<sup>234</sup> Notably, the dissent argued that the emotive nature of visual images “does not necessarily undermine the warnings’ factual accuracy.”<sup>235</sup>

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<sup>226</sup> See *id.* at 2768.

<sup>227</sup> *Id.* at 2769 (using the term in both ways—at times describing interactive games as more “passive” than other media types, but also describing the “passive” viewing experience of television and films).

<sup>228</sup> See *id.* at 2767 (discussing “images of human beings as targets”); *id.* at 2771 (discussing depictions and images).

<sup>229</sup> *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1208 (D.C. Cir. 2012); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 526 (6th Cir. 2012).

<sup>230</sup> *Disc. Tobacco City*, 674 F.3d at 526 (“But, in contrast to the textual warnings, there can be no doubt that the FDA’s choice of visual images is subjective, and that graphic, full-color images, because of the inherently persuasive character of the visual medium, cannot be presumed neutral.”).

<sup>231</sup> *Id.* at 528 (Clay, J., dissenting).

<sup>232</sup> *R.J. Reynolds*, 696 F.3d at 1208.

<sup>233</sup> *Id.* at 1211.

<sup>234</sup> Compare *id.* at 1216 (stating that the graphic warnings did not constitute information that was “purely factual and uncontroversial”), with *id.* at 1230 (Rogers, J., dissenting) (“That such images are not invariably comforting to look at does not necessarily make them inaccurate.”). In *Discount Tobacco City*, the Sixth Circuit said the images were factual. 674 F.3d at 569; see also Corbin, *supra* note 7, at 39 (agreeing with the Sixth Circuit’s determination that the emotion-invoking images were nevertheless factual and contrasting the reasoning with that of the D.C. Circuit in *R.J. Reynolds*).

<sup>235</sup> *R.J. Reynolds*, 696 F.3d at 1230.

In all of these examples, only Justice Breyer's dissent in the video games case explicitly referenced neuroscience research.<sup>236</sup> Otherwise, the distinctions between textual and visual appear to be largely a product of the judges' intuitions. That does not mean that these intuitions are necessarily wrong in light of cognitive neuroscience insights; the speech cases discussed here illustrate that they may well be correct.<sup>237</sup> But the absence of an empirical basis for these intuitive assumptions should give us pause. Indeed, as this Article argues with respect to religious symbols, such intuitive assumptions may just as well turn out to be wrong. And at least some judges seem acutely aware of this problem.<sup>238</sup>

### C. Distinguishing Visual Perception and Cultural Meaning

So far, the discussion of religious visual symbols as images has largely disregarded the symbolic dimension. To reiterate, how visual images communicate is an empirical, objective question whereas the question of meaning is subjective and context-dependent. The neuroscience data presented in Section A of this Part undermines the claim that visuals are somehow less powerful or even "passive" as compared to text.<sup>239</sup> This Section shows that to the extent "passive" is shorthand for a bundle of factors related to context or cultural meaning, the label is misleading at best, and therefore not useful.<sup>240</sup>

For purposes of the Establishment Clause, we are only concerned with visual representations that are *religious* symbols. Thus, problems arise especially when visual representations are not obviously religious.<sup>241</sup> Which visual symbols are religious? Semiotics teaches us that multiple steps are involved in getting from a visual image to a symbolic religious message.<sup>242</sup> Simply put, cultural meaning is given to the symbolic representation.

Images, like texts, must be interpreted to fully make their meaning accessible. Images "acquire meaning from our associations to them, drawn from our perceptual knowledge, experience, [and] cultural setting."<sup>243</sup> This brings the communicative impact of visuals into conversation with more traditional approaches to the interpretation of texts and symbols, including literary criticism,

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<sup>236</sup> See *Entm't Merchs. Ass'n*, 131 S. Ct. at 2768 (Breyer, J., dissenting).

<sup>237</sup> See *supra* notes 192–235 and accompanying text.

<sup>238</sup> See *Elmbrook II*, 687 F.3d at 873 (Posner, J., dissenting).

<sup>239</sup> See *supra* notes 151–187 and accompanying text.

<sup>240</sup> See *infra* notes 241–299 and accompanying text.

<sup>241</sup> 2 GREENAWALT, *supra* note 32, at 69 ("The interesting, and constitutionally troublesome, issues arise in more ambiguous situations, in which it is unclear either whether words or symbols are religious or whether the state supports the religious message that they indisputably convey.").

<sup>242</sup> See Zick, *supra* note 12, at 2330–32 (outlining semiotics in order to appropriately interpret enigmatic signs).

<sup>243</sup> Spiesel, *supra* note 138, at 41.

ethnography, and other interpretive tools discussed in the legal literature.<sup>244</sup> Legal scholars have proposed various approaches to determine the symbolic meaning of a message.<sup>245</sup> For example, several scholars have suggested looking to the work of anthropologist Clifford Geertz.<sup>246</sup> Using an ethnographic approach, these scholars argue, facilitates the recovery of the cultural meaning of the symbol.<sup>247</sup> Cultural literacy in interpreting religious symbols thus becomes key; the observer must recognize the religious nature of the symbol or act. Indeed, as Justice Felix Frankfurter stated in his dissent in *West Virginia Board of Education v. Barnette*, “The significance of a symbol lies in what it represents.”<sup>248</sup>

But who decides what the symbol represents? As Rebecca Tushnet explains, “we trust our own (natural-seeming and immediate) reactions to images, but we worry that other people’s reactions to images may be irrational—especially if they don’t see the same things we do.”<sup>249</sup> But what individual observers see is determined by their characteristics; what one may deem natural and immediate may not be at all obvious to someone else looking at the same visual representation. Whether the observer views a football game of his own team<sup>250</sup> or is otherwise affiliated with one side,<sup>251</sup> the same is likely true for the religious affiliation of the observer.<sup>252</sup> If the observer is affiliated with a religious group whose symbol is on display, the perception is likely different than if the observer is not affiliated with that particular group or, even more problematically perhaps, not affiliated with any religion.<sup>253</sup> Perception of the visual symbol, in short, arguably “depends on which team you favor.”<sup>254</sup>

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<sup>244</sup> See, e.g., Hill, *supra* note 10, at 493 (using a literary criticism approach); Zick, *supra* note 12, at 2265 (proposing an ethnography approach).

<sup>245</sup> See, e.g., Hill, *supra* note 127, at 770 (applying a speech act theory approach to ceremonial deism); Hill, *supra* note 10, at 493 (applying a linguistic speech act theory to interpret the meaning of religious symbols).

<sup>246</sup> See Ravitch, *supra* note 10, at 1021 (referencing Geertz’s analysis of the purpose of religious symbols in that they “function to synthesize people’s ethos”); Zick, *supra* note 12, at 2266 (stating that the Geertzian “approach . . . focuses on the interpretation of symbols and symbol systems within a culture”). See generally CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973).

<sup>247</sup> See, e.g., Ravitch, *supra* note 10, at 1021; Zick, *supra* note 12, at 2322.

<sup>248</sup> 319 U.S. at 662 (Frankfurter, J., dissenting).

<sup>249</sup> Tushnet, *supra* note 7, at 721; see also Adler, *supra* note 30, at 214–15 (identifying similar issues in *Barnette*).

<sup>250</sup> See Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 132–34 (1954) (analyzing selective perception among fans at a Princeton-Dartmouth football game).

<sup>251</sup> This is a key theme discussed in the literature on cognitive illiberalism. See, e.g., Kahan et al., *supra* note 7, at 838.

<sup>252</sup> See, e.g., 2 GREENAWALT, *supra* note 32, at 89 (“Most Christians may pass a crèche in a public space without giving it a second thought; it may have more significance for most Jews.”).

<sup>253</sup> See generally Caroline Mala Corbin, *Nonbelievers and Government Religious Speech*, 97 IOWA L. REV. 347 (2012) (contending that government religious speech violates the Establishment

Moreover, in the context of religious symbols, in *Lynch v. Donnelly*, the Supreme Court suggested that to “[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.”<sup>255</sup> Though questionable with respect to the conclusion on the merits, the idea is the same as the proposition that we tend to more easily find something we are looking for.<sup>256</sup> This is not to say that the merits question will be answered differently, and uniformly, according to the religious background of the viewer.<sup>257</sup> Instead, it simply means that perception is influenced by individual characteristics. Moreover, this observation highlights the importance of distinguishing between perception, interpretation of the message, and the merits question. It also illustrates one of the key problems of the endorsement test’s “reasonable observer” persona that (still) is predominantly used to assess whether public displays violate the Establishment Clause.<sup>258</sup>

Justice Jackson in *Barnette* overstated the subjectivity of symbolic speech.<sup>259</sup> Sometimes symbols, including religious symbols, are relatively clear in their meaning.<sup>260</sup> This creates a conundrum that explains why visual perception alone cannot provide an answer to Establishment Clause inquiries. Two examples, the Latin cross and holiday displays, illustrate this problem. If images are

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Clause even if it only offends nonbelievers); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111 (2011) (arguing that courts should treat nonbelievers differently in Establishment Clause analysis).

<sup>254</sup> Tushnet, *supra* note 7, at 701. Some advocate for a larger role of the faithful. Timothy Zick has argued for a Geertzian “interpretive, semiotic approach to sacred symbols [that] must take into consideration the ‘moods and motivations’ sacred symbols can evoke in the faithful.” Zick, *supra* note 12, at 2311. In his assessment, it is the perspective of the faithful that is lacking in “the current doctrine of sacred symbols.” *Id.* Although I agree with the general proposition that symbols must be taken more seriously—and the Geertzian approach appears to be one suitable avenue—it is not primarily the perspective of the faithful that deserves attention. Rather, in Establishment Clause cases, we are chiefly concerned with the meaning a religious symbol has to others, who will be rendered outsiders if the State embraces a religious identity for itself and reinforces that choice symbolically to its citizens.

<sup>255</sup> 465 U.S. 668, 680 (1984).

<sup>256</sup> Though beyond the scope of this discussion, it is worth pointing out that there is a body of cognitive neuroscience literature dealing with the question of attention. For an example of such literature, see generally Kathleen M. O’Craven et al., *fMRI Evidence for Objects as the Units of Attentional Selection*, 401 NATURE 584 (1999).

<sup>257</sup> See Hill, *supra* note 10, at 531–32 (arguing that religious background does not determine the outcome on the merits in religious symbol cases).

<sup>258</sup> See 2 GREENAWALT, *supra* note 32, at 87 (“The test, at least in its basic outline, has considerable appeal, but its proper boundaries and status are elusive, and these bear importantly on how, in my judgment, courts should respond to texts and symbols that people may perceive differently.”); see also B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2330338>, archived at <http://perma.cc/EWB7-TGP3> (addressing criticisms of the reasonable observer).

<sup>259</sup> 319 U.S. at 632–33 (“A person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another’s jest and scorn”).

<sup>260</sup> See Laycock, *supra* note 47, at 1244–49 (rejecting the “assault on meaning” in cases involving textual and visual religious symbols); Zick, *supra* note 12, at 2336 (“Some symbols more or less speak for themselves; they are ‘uncontested’ in the legal sense of the term.”).

as powerful as the neuroscience data suggests, they may still differ in their degrees of sectarianism. Arguably, the Latin cross conveys a more clearly religious message than the crèche as a component of Christmas displays. Thus, Part III provides a conceptual framework rather than an empirics-based one to reconceptualize Establishment Clause inquiries.

### 1. Latin Cross

One purportedly “passive” symbol in particular has been the subject of recent litigation, both domestically and abroad: the Latin cross. In determining the religious nature of a symbolic message, “the preeminent symbol of Christianity”<sup>261</sup> is the seemingly easy case. Federal courts have consistently interpreted the Latin cross to be a religious symbol.<sup>262</sup> Yet, even the Latin cross causes interpretive difficulties. Are we dealing with a bare cross, customary in many Protestant denominations, or a crucifix depicting the corpus, common in the Catholic, Lutheran, Eastern Orthodox, and Anglican traditions? The symbolic message communicated differs accordingly, and at least one judge has suggested a distinction in meaning on this basis.<sup>263</sup> Despite general consensus that the cross is a religious symbol, there is a decided lack of agreement on the question whether it has additional secular meaning.<sup>264</sup> The “passive” label fails adequately to capture these contextual concerns.

One nonreligious alternative meaning of the Latin cross is evident. The burning cross conveys a message of racial hatred,<sup>265</sup> one that also attaches to the Ku Klux Klan’s (KKK) use of the cross when it is not set ablaze.<sup>266</sup> In *Capitol Square Review & Advisory Board v. Pinette*—a case in which the KKK

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<sup>261</sup> *Salazar v. Buono*, 559 U.S. 700, 725 (2010) (Alito, J., concurring in part and concurring in the judgment) (referring to the cross).

<sup>262</sup> *See, e.g., Trunk II*, 629 F.3d 1099, 1101 (9th Cir. 2011); *Am. Atheists, Inc.*, 616 F.3d at 1160; *Weinbaum v. Las Cruces*, 541 F.3d 1017, 1022–23 (10th Cir. 2008); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996); *Gonzales v. N. Twp. of Lake Cnty., Ind.*, 4 F.3d 1412, 1418 (7th Cir. 1993); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993); *Harris v. City of Zion*, 927 F.2d 1401, 1403 (7th Cir. 1991); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986); *ACLU of Ga. v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1103 (11th Cir. 1983); *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930 (3d Cir. 1980).

<sup>263</sup> *Separation of Church & State Comm.*, 93 F.3d at 626 n.12 (O’Scannlain, J., concurring) (“While a crucifix is an unmistakable symbol of Christianity, an unadorned Latin cross need not be.”).

<sup>264</sup> *See infra* notes 265–287 and accompanying text. Courts elsewhere have encountered similar questions whether the Latin cross has a discernible secular meaning. In 2011, in *Lautsi v. Italy*, Italy argued that outfitting public school classrooms with crucifixes communicated a fundamentally cultural, rather than religious, message. *Lautsi v. Italy*, App. No. 30814/06, at \*1, \*17 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>, archived at <http://perma.cc/7B38-PCAX>.

<sup>265</sup> *Black*, 538 U.S. at 357 (noting that the burning of a cross was a “symbol of hate”).

<sup>266</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring).

sought to place an unadorned (and not burning) cross in a display on public property—Justice Clarence Thomas pointed out the nonreligious meaning of erecting such a cross, characterizing it as “a political act, not a Christian one.”<sup>267</sup> To be sure, the cross remains primarily a Christian symbol, but according to Justice Thomas, “[t]he Klan simply . . . appropriated one of the most sacred of religious symbols as a symbol of hate.”<sup>268</sup> The symbolic message communicated by the cross in this instance, therefore, is only apparent in light of the KKK’s authorship.

In several more recent cases, another secular message has been ascribed to the cross. Several judicial decisions have found it to be a marker of the resting place of the dead, with various secular messages of honor, valor, and sacrifice attached.<sup>269</sup> Justice Kennedy, writing for the plurality in *Salazar v. Buono*, interpreted the cross in this manner.<sup>270</sup> Both Justice Kennedy and Justice Alito further interpreted the meaning of the cross as reminiscent of military cemeteries in the United States and abroad.<sup>271</sup> Likewise, in *American Atheists, Inc. v. Davenport*, the U.S. Court of Appeals for the Tenth Circuit—in a case involving Utah highway crosses—acknowledged that “a reasonable observer would recognize these memorial crosses as symbols of death.”<sup>272</sup> But the Tenth Circuit also pointed out that there is a distinctly Christian dimension to the use of the cross as a marker of death.<sup>273</sup> And though common as a symbol of death, it is not therefore secular.<sup>274</sup> Likewise, in *Buono*, Justice Stevens expressed the view that “[m]aking a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian.”<sup>275</sup> Therefore, even if there were a secular message grafted onto the religious message of the cross, it does not become “passive” in its meaning.

Scholars and courts disagree whether meaning is an empirical question,<sup>276</sup> but that is a different question than the empirical claim regarding visual per-

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<sup>267</sup> *Id.* (noting “the fact that the legal issue before us involves the Establishment Clause should not lead anyone to believe that a cross erected by the Ku Klux Klan is a purely religious symbol”).

<sup>268</sup> *Id.* at 771.

<sup>269</sup> See, e.g., *Buono*, 559 U.S. at 721 (plurality opinion); *Davenport*, 637 F.3d at 1111.

<sup>270</sup> *Buono*, 559 U.S. at 721 (plurality opinion).

<sup>271</sup> *Id.*; *id.* at 723–24 (Alito, J., concurring in part and concurring in the judgment).

<sup>272</sup> 637 F.3d at 1122.

<sup>273</sup> *Id.* As the Tenth Circuit put it, “a memorial cross is not a *generic* symbol of death; it is a *Christian* symbol of death that signifies or memorializes the death of a *Christian*.” *Id.* Further, the court found “no evidence . . . that the cross has been widely embraced as a marker for the burial sites of non-Christians or as a memorial for a non-Christian’s death.” *Id.* Similarly, an exchange during oral argument in *Buono* illustrated the difference between a generic marker and a distinctly Christian marker. Transcript of Oral Argument at 38–39, *Buono*, 559 U.S. 700 (No. 08-472).

<sup>274</sup> *Davenport*, 637 F.3d at 1122–23.

<sup>275</sup> *Buono*, 559 U.S. at 747 (Stevens, J., dissenting).

<sup>276</sup> See, e.g., Hill, *supra* note 10, at 529 (asserting that lower courts treat meaning “as primarily an empirical question” and disagreeing with that approach).

ception. Does it matter for the assessment of the religious character of a cross memorial in Utah that the designers do not revere the cross as a religious symbol<sup>277</sup> and only eighteen percent of that state's population does so?<sup>278</sup> The larger question is to what extent the local should matter in questions of Establishment Clause application in general, and its application to religious symbolic expression in particular.<sup>279</sup> But on the narrower question posed here, the context of determining the symbol's meaning, it is largely irrelevant whether the cross is revered as a symbol of faith in the local community.<sup>280</sup> What matters is that it is recognizable as a religious symbol, even if it is not the object of religious reverence. Put another way, the majority of Utah citizens likely knows that the Latin cross is a religious symbol. Likewise, as cases such as *Davenport* show, the intent of the designers (and possible testimony as to intent) will not necessarily matter for the court's interpretation of the symbol.<sup>281</sup> Courts should attempt to inquire into the range of plausible meanings, including potential religious and secular meanings of the symbols, in coming to a context-dependent conclusion.<sup>282</sup> The difficulty of this analysis will vary case-by-case.

If the Latin cross has additional meaning(s), should that matter for Establishment Clause purposes? Scholars have examined similar questions under the headings of contested and uncontested meanings,<sup>283</sup> social meaning,<sup>284</sup> as well as consensus on meaning.<sup>285</sup> As in the First Amendment speech context, there are standard and nonstandard interpretations of visual religious symbols.<sup>286</sup> The secular message of the cross in particular is far less obvious and far more contested than its religious message. As Douglas Laycock notes, the nonreli-

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<sup>277</sup> *Davenport*, 637 F.3d at 1118 (“The secular nature of the UHPA motive is bolstered by the fact that the memorials were designed by two individuals who are members of the Mormon faith, the Church of Jesus Christ of Latter Saints [sic] (‘LDS Church’), a religion that does not use the cross as a religious symbol.”).

<sup>278</sup> *Id.* 1121–22 (noting that “a majority of Utahns do not revere the cross as a symbol of their faith”). The Tenth Circuit did not find that to be the case. *See id.* at 1122–24 (“Similarly, the fact that cross-revering Christians are a minority in Utah does not mean that it is implausible that the State’s actions would be interpreted by the reasonable observer as endorsing that religion.”).

<sup>279</sup> *See* Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1874–91 (2004).

<sup>280</sup> *See* Laycock, *supra* note 47, at 1243 (reaching the same conclusion).

<sup>281</sup> *See Davenport*, 637 F.3d at 1118; Hill, *supra* note 10, at 529 (discussing problems associated with treating “[t]he meaning of . . . allegedly religious symbols . . . as primarily an empirical question”). *But see* Zick, *supra* note 12, at 2337–38 (noting that “the speakers testified with respect to their intended messages, thus removing any remaining symbolic uncertainty”).

<sup>282</sup> Zick, *supra* note 12, at 2367.

<sup>283</sup> *Id.* at 2336.

<sup>284</sup> CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 124–28 (2007).

<sup>285</sup> Hill, *supra* note 10, at 518.

<sup>286</sup> *See* Schauer, *supra* note 138, at 226 (discussing nonstandard meaning of nonlinguistic communication).



gious meaning of the cross, as discussed in these cases, depends entirely on its religious meaning.<sup>287</sup> Thus, there is so little ambiguity in the message of the cross that, even if it communicates an alternative message—and especially if that alternative meaning is indeed entirely dependent on the religious message—the alternative meaning should not matter for the message of the cross. And none of these alternative meanings, even if they were plausible, are helpfully summarized under the label “passive.”

## 2. Christmas Displays

The ostensible problem of ambiguity we see in connection with the Latin cross does not arise in the same way in the Christmas display cases, because the crèche—with figures of Mary and Joseph, the baby, and the shepherds—can be identified as the visual representation of the textual Biblical story of Jesus’s birth.<sup>288</sup> This identification, of course, requires that the audience knows of the scriptural source. Perhaps more problematic, once the crèche is combined in a Christmas display with other, secular features,<sup>289</sup> selective observation may factor into the display’s assessment. We may focus on the religious or secular elements of such “mixed” holiday displays, depending on what we are looking for.<sup>290</sup> Indeed a similar problem arises when the cross is only one element of a larger display, such as the Mt. Soledad war memorial.<sup>291</sup>

But there is another complication with respect to Christmas displays: the Christmas holiday, and the crèche as its representation, may have undergone a process of secularization.<sup>292</sup> The Tenth Circuit, for instance, contrasted Christmas, “which has been widely embraced as a secular holiday,” with the cross, for which the court discerned “no evidence” of being “widely embraced by non-Christians as a secular symbol for death.”<sup>293</sup> Although courts often assert that certain symbols or expressions have lost their religious content, it remains unclear how exactly they make this determination.<sup>294</sup> Addressing this shortcoming, Jessie Hill suggests taking a linguistic speech act theory approach to

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<sup>287</sup> Laycock, *supra* note 47, at 1240–42. Laycock concludes that “[t]here is no ambiguity about the primary meaning of a Christian cross.” *Id.* at 1239.

<sup>288</sup> See *Luke* 2:1–:20 (New American Bible); *Matthew* 2:1–:11 (New American Bible).

<sup>289</sup> See *Lynch*, 465 U.S. at 671.

<sup>290</sup> See *supra* notes 252–256 and accompanying text; *cf.* Tushnet, *supra* note 7, at 748 n.290 (collecting sources that discuss how people will not notice things if they are not actively looking for them).

<sup>291</sup> *Trunk II*, 629 F.3d at 1103.

<sup>292</sup> See Hill, *supra* note 127, at 715–26 (discussing secularization thesis and criticisms); see also Ravitch, *supra* note 10, at 1059–61 (discussing the distinction between desacrilization and secularization).

<sup>293</sup> *Davenport*, 637 F.3d at 1122.

<sup>294</sup> Hill, *supra* note 127, at 714–26.

the “methodological question whether the religiosity of a particular practice, symbol, or phrase has faded.”<sup>295</sup> In the context of advocating a Geertzian approach, Timothy Zick argues that judicial interpretation has led to desacralization of holiday displays in most instances.<sup>296</sup> But even if an “authoritative means of resolving the meaning of sacred symbols” appears out of reach, a more attentive evaluation and interpretation is necessary.<sup>297</sup> Some, however, point out that it is not the loss of religious meaning—the desacralization of the symbols themselves that is caused by adding secular elements—but rather the secularization of the overall display.<sup>298</sup> It appears less important to determine who is right; it is, however, important to note that a shift in symbolic meaning seems to occur that changes the message communicated. Nevertheless, the core meaning of the symbolic representation is unambiguously religious.<sup>299</sup> Here, too, none of the shifts in meaning are usefully described as “passive.”

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Visual symbols are at least as “active” as textual speech, an empirical finding that is objectively ascertainable by neuroscience data. The data refutes the empirical claim that visual symbols are merely “passive” as compared to text. Judges seem to be aware of the activity of symbols in the speech cases discussed. The result of the empirical question—how images communicate, in light of the neuroscience data presented—is that text and visual images should be treated the same way in terms of their communicative impact. The separate question of symbolic meaning is context-dependent and subjective. At this point, the empirical literature can be brought into conversation with the interpretive literature that concerns the meaning of symbols. The cultural interpretation of symbols also is the same for visual and textual messages; text and images can equally be used to convey symbolic messages that must be interpreted in order to make their meaning accessible. Interpreting the meaning of symbols, thus, has nothing to do with whether the medium is textual or visual.

### III. COMMUNICATIVE IMPACT

What prescriptive lessons follow from these insights for the Establishment Clause and for First Amendment theory as it concerns visual symbols more broadly? Images speak at least as loudly as words, and sometimes—as the discussion in Part II suggests—a message may be conveyed even more in-

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<sup>295</sup> *Id.* at 731.

<sup>296</sup> Zick, *supra* note 12, at 2367 (“The upshot, where some secular purpose, as is generally the case, can be ascertained or judicially imagined is that judges . . . will only in the rarest of circumstances perceive an unconstitutional establishment from the display of sacred symbols.”).

<sup>297</sup> *Id.*

<sup>298</sup> Ravitch, *supra* note 10, at 1059–61.

<sup>299</sup> See EISGRUBER & SAGER, *supra* note 284, at 134 (reaching the same conclusion).

tensely by images than by words. There should not be a constitutionally relevant distinction between images and words that discounts the communicative impact of images and privileges words. Having discarded the active/passive distinction and textual privilege, this Part provides a novel conceptual framework for assessing symbolic religious messages according to their communicative impact irrespective of the medium. It argues that endorsement and coercion should be reconceptualized as matters of degree rather than kind, because doing so provides a better account of what matters: the communicative impact of a message. This conception is more responsive to the underlying normative concern that the State may not adopt a religious identity of its own.

The most obvious immediate justification for the medium-neutral prescriptive position stems from the text of the Establishment Clause itself. Textually, the Establishment Clause is medium-neutral; “Congress shall make no law respecting an establishment of religion”<sup>300</sup> does not indicate by which communicative means an establishment results. To adapt the classic principle of media neutrality in copyright law, it is the establishment of religion that the Establishment Clause prohibits, and not the particular form by which such establishment is ultimately achieved.<sup>301</sup> If textual messages are capable of producing an Establishment Clause violation by communicating the state’s own religious identity and resulting preference for one particular religion, the same is true for visual messages. In light of the provision’s medium-neutrality, courts ought to assess textual and visual religious messages alike in terms of their communicative impact.

This Part argues that courts should examine visual religious symbols under a communicative impact framework. First, Section A explains that the proposed communicative impact framework for visual symbols would result in greater First Amendment symmetry.<sup>302</sup> Next, Section B addresses the question of when the communicative impact of religious symbols can be attributed to the State and accordingly trigger the Establishment Clause.<sup>303</sup> Finally, Section C reframes familiar themes of Establishment Clause doctrine under the premise that the State may not communicate a religious identity, regardless of whether through endorsement or coercion.<sup>304</sup>

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<sup>300</sup> U.S. CONST. amend. I.

<sup>301</sup> Cf. *Holmes v. Hurst*, 174 U.S. 82, 98 (1899) (“It is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes . . .”).

<sup>302</sup> See *infra* notes 305–327 and accompanying text.

<sup>303</sup> See *infra* notes 328–339 and accompanying text.

<sup>304</sup> See *infra* notes 340–364 and accompanying text.

### A. First Amendment Symmetry

Communicative impact is routinely examined in free speech doctrine and theory.<sup>305</sup> There, the question is whether a law is aimed at the communicative impact of the expression or whether it is a law of general application that has an incidental effect on the communication.<sup>306</sup> This question has relevance in the context of both textual and symbolic speech. For a symbolic speech example, recall only *Virginia v. Black*, the cross burning case.<sup>307</sup> Communicative impact in the free speech area is employed to discuss the content of the message conveyed.<sup>308</sup> Likewise, we are concerned with the question of content of the message in the Establishment Clause context. In free speech scholarship, the content of the message conveyed is often expressed in terms of the speech's communicative impact.<sup>309</sup> Importantly, scholars in the free speech context sometimes speak of communicative impact in terms suggesting a distinction of degrees.<sup>310</sup>

In its focus on communicative impact, the framework proposed in this Article results in greater First Amendment symmetry. Text should no longer be given special status in the Establishment Clause context; as previously demonstrated, this distinction does not exist in the speech context.<sup>311</sup> To be sure, the

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<sup>305</sup> See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (cross burning); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card burning).

<sup>306</sup> See *O'Brien*, 391 U.S. at 376–77; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (2d ed. 1988) (subsequently elaborating the *O'Brien* idea of communicative impact as government motivation); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496–98 (1975) (analyzing *O'Brien's* communicative impact inquiry).

<sup>307</sup> See 538 U.S. at 360–61; cf. Schauer, *supra* note 138, at 201 (explaining that “the case turned not on whether Virginia had targeted the communicative impact of cross-burning, for of course it had, but instead on whether this was one of the communicative impacts whose delivery the First Amendment did not protect”).

<sup>308</sup> Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 244 (2012) (explaining that “content is most frequently glossed in terms such as ‘message,’ ‘substance,’ ‘meaning,’ or ‘communicative significance’”).

<sup>309</sup> *Id.* Sometimes “message” and “communicative impact” are used interchangeably. See Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 117 (1981) (rejecting the *O'Brien-Hart-Tribe* concept but still agreeing with this point).

<sup>310</sup> See, e.g., William E. Lee, *The Futile Search for Alternative Media in Symbolic Speech Cases*, 8 CONST. COMMENT. 451, 457 (1991) (discussing alternative mediums for speech: “another medium will be adequate even though the communicator must sacrifice some intensity or communicative impact”; “the alternatives must not result in diminished communicative impact”; and “the comparison of the communicative impact of various forms of speech”). Likewise, in the context of (usually textual expressions of) ceremonial deism, one scholar asserts that such messages, “though religious in origin . . . no longer carry any religious impact.” See Hill, *supra* note 127, at 712 (emphasis added). Further, she argues that city names “have lost their religious impact over time,” and concludes that “one might doubt whether the city names of Corpus Christi and San Francisco, or perhaps even the use of ‘A.D.’ on public documents, should be unconstitutional given the apparent lack of religious impact those terms convey.” See *id.* at 726, 759 (emphasis added).

<sup>311</sup> See *supra* notes 188–238 and accompanying text.

underlying concerns are different.<sup>312</sup> We are not worried about preferential messages in the speech context; indeed, government speech can advance specific positions (e.g., anti-smoking or anti-obesity).<sup>313</sup> There is, moreover, no inherent value in greater First Amendment symmetry for symmetry's sake; the chief concern here is the empirical approach to visual perception. Why is the theoretical and doctrinal approach to a cross on the wall different than to a burning cross? On the level of visual perception, it should not be.<sup>314</sup>

On the question of interpretation of the cultural meaning, historical and cultural context plays a crucial role. In *Black*, the burning cross was not merely an image, it was a symbol; what makes an image a symbol is the cultural meaning we attach to it.<sup>315</sup> It was the visual character of the burning cross that was central to conveying a message that could hardly have been communicated in a textual form.<sup>316</sup> The message's specific "meaning—lynching, burning, violent racism—lay not in the image itself when viewed as a bare text."<sup>317</sup> Rather, it is the interpretation of its symbolism that gives it meaning. Thus, the "burning cross—a symbol—was understood to constitute essentially an explicit threat, allowing the state to ban cross-burning carried out for the purposes of intimidation."<sup>318</sup>

The cultural dimension of interpreting the symbol of the burning cross is well understood by the Supreme Court. Justice Thomas stated in his dissent in *Black* that "[i]n every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, and the profane. I believe that cross burning is the paradigmatic example of the latter."<sup>319</sup> In the same case, Justice O'Connor stated in her partial majority and partial plurality opinion that a finding of intent to intimidate makes it essential to evaluate "all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate."<sup>320</sup> A key difference between Justice Thomas's dissent and Justice O'Connor's as well as Justice David Souter's opinions

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<sup>312</sup> See *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 526 (6th Cir. 2012) (permitting preferential messages in the speech context).

<sup>313</sup> See *id.*

<sup>314</sup> See *supra* notes 151–187 and accompanying text.

<sup>315</sup> See BEZANSON, *supra* note 206, at 239 (explaining that "historically grounded cultural meaning attached to the burning cross" was due in large part to the experiences by people who witness the burning cross in public, especially for those people of race who "had deeply internalized the brutal connotations").

<sup>316</sup> See Tushnet, *supra* note 7, at 697.

<sup>317</sup> BEZANSON, *supra* note 206, at 239.

<sup>318</sup> See Tushnet, *supra* note 7, at 697.

<sup>319</sup> 538 U.S. at 388 (Thomas, J., dissenting).

<sup>320</sup> *Id.* at 367 (plurality opinion); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 432 (1992) (Stevens, J., concurring in the judgment) (discussing the message sent by cross burning in context).

lies in the role of standard and nonstandard meanings.<sup>321</sup> Whereas Justice Thomas focused on the standard meaning of cross burning that communicates intimidation based on racial hatred, Justices O'Connor and Souter respectively emphasized nonstandard interpretations.<sup>322</sup> This type of difference in interpretive focus was equally evident in interpretations of the Latin cross.<sup>323</sup> And, importantly for the distinction between images and words, Frederick Schauer argues that the result in Justice O'Connor and Justice Souter's opinions would likely have been different if the case had dealt not with a visual but rather a textual message.<sup>324</sup>

In the flag burning cases, the Supreme Court, as one scholar put it, "seemed struck by the strange force of the flag as a visual symbol."<sup>325</sup> The range of meanings possibly communicated by the flag thus played an important role, as the visual symbol's various meanings could not be contained in a single message.<sup>326</sup> Interpretations of the Confederate flag offer a similar insight on varying interpretations of the symbol. Courts have struggled to define the line between the flag being a symbol of hate and a symbol of historical significance.<sup>327</sup>

We must distinguish how the observer sees, what the observer sees—a religious message or a secular message?—and how the observer interprets the possible effect of a religious message—endorsement?—that results from the display. Whenever there is communicative impact, two questions follow: first, whether the State is responsible for the message and, second, whether the impact is coercive, endorsing, or otherwise has an effect that the Establishment Clause prohibits.

### B. Calibrating Communicative Impact

At a minimum, the Establishment Clause prohibits the State from adopting a religious identity as its own. Consequently, the Establishment Clause contains a content-based restriction on speech attributable to the government, prohibiting

<sup>321</sup> Schauer, *supra* note 138, at 223–24.

<sup>322</sup> *Id.*

<sup>323</sup> See *supra* notes 261–287 and accompanying text.

<sup>324</sup> Schauer, *supra* note 138, at 225–26 (using the textual message "We will lynch you just like we lynched your ancestors").

<sup>325</sup> Adler, *supra* note 146, at 215.

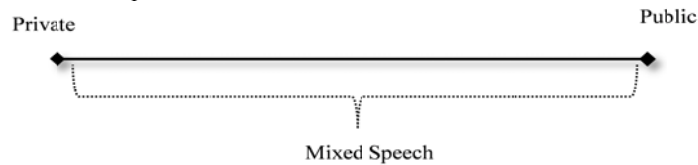
<sup>326</sup> *Id.* ("Visual images by their nature cannot be confined.")

<sup>327</sup> Michael C. Dorf, *Same-Sex Marriage, Second Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1316–23 (2011) (discussing the Confederate battle flag); Zick, *supra* note 12, at 2291, 2350–54 (same); see, e.g., *Briggs v. Mississippi*, 331 F.3d 499, 506–08 (5th Cir. 2003) (holding that the Mississippi state flag—which incorporates the Confederate flag including a religious symbol, the St. Andrew's Cross—does not violate the Establishment Clause); *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) (holding that the Equal Protection Clause is not violated by flying a Confederate flag over the state capitol); see also Haupt, *supra* note 100, at 621–23 (discussing "Sons of Confederate Veterans" license plates).

the State from communicating religious subject matter as an expression of its own religious identity or preference. In short, if the State may not have its own religious identity, it also may not communicate a religious identity.<sup>328</sup> Whether such an expression of identity results in coercion or endorsement is discussed in the next Section. For the time being, it bears emphasis that Establishment Clause constraints only apply to religious speech attributable to the state.

Considering the threshold question of attribution of the message to the State contextualizes the relationship between the message and its communicative impact. I have argued elsewhere that, for attribution purposes, religious speech is best conceptualized as situated between the end points of purely public and purely private speech on a mixed-speech continuum, as Figure 1 illustrates.<sup>329</sup>

Figure 1: The Mixed-Speech Continuum



Responsibility for speech, I have argued, should be assigned by assessing “effective control” over the speech.<sup>330</sup> The end-points designate pure private speech and pure government speech. At the private end of the spectrum, full free speech and free exercise protection applies; at the public end of the spectrum, Establishment Clause limits apply.<sup>331</sup> Along the continuum, control over the message shifts; as long as private control outweighs government control, the message is attributable to private speakers, with full Free Speech and Free Exercise Clause protection.<sup>332</sup> At the mid-point of truly hybrid speech, effective control is equally shared; here, I have argued, the underlying interests of the First Amendment require free speech protection of the message and simultaneous imposition of Establishment Clause limits.<sup>333</sup> Once the State has effective control over the message, Establishment Clause constraints apply.<sup>334</sup>

<sup>328</sup> See *supra* notes 14–16 and accompanying text.

<sup>329</sup> Haupt, *supra* note 100, at 587–91 (discussing the idea of a mixed-speech continuum).

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 587.

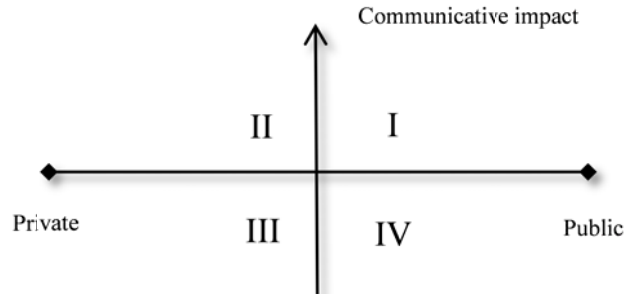
<sup>332</sup> *Id.* at 589.

<sup>333</sup> *Id.* at 632–33 (explaining that in cases of truly hybrid speech, “the speech interests require a prohibition of viewpoint discrimination and simultaneous nonendorsement under the Establishment Clause”).

<sup>334</sup> *Id.* at 589–90.

Complementing this framework, we can conceptualize the mixed public-private speech continuum as the x-axis with the communicative impact scale as the y-axis as illustrated in Figure 2.

Figure 2: Communicative Impact and the Mixed-Speech Continuum



In terms of attribution, Quadrants I and IV represent instances in which the State has effective control over the message; accordingly, Establishment Clause limits apply. Quadrants II and III represent instances in which private speakers have effective control over the message; it is therefore fully protected by the Free Speech and Free Exercise Clause. Quadrants III and IV represent what we would term non-communicative in free speech terms.<sup>335</sup> Here, the message has no (discernible) religious content. To be sure, what is nonreligious may sometimes be difficult to determine. But for purposes of assessing the communicative impact of religious messages, such messages lack significance. Finally, we do not need to evaluate the communicative impact of messages falling into Quadrants II and III because the communicative impact of religious messages attributable to private speakers is not a concern. Such speech is fully protected as a matter of free speech and free exercise. As soon as we are concerned with religious messages attributable to the government, however, communicative impact matters. That is, once we have reached the point of at least truly hybrid speech on the mixed-speech continuum, we are concerned with the degree of communicative impact of the message. To be perfectly clear, this means that the following discussion will chiefly concern Quadrant I.

A medium-neutral inquiry focuses on the communicative impact of the message conveyed rather than a distinction between textual and visual—or corresponding designation as active and passive—as it relates to the means of communication. Admittedly, this results in a significant line-drawing problem; but the line drawing rests on the degree of intensity of the message communi-

<sup>335</sup> See TRIBE, *supra* note 306, § 12-2 (discussing communicative significance and communicative/noncommunicative distinction); Ely, *supra* note 306, 1489–90 (same).



cated, not the form of communication. Evaluating the message based on communicative impact corresponds to the normative question of at what point the State has assumed a distinct religious identity.

Medium neutrality means that some visual symbolic messages may have similarly low communicative impact as textual messages such as “under God,” “In God We Trust,” or “God save the United States and this Honorable Court.” These statements do not violate the Establishment Clause.<sup>336</sup> Similarly, visual messages may be deemed to have low communicative impact, as a result of their symbolic valence or strength of the religious message. Examples might include crosses in public buildings as an architectural feature, the frieze including the Ten Commandments at the Supreme Court,<sup>337</sup> or crosses in flags or coats of arms. Yet, the resulting permissibility under the Establishment Clause has little to do with their “passive” character but rather the low communicative impact of the religious message conveyed.

Where does the cognitive neuroscience matter? Calibrating communicative impact in light of the neuroscience data debunks the notion that visual religious symbols are somehow less powerful than text as an empirical matter, or “passive” due to their visual nature.<sup>338</sup> But the focus on communicative impact in a medium-neutral manner is a conceptual tool rather than an empirical proposal. In terms of relevancy for constitutional inquiry, there are limits on the lessons to be drawn from neuroscience. Neuroscience data does not provide a yardstick of constitutional wrong based on how individuals perceive visual representations of religious symbols. One might see some validation of the idea of a reasonable religious outsider as the reasonable person,<sup>339</sup> assuming that such a person would have a negatively charged reaction to religious symbols of groups other than their own. That negative reaction would have to rise

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<sup>336</sup> In dicta, current and former Supreme Court justices have indicated their approval for these and other forms of ceremonial deism. *See, e.g.*, *Town of Greece v. Galloway*, No. 12-696, slip op. at 22 (U.S. May 5, 2014) (Kagan, J., dissenting); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 887–93 (2005) (Scalia, J., dissenting); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring in the judgment); *id.* at 35–36 (O’Connor, J., concurring in the judgment); *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 624–25 (1989) (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 670–74 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Lynch v. Donnelly*, 465 U.S. 668, 676–77 (1984); *id.* at 692–93 (O’Connor, J., concurring); *see also* Hill, *supra* note 127, at 717–20 (discussing Supreme Court cases addressing instances of ceremonial deism).

<sup>337</sup> *See* *Van Orden v. Perry*, 545 U.S. 677, 689–90 (2005) (plurality opinion).

<sup>338</sup> *See supra* notes 151–187 and accompanying text.

<sup>339</sup> *See* Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 *UCLA L. REV.* 1545, 1598 (2010) (arguing that government speech should be considered through the lens of a “religious outsider”); Hill, *supra* note 127, at 751; *see also* *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting) (“It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses.”).

to the level of feeling like an outsider in the political community, which is not measurable by gauging visual perception. But Establishment Clause theory and doctrine should take the broader lessons about visual perception into consideration as judges conduct the inquiry into communicative impact.

This does not preclude an empirics-driven solution at some future point. Several factors might be taken into account in determining the degree of communicative impact. A list might include spatial considerations such as size and location of the symbol, duration of exposure, religiosity, symbolic valence, and ambiguity. Unavoidable attention to a specific religious message also indicates a high degree of communicative impact; the message, of course, might be conveyed in textual or visual form. A bit lower on the communicative impact spectrum would be an avoidable religious message. And the lowest communicative impact results from a message that is not clearly religious, ambiguous, or commonly understood as nonreligious. To validate this list of factors, cognitive neuroscience research could potentially provide useful insights. If indeed a majority of individuals is affected in a certain way by these factors, they ought to be relevant in assessing the communicative impact of a message. We might be able to generate a presumption for different levels of communicative impact with respect to certain visual and textual symbolic messages in a variety of situations if we have an evidentiary basis; this evidentiary basis could conceivably be provided by future neuroscience research.

### *C. Coercion and Endorsement as Matters of Degree*

On the merits, Establishment Clause jurisprudence is notoriously unclear.<sup>340</sup> The Supreme Court's most recent major Establishment Clause opinion held the practice of legislative prayer at town board meetings to be constitutional.<sup>341</sup> Applying the resulting framework to religious symbols is the next important step in clarifying current uncertainties in Establishment Clause doctrine. The first step in determining the proper merits test for religious symbols is to end misconceptions about how images, and in particular visual religious symbols, communicate. This is a matter of empirical evidence. So far, the courts have guessed—and in light of the cognitive neuroscience data, guessed wrongly—that visual representations of religious symbols are constitutionally less troublesome than textual ones. But this wrong guess should not be perpetuated in the doctrine. To the extent that coercion and endorsement matter, these approaches must equally engage the power of the visual and textual.

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<sup>340</sup> See, e.g., *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 22 (2011) (Thomas, J., dissenting from denial of certiorari) (urging the Court to “clean up our mess”).

<sup>341</sup> See *Greece*, No. 12-696, slip op. at 1; *supra* note 34 and accompanying text.

This Section reframes familiar themes of Establishment Clause doctrine on the merits, proceeding from the normative premise that the State may not adopt its own religious identity and communicate it, regardless if it seeks to enforce it by means of coercion or promote it by means of endorsement. This theory conceptualizes endorsement and coercion as matters of degree rather than kind. Notably, however, abandoning the false notion of “passive” symbols is not predicated on adopting this theory. Within the framework of an underlying theory of coercion or endorsement as alternative categories of state activity prohibited by the Establishment Clause, the implications of treating visual religious symbols as “active symbols” still apply. But reconceptualizing endorsement and coercion helps address issues of varying degrees of communicative impact that might otherwise be insufficiently analyzed. This is particularly relevant for communication at the margins that either falls between endorsement and coercion or under the rubric of mild endorsements.

Reconceptualizing endorsement and coercion as matters of degree, therefore, serves as a more accurate way to think about the impact of religious messages, regardless of the medium. Although courts need not abandon the labels of coercion and endorsement, the advantage of this conceptual tool is to integrate the two traditionally separate Establishment Clause inquiries into one. For both inquiries, most important is the degree of communicative impact of the message. The existing labels correspond to different degrees of impact: coercion has high impact, endorsement has medium impact, and mild endorsements have low impact. The existent categories thus are consistent with this proposal. But the concept of endorsement and coercion as matters of degree provides a better account of the underlying concern: the communicative impact of the religious message conveyed, irrespective of its medium. Moreover, it does not invite the kind of sorting into active and passive that a distinction among endorsement and coercion as different in kind invites. A focus on the communicative impact of the message requires full attention to how a symbolic message communicates—whether visual or textual in nature.

Reconceptualizing endorsement and coercion as matters of degree starts from the premise that the state may not adopt a religion as its own and communicate that preference. This can conceivably be done in various degrees on a spectrum. The spectrum would range from a weak form of state identity, which would be communicated via endorsement of religious preferences, to a strong form of state identity, which would be communicated and, indeed, enforced by coercion.<sup>342</sup> This approach renders the expansion of the coercion category unnecessary; it takes into account that some forms of coercion are stronger than

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<sup>342</sup> Cf. *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring) (“Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.”).

others. It also helps provide an account of how some forms of endorsement might be considered as troublesome as coercion.

What does the communicative impact scale look like and how does it give guidance in deciding cases involving textual or visual religious symbols? In terms of degrees, the State might adopt its own religious preference and implement it by legal coercion at the far end. In this strong form of religious state identity, the State has adopted a particular religion as its own and forces its citizens into compliance. If the State demands that people act a certain way, it has adopted an orthodoxy that it seeks to impose on everyone, and asks everyone to actively subscribe to that orthodoxy and act accordingly. Coercion indicates a necessarily high degree of communicative impact. It demands participation in or at least compels attendance of religious practice. Yet when Justice Kennedy, for instance, speaks of “subtle coercive pressure” in *Lee v. Weisman*,<sup>343</sup> this suggests that degrees of communicative impact matter.

But coercion is not necessary to achieve a high level of communicative impact. As Justice Scalia concedes in his dissent in *Lee*, messages of endorsement may be as troublesome as legal coercion.<sup>344</sup> A relatively high degree of communicative impact can also be reached via endorsement; this represents a weaker form of the same idea, where the State wants to convince everyone to follow state religion by means other than coercion, such as overt proselytizing. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, Justice Kennedy took this into consideration when he discussed the noncoercive, yet apparently equally troublesome, cross atop a city hall.<sup>345</sup> In between, there are various conceivable degrees of endorsement indicating support for religious positions the State deems favorable.<sup>346</sup> A parallel to free speech might consider persuasive effect,<sup>347</sup> distinguishing the degree of persuasive/coercive force of the message. To pick up an example Douglas Laycock uses: “If a Christian cross has sufficient secular meaning to fall outside the Establishment Clause, then so might a sectarian prayer.”<sup>348</sup> The example illustrates the importance of assessing communicative impact irrespective of the medium.

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<sup>343</sup> *Id.* at 588 (majority opinion) (holding that “subtle coercive pressures” exist in an overt religious exercise in a secondary school environment where a student has no real alternative which would have allowed her to avoid the appearance of participation).

<sup>344</sup> *Id.* at 641 (Scalia, J., dissenting) (noting that the country’s constitutional tradition has “ruled out of order government-sponsored endorsement of religion”).

<sup>345</sup> 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part) (noting that a cross atop a city hall would violate the Establishment Clause because the symbolic recognition would place government weight behind a specific religion).

<sup>346</sup> See EISGRUBER & SAGER, *supra* note 284, at 138; 2 GREENAWALT, *supra* note 32, at 186.

<sup>347</sup> Kendrick, *supra* note 308, at 245–46 (discussing persuasion-related discrimination); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334–35 (1991).

<sup>348</sup> Laycock, *supra* note 47, at 1248.

At the low end of the communicative impact spectrum, this concept allows for recognition that some messages, though religious in nature, are “unprofound.”<sup>349</sup> To illustrate, recall *Van Orden v. Perry*, where Chief Justice Rehnquist compared a freestanding Ten Commandments monument to the visual depiction of Moses as a lawgiver among other lawgivers in the Supreme Court chamber’s frieze.<sup>350</sup> Although the same religious symbol is at issue, the degree of communicative impact is different. Thus, when Laycock discusses “enormous differences of degree” in various representations of the Ten Commandments,<sup>351</sup> the underlying concern is about communicative impact. But, as already emphasized, none of this depends on the form of communication; the communicative impact assessment applies to both visual and textual messages.

Thus, there may be textual messages with less communicative impact than visual messages. The motto “In God We Trust” may have less impact on the audience than sitting through a graduation ceremony at a church richly outfitted with religious imagery. Similarly, a short prayer at a graduation or in a legislature is over within seconds, while a cross by the side of a highway can easily and immediately be registered as such—even with the observer traveling at 55 mph<sup>352</sup>—and can trigger emotions accordingly. This results in significant communicative impact, and depending on the circumstances, the impact is perhaps as significant as a brief spoken prayer.

To illustrate, consider three examples: first, the graduation-at-church case; second, the graduation prayer case; and third, the case of legislative prayer. Following this conceptual framework, the en banc decision in the *Elmbrook* graduation-at-church case probably came out the right way, though for the wrong reason.<sup>353</sup> As discussed, the en banc majority in that case focused on the textual elements in the church.<sup>354</sup> Giving the visual symbol of the cross short shrift is an indicator of the hierarchy of words over images implicit in many religious symbol cases. But paying close attention to the communicative im-

<sup>349</sup> 2 GREENAWALT, *supra* note 32, at 91.

<sup>350</sup> 545 U.S. at 688 (plurality opinion) (noting the similarities between the two displays).

<sup>351</sup> Laycock, *supra* note 47, at 1220; *see also* EISGRUBER & SAGER, *supra* note 284, at 142–43 (contrasting the depiction of Moses in the Supreme Court frieze with other Ten Commandment monuments).

<sup>352</sup> *See* *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1112 (10th Cir. 2010) (“Because generally drivers would be passing a memorial at 55-plus miles per hour, the UHPA determined that the cross memorials ‘needed to prominently communicate all of this instantaneously.’”); *id.* at 1121 (noting that although a motorist driving by at 55-plus miles per hour may not notice the biographical information on the memorial cross, the motorist would be “bound to notice the preeminent symbol of Christianity and the UHP insignia, linking the State to the religious sign”).

<sup>353</sup> *Elmbrook II*, 687 F.3d 840, 856 (7th Cir. 2012) (en banc) (holding that conducting a graduation ceremony in a church violates the Establishment Clause).

<sup>354</sup> *Id.* at 852–53 (noting that the numerous pamphlets and other persuasive literature contributed to a finding that the selected location violated the Establishment Clause); *see supra* notes 112–117 and accompanying text.

pact of the cross itself—the duration of exposure of the audience, the spatial setup with the cross as the centerpiece, the lack of ambiguity in the message conveyed by the cross given the spatial dimension—makes it a powerful vehicle for a religious message. Indeed, it might be a more powerful vehicle than a short, nondenominational textual prayer as the one at issue in *Lee*.<sup>355</sup> Thus, a focus on the symbol itself, rather than the textual surroundings that supplemented it, would likely have led to the same outcome, but with a rationale that pays heed to a medium-neutral evaluation of communicative impact of the message.

This assessment does not necessarily place all other graduation-at-church scenarios in the same category of relatively high communicative impact. In *Elmbrook*, a high degree of communicative impact resulted from the presence of the cross and its surroundings, richly outfitted with other religious symbols. A lesser degree of communicative impact would be achieved in an unadorned church building; this, of course, relates back to interpreting the cultural meaning.<sup>356</sup> In terms of placing the message on the communicative impact spectrum, however, we are here only dealing with matters of degree when the religious nature of the message is clear. A low degree would be achieved if the graduation ceremony took place in a building owned by a religious group that did not function as a site of worship.

The medium-neutral assessment guided by the communicative impact of the message likewise applies to textual religious messages. In the graduation prayer case, the length of the prayer and its denominational valence can increase or decrease its communicative impact. In the school context, moreover, compelled attendance (whether direct or indirect) places school-related activities closer toward the coercion side.

The final example, legislative prayer, illustrates how the mixed-speech continuum—the x-axis—relates to the communicative impact spectrum.<sup>357</sup> Responsibility for the speech may shift along the x-axis. If a member of the legislative body or a paid chaplain—as in *Marsh v. Chambers*—offers the prayer, such actions would be situated on the government speech end.<sup>358</sup> Conceivably, however, the legislative body can open participation to other members of the community—as the town board did in *Town of Greece v. Galloway*—inviting a rotating

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<sup>355</sup> See 505 U.S. at 578–79 (holding that a nonsectarian prayer at an official public school graduation ceremony imposes a high risk of compulsion and therefore violates the Establishment Clause).

<sup>356</sup> See *supra* notes 239–299 and accompanying text.

<sup>357</sup> To a lesser extent, a similar shift along the x-axis can occur in the context of graduation prayer if the prayer is offered by students. In the public school setting, however, the State generally retains a high degree of control over the message. See Haupt, *supra* note 100, at 592–93.

<sup>358</sup> See 463 U.S. 783, 792–95 (1983) (holding that the practice of opening legislative sessions with prayer by a chaplain paid by the state does not violate the Establishment Clause because it is simply an acknowledgement of widely held beliefs); Haupt, *supra* note 100, at 616–17.

selection of speakers or (though highly unlikely to happen in practice<sup>359</sup>) even creating a public forum. Doing so would push the speech further toward the private end of the continuum as effective control over the message shifts.<sup>360</sup> On the communicative impact spectrum—the y-axis—the degree of impact can shift from coercion to lesser forms of noncoercive, yet high impact, to low impact. A clearly impermissible coercive practice might entail prayer by a member of the legislative body or a paid chaplain where attendance of the meeting is required (in such a case, moreover, the Free Exercise clause would certainly require an opt-out). A noncoercive practice of legislative prayer may also vary in its communicative impact. Notably, *Marsh* and *Greece* recognized that at some point, otherwise permissible legislative prayer could become impermissible.<sup>361</sup> The idea of degrees of impact tracks closely with these concerns.

To illustrate, consider the different degrees of impact if a legislative body adopts a policy, whereby at the beginning of the term all members vote in a secret ballot whether to: (a) open the session without any specified activity; (b) open the session with some purely civic activity (though the reference to God in the Pledge might already complicate matters); (c) hold a minute of silence; (d) say a nonsectarian prayer; or (e) pray in the name of Jesus.<sup>362</sup> Assuming a truly secret and unanimous vote, there is no free exercise violation. Under a strict coercion theory, there would be no Establishment Clause violation if attendees are given an opt-out.<sup>363</sup> But seen on the communicative impact spectrum, other factors to be taken into consideration would include whether there is an audience<sup>364</sup> or even whether the opening remarks are included in the legislative record.

These examples illustrate that conceptualizing coercion and endorsement as matters of degree along a communicative impact spectrum more accurately

<sup>359</sup> See Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1030 (2010) (arguing that although the public-forum concept can solve the problems associated with legislative prayer, the idea will not work because no government will likely be willing to give up control over legislative prayer).

<sup>360</sup> Haupt, *supra* note 100, at 617–18.

<sup>361</sup> See *Greece*, No. 12-696, slip op. at 14–15 (“If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort.”); *Marsh*, 463 U.S. at 794 (noting that indications that a prayer opportunity was exploited to advance or disparage one particular faith may render legislative prayers impermissible).

<sup>362</sup> Cf. Lund, *supra* note 359, at 1002 (discussing what makes legislative prayer more or less sectarian).

<sup>363</sup> See *Greece*, No. 12-696, slip op. at 22 (discussing the possibility of members of the public “leaving the meeting room during the prayer, arriving late, or even . . . making a later protest”); cf. *Lee*, 505 U.S. at 588 (noting that coercive pressures exist where an individual is left with no real alternative which would have allowed them to avoid the fact or appearance of participation).

<sup>364</sup> See *Greece*, No. 12-696, slip op. at 12–13 (Kagan, J., dissenting).

tracks changes in the message than does a single rule for legislative prayer, graduation prayer, or graduations held in houses of worship. Most importantly, in all instances the degree of impact is not contingent on the medium by which the message is conveyed.

#### CONCLUSION

Establishment Clause cases initially shifted from money to messages; within the latter, there is now a noticeable shift from textual to visual messages.<sup>365</sup> Contemporary Establishment Clause theory and doctrine still privileges the written or spoken word though an increasing number of high-profile cases now involve visual representations of religious imagery. In an era when visuals “increasingly dominate our culture,”<sup>366</sup> scholars have detected a “changing legal culture” when it comes to the role of images in the law.<sup>367</sup> Heightened sensibility with respect to visual representations would benefit Establishment Clause analysis of religious symbols as well.

As Justice Breyer articulated, judges typically lack the social science training to evaluate empirical findings, such as neuroscience.<sup>368</sup> Erroneously designating religious imagery as merely “passive” is a case in point. As this Article has demonstrated, religious symbols are not “passive;” visual religious symbols can be as active as—if not sometimes more active than—textual religious speech. Insights from neuroscience are gaining importance in a wide variety of areas of the law; Establishment Clause theory and doctrine should likewise benefit from these insights. Arguably, “[t]he legal academy has yet seriously to come to grips with the changes that this infusion of the visual means for legal thinking and rhetoric.”<sup>369</sup> Likewise, dealing with visual representations in the area of religious symbols requires an appreciation for the nature of images. If, for instance, Judge Posner is “invit[ing] a new jurisprudence of iconography,”<sup>370</sup> a good starting point to assess Establishment Clause juris-

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<sup>365</sup> Lupu, *supra* note 24, at 773.

<sup>366</sup> FEIGENSON & SPIESEL, *supra* note 7, at 2; *see also* Zick, *supra* note 12, at 2263 (“We live in a culture of symbols.”).

<sup>367</sup> FEIGENSON & SPIESEL, *supra* note 7, at xi–xii (focusing on the role of digital pictures and multimedia in the courtroom).

<sup>368</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2769 (2010) (Breyer, J., dissenting).

<sup>369</sup> Spiesel, *supra* note 23, at 391; *see also* FEIGENSON & SPIESEL, *supra* note 7, at xi (“Understanding [pictures] requires new skills. That’s unsettling to many lawyers and judges; law school doesn’t train them to deal with pictures, and their experiences in practice may not have prepared them well, either.”); Sanger, *supra* note 148, at 361 (“[T]here has been no considered study of the role of visuality in law.”). The diverging results in cases involving the constitutionality of compelled visual speech underscore the legal uncertainty that currently accompanies visual images. *See* Corbin, *supra* note 7, at 10 (“Mandatory cigarette graphics have been struck but mandatory abortion ultrasounds have been upheld.”).

<sup>370</sup> *Elmbrook II*, 687 F.3d at 857 (Hamilton, J., concurring).



prudence as it relates to religious symbols is to look to other fields that teach us how images communicate.

Judicial decisions dismissing the visual as merely passive are based on a misconception of how visual images communicate. The data provided in this discussion refutes the notion that visuals are passive and supports the notion that they are at least as active as words. For someone who intuitively agrees with the old adage that “a picture is worth a thousand words,” the neuroscience discussion may seem superfluous. But it matters because it provides data empirically confirming the intuition.

There is a larger trend in the law that has led to a re-examination of the role of images as distinct from words. Establishment Clause theory as it concerns religious symbols must sufficiently account for the communicative impact of visuals. Reconceptualizing endorsement and coercion as matters of degree focuses attention on the communicative impact of the message. It discards misleading labels and categorizations, such as the notion of “passive” symbols, in favor of a comprehensive approach to religious symbolic messages irrespective of the medium by which they are communicated. After the Supreme Court has now revisited the textual by affirming the permissibility of legislative prayer, scholarship concerned with the future of the Establishment Clause must consider how the resulting doctrinal structure might apply to the role of religious symbols. A medium-neutral approach within a framework of communicative impact provides an appropriate theoretical basis.



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## Professional Speech

**ABSTRACT.** Professionals speak in the course of exercising their profession. At the same time, the state can regulate the professions. What is the permissible scope of regulation of the professions as distinct from regulation of professional speech? This Article provides a comprehensive account of the doctrinal and theoretical bases of professional speech and its application to controversial First Amendment questions.

First Amendment protection for professional speech rests on distinctive theoretical justifications, and the key to understanding professional speech lies in understanding the character of the learned professions. This Article suggests that the professions should be thought of as knowledge communities. Conceptualizing the professions as knowledge communities not only informs the justifications for First Amendment protection but also the limits of that protection, the permissibility of regulation of the professions, and the imposition and extent of tort liability for professional malpractice.

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**INTRODUCTION**

Professionals speak; some speak a lot. Lawyers use verbal communication to exercise their profession. So do psychologists. Medical advice is dispensed via such communication as well. The list goes on. The content of these communications, we intuitively assume, is protected. The scope of protection, however, is elusive. At the same time, the state can regulate the professions. Traditional forms of regulation include licensing requirements, advertising regulations, and the imposition of professional malpractice liability. But new forms of regulation go further: they target the content of the communication between a professional and her client. Sometimes, such regulation aligns with professional insights, but sometimes it contradicts them. The resulting tension between state regulation of the professions and professionals' free speech interests remains underexplored.

Recent cases involving professional speech<sup>1</sup> have made this tension apparent. Can the State of California and the State of New Jersey ban sexual orientation change efforts (SOCE)?<sup>2</sup> Can the State of South Dakota require that abortion providers read to their patients a legislatively drafted statement that does not correspond to the current state of medical science?<sup>3</sup> In other words: do psychologists have a First Amendment right to engage in conversion therapy? Do physicians have a First Amendment right not to be compelled to make state-scripted, erroneous claims about abortion to their patients? These examples represent potential infringements on a professional's right to free

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1. Following Daniel Halberstam and Robert Post, I will refer to "professional speech" as speech "uttered in the course of professional practice" as distinct from "speech . . . uttered by a professional." Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 843 (1999); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 947 [hereinafter Post, *Informed Consent to Abortion*].
  2. See *Pickup v. Brown (Pickup I)*, 728 F.3d 1042 (9th Cir. 2013) (upholding the California law prohibiting licensed mental health providers from providing SOCE therapy to children under eighteen against a First Amendment challenge), *aff'd, remanded, and reh'g denied*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014); *King v. Christie (King I)*, 981 F. Supp. 2d 296 (D.N.J. 2013) (upholding the New Jersey conversion therapy ban), *aff'd sub nom.*, *King v. Governor of N.J. (King II)*, 767 F.3d 216 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015); see also *Doe v. Christie*, 33 F. Supp. 3d 518 (D.N.J. 2014) (same).
  3. *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds II)*, 686 F.3d 889 (8th Cir. 2012) (en banc) (upholding the South Dakota informed consent statute requiring abortion providers to warn against an alleged increased risk of suicide).

speech. But federal appellate courts have taken opposing approaches to indistinguishable questions.<sup>4</sup>

What is strikingly—and perhaps somewhat surprisingly—still absent from the case law and the legal literature is a comprehensive theory of professional speech.<sup>5</sup> The Supreme Court has never identified, with any clear boundaries, the category of professional speech. Nonetheless, it is implicit in a number of decisions involving government-funded speech,<sup>6</sup> commercial speech,<sup>7</sup> and other areas.<sup>8</sup> This Article seeks to fill the lacuna left by courts and scholars by offering an account of the doctrinal and theoretical bases of professional speech and its application to controversial First Amendment questions.

First Amendment protection for professional speech, I argue, rests on distinctive theoretical justifications, and the key to understanding professional speech lies in understanding the character of the so-called “learned” professions. These learned professions, I submit, should be thought of as knowledge communities, that is, communities whose principal *raison d’être* is the generation and dissemination of knowledge.<sup>9</sup> Conceptualizing the professions as knowledge communities not only informs the theoretical justifications for First Amendment protection<sup>10</sup> but also the limits of that

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4. Compare *Pickup I*, 728 F.3d 1042 (upholding California’s conversion therapy law as a permissible regulation of conduct), with *King II*, 767 F.3d 216 (upholding New Jersey’s conversion therapy law as a permissible regulation of speech).
  5. See Halberstam, *supra* note 1, at 772 (“[W]e still have . . . no paradigm for the First Amendment rights of attorneys, physicians, or financial advisers when they communicate with their clients.”); *id.* at 834-35 (“[T]he Supreme Court and lower courts have rarely addressed the First Amendment contours of a professional’s freedom to speak to a client. Accordingly, courts have failed to develop a general method for reviewing restrictions on professional speech.”); Post, *Informed Consent to Abortion*, *supra* note 1, at 947 (explicitly abstaining from offering a comprehensive theory of the “constitutional status of professional speech”); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1342-43 (2005) (“[C]ourts need to develop First Amendment standards to judge the constitutionality of laws that restrict professionals’ speech to clients.”).
  6. See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Rust v. Sullivan*, 500 U.S. 173 (1991).
  7. See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (lawyer direct mailing to victims); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) (lawyer in-person solicitation); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (newspaper advertisements for legal services); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (advertising for abortion services).
  8. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (mentioning abortion providers’ First Amendment rights “as part of the practice of medicine, subject to reasonable licensing and regulation by the State”).
  9. See *infra* Section I.A.1.
  10. See *infra* Part II.

protection, the permissibility of regulating the professions, and the imposition and extent of tort liability for professional malpractice.<sup>11</sup> Imposing professional malpractice liability has never been found to offend the First Amendment. Why that is so, however, merits further investigation. Conceptualizing the learned professions as knowledge communities guides this undertaking.

Professionals speak not only for themselves but also as members of a learned profession: they “assist[] individuals in making personal choices based on the cumulative knowledge of the profession.”<sup>12</sup> The professions as knowledge communities thus function in a way akin to what Paul Horwitz calls “First Amendment institutions.”<sup>13</sup> First Amendment scholars concerned with professional speech have hinted at the connection between the professions and institutions<sup>14</sup> but have yet to provide a full explication. This Article takes on that task.

My analysis abuts and engages the emerging institutionalist First Amendment literature.<sup>15</sup> In my account, it is the institutionalization of professional discourse that builds the basis for the knowledge community. The subsequent dissemination of that knowledge within the professional-client relationship ties the individual professional back to the knowledge community. That the individual professionals are bound together by the knowledge community is also the underlying assumption of professional malpractice law, in which the knowledge community’s standard of care determines the benchmark against which the individual professional’s liability is assessed.

This Article proceeds in four parts. Part I provides a definition of professional speech, with particular attention to the role of the learned professions as knowledge communities. It then situates professional speech in

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11. See *infra* Part III.

12. Halberstam, *supra* note 1, at 773.

13. PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 247-54 (2012) (discussing professional speech within “the borderlands of institutionalism”). Halberstam appears to make a similar proposal when he speaks about “First Amendment protection of relational speech institutions,” Halberstam, *supra* note 1, at 851, although he does not consider professional associations but rather the bounded nature of the professional-client relationship as the basis for identifying the institutionalized nature of the speech. My approach is perhaps best characterized as situated between these two. See *infra* Section I.A.1. Moreover, I do not necessarily subscribe to all First Amendment institutionalist implications. I do not aim to give an institutional account across the First Amendment; nor do I confine the institutionalization to the professional-client relationship.

14. See, e.g., HORWITZ, *supra* note 13, at 350 n.38 (explaining the connection between law, medicine, and journalism and the university).

15. See, e.g., *id.* at 9; Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747 (2007); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) [hereinafter Schauer, *Institutional First Amendment*].

the doctrinal context of the First Amendment. Commentators have analyzed professional speech primarily in relation to – and by analogy with – commercial speech,<sup>16</sup> which has received increasingly robust First Amendment protection.<sup>17</sup> But the underlying comparison, I argue, is tenuous. The speech interests are fundamentally different. The doctrinal fate of professional speech, therefore, ought not to be tied to that of commercial speech.

Part II undertakes a normative defense of First Amendment protection for professional speech. The traditional justifications for speech protection apply in a distinctive fashion to *professional* speech. Professional speech is unique in the way it implicates the autonomy interests of both the speaker and the listener. I will call “decisional autonomy interests” the interests of the listener who depends on the information provided by a professional to make an informed decision.<sup>18</sup> The professional-client relationship is typically characterized by an asymmetry of knowledge. The client seeks the professional’s advice precisely because of this asymmetry. At the same time, the agency of the listener requires that the ultimate decision rest with her. The other autonomy interests are those of the speakers, which I will call “professional autonomy interests.” The qualifier “professional” signals that it is not the autonomy interest to freely express one’s personal opinions that is at stake – as is the case in most free speech theory – but rather to express one’s *professional* opinion as a member of the knowledge community.

Turning then to marketplace considerations, I argue that the classic notion of a “free trade in ideas”<sup>19</sup> has little purchase as between the professional and the client. The professional does not seek to subject her professional opinion to “the competition of the market”<sup>20</sup> when speaking within the confines of the professional-client relationship. Yet, there is a dimension to the marketplace idea in the professional speech context that is generally underappreciated and

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16. See, e.g., Halberstam, *supra* note 1, at 838; Post, *Informed Consent to Abortion*, *supra* note 1, at 974-90. But see Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 239 (1994) (asserting that “conversations between doctors and patients about diagnosis and treatments are not commercial speech” but providing no analysis explaining why that is the case).

17. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999).

18. The Court’s failure to consider the patient’s interest in receiving information has been repeatedly criticized in the reproductive rights context. See, e.g., Berg, *supra* note 16, at 219-20.

19. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

20. *Id.*



comes into relief when the professions are thought of as knowledge communities. Within the discourse of the knowledge community itself—that is, outside the professional-client relationship—a marketplace of ideas exists, which we might call an epistemic marketplace. Professional standards are generated by testing insights in that marketplace. The current state of the knowledge community’s discourse provides the foundation for the professional’s advice.

Finally, theories of democratic self-government also provide a normative basis for the protection of professional speech. The information that the knowledge community communicates to clients through individual professionals cumulatively enhances the basis upon which public opinion is formed. This is not simply a matter of enabling self-government through ordinary deliberation by adding another opinion to the public discussion. Rather, professionals contribute specialized, technical knowledge to which lay citizens would not otherwise have access. It is precisely in their capacity as members of knowledge communities that professionals enhance the process of self-governance, and so as members of knowledge communities that they should enjoy First Amendment protection.

Part III considers the appropriate limits on professional speech. It interrogates the extent to which the state may regulate the professions’ educational and knowledge standards. It also considers the interplay between the First Amendment and tort liability for professional malpractice. In order to avoid malpractice liability, professionals must exercise their profession according to the degree and skill of a well-qualified professional. For example, the Restatement (Third) of the Law Governing Lawyers states, “[A] lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.”<sup>21</sup> It is thus the knowledge community that determines the standard of care. This Part engages contemporary tort scholarship that incorporates this insight by focusing on the profession’s distinctive expertise.<sup>22</sup> This emerging approach mirrors my concern with granting deference to the knowledge community’s insights.

The extent of tort liability, I argue, should be consistent with the scope of protection of the knowledge community’s discourse under the First Amendment. Only if liability and protection are coextensive can this liability mechanism yield fair results. If liability is properly measured against the standard of care determined by the profession, the knowledge community’s

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21. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(1) (AM. LAW INST. 2000).

22. See Alex Stein, *Toward a Theory of Medical Malpractice*, 97 IOWA L. REV. 1201, 1207-08 (2012); see also Eleanor D. Kinney, *What Does New Theory Contribute to the Evolution of the Tort of Medical Malpractice?*, 97 IOWA L. REV. BULL. 115, 120 (2013).

formation of this standard should remain uncorrupted and its application within the professional-client relationship should receive robust First Amendment protection.

Part IV applies this approach to controversial First Amendment disputes, returning to the cases referenced at the outset. In so doing, it considers how the theory of professional speech focused on knowledge communities plays out in litigation terms, a question that traditionally remains underexamined in the First Amendment literature.

State regulation interacts with knowledge communities' insights in multiple and varied ways. It sometimes reinforces professional knowledge, and it sometimes contradicts such knowledge. The questions raised in cases challenging regulations that contradict professional knowledge play out against the larger jurisprudential backdrop concerning the role of legislative findings of fact. Whose knowledge should state regulation rely on? The knowledge community theory of professional speech provides a conceptual framework to assess this question. This theory of professional speech, informed by the role of knowledge communities, thus allows us to reconceptualize how we think about government involvement in professional speech. Under this view, to borrow loosely from Alexander Meiklejohn, the First Amendment is directed against the "mutilation of the thinking process" of the knowledge community.<sup>23</sup>

#### I. SITUATING PROFESSIONAL SPEECH

When a lawyer advises a client, she engages in professional speech. Likewise, when a physician advises a patient, she engages in professional speech. Scholarship and case law seem to assume, almost intuitively, that professional speech exists. But the instinct that professional speech is distinctive as a category of speech, and the way in which it is distinctive, is not sufficiently explained in the case law or First Amendment theory.

This Part first explores the character and function of the professions before distinguishing professional speech from professionals' private speech and from government speech. Throughout this Article, I argue that the professions should be thought of as knowledge communities. The role of knowledge communities defines the type of speech that ought to be protected from outside—particularly, state—interference, and the extent to which state regulation of the professions is permissible.

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23. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1960) ("It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.").

This Part then situates professional speech in First Amendment doctrine. The concept is implicit in numerous Supreme Court decisions, though it is not identified as a separate category of speech. Courts and scholars sometimes analogize professional speech to commercial speech, which is increasingly receiving First Amendment protection from state interference. While a heightened level of protection is desirable as a doctrinal matter in the professional speech context as well, the underlying analogy is tenuous. In questioning the analogy between commercial speech and professional speech, I suggest that professional speech more than commercial speech should receive robust First Amendment protection.

A. *What Is Professional Speech?*

The First Amendment fragments speech. We treat different types of speech differently all the time.<sup>24</sup> But to the extent we treat professional speech differently for different professions—thus distinguishing between speakers engaged in arguably the same type of speech—differential treatment is problematic. For example, why should the speech of a lawyer be more protected than that of a physician?<sup>25</sup> Nonetheless, the level of attention afforded to the regulation of professional speech varies significantly across professions. First Amendment questions surrounding lawyers' professional speech, for instance, remained largely unexplored until recently.<sup>26</sup> Legislative interference with physician speech, conversely, has received comparatively more attention.<sup>27</sup>

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24. Schauer, *Institutional First Amendment*, *supra* note 15, at 1263 (“[I]t seems a permissible generalization to conclude that First Amendment doctrine has been hesitant to draw lines between or among speakers or between or among communicative institutions, preferring overwhelmingly to demarcate the First Amendment along lines representing different types of speech.”).

25. Some have argued that lawyers' professional speech deserves special protection because of the role lawyers play in society. *See, e.g.*, Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639, 712 (2011) (“Given the integral role of attorneys in America’s democratic government, it seems reasonable, if not imperative, that this category of speech—attorney advice—should be fiercely guarded from unnecessary regulation.”); Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 36 (2011) (“[A]ttorney free speech is essential to the proper functioning of the United States justice system.”). *But see* W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 313 (2001) (“[N]o single model of lawyering theory can account for the function of lawyers in our society.”).

26. Knake, *supra* note 25, at 646.

27. *See generally* Berg, *supra* note 16, at 206 (discussing the Rehnquist Court’s regulation of physician speech and developing “a First Amendment theory of doctor-patient discourse that appreciates and protects patients’ interests in receiving complete, unbiased medical

Unlike other analyses focused on specific professions,<sup>28</sup> I aim to develop a broad conceptual approach to professional speech. Doing so avoids creating professional speech silos within the First Amendment and the subsequent problem of sorting professional speech into subcategories. A unified approach to professional speech also shields some professions from being “especially vulnerable to excess constriction by judges and juries too concerned with the moral or social undesirability of those . . . carrying the First Amendment claim.”<sup>29</sup> Consider, for example, the situation of reproductive health care providers. There may be less desire to protect professional speech concerned with abortion—and more tolerance for government demands to read inaccurate, legislatively drafted scripts, compelled descriptions of mandatory ultrasounds and the like—based on moral disapproval.<sup>30</sup> But if professional speech is worthy of protection as such, then the underlying topic of the speech is irrelevant to its protection. A unified approach to professional speech, then, provides protection for all professional speech.

I submit that the kind of professional speech worthy of protection, irrespective of the particular profession involved, includes three core elements: (1) a knowledge community’s insights, (2) communicated by a professional within the professional-client relationship, (3) for the purpose of providing professional advice. The first element concerns the role of knowledge

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information and advice”); Post, *Informed Consent to Abortion*, *supra* note 1 (analyzing “the First Amendment principles that should apply to compelled physician speech”).

28. See, e.g., Berg, *supra* note 16; Tarkington, *supra* note 25; Wendel, *supra* note 25, at 306 (pointing out “the categorization problems presented by lawyers’ speech”).
29. Schauer, *Institutional First Amendment*, *supra* note 15, at 1268. This approach differs markedly from others in its sole focus on *professional* speech. See, e.g., Wendel, *supra* note 25, at 308 (arguing in favor of an approach that also considers other “expressive-rights” contexts involving lawyers).
30. See, e.g., Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175 (2014); Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey*, 95 COLUM. L. REV. 1724, 1764 (1995) (asserting that “the Court has been less willing to extend First Amendment protection to speech related to [abortion]”); Wells, *supra*, at 1759-60 (“[Abortion] is an activity that many people find abhorrent and corrupt. . . . Supreme Court Justices are not immune from such personal views. As a portion of the Court has indicated, ‘Some of us as individuals find abortion offensive to our most basic principles of morality.’” (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992))). See generally Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985). Vincent Blasi observes that some periods of time are more “pathological” than others, and in these pathological time periods, there exist “certain dynamics that radically increase the likelihood that people who hold unorthodox views will be punished for what they say or believe.” Blasi, *supra*, at 450. Blasi’s central thesis is that “[t]he first amendment . . . should be targeted for the worst of times” to assure that speech is protected. Blasi, *supra*.

communities; the second and third elements distinguish the context and purpose. I will address these elements in turn.

1. *The Role of Knowledge Communities*

The connection to a knowledge community circumscribes the type of communication rendered as professional advice. Not all occupations are considered professions. There are certain core professions we intuitively think of, medicine and law traditionally chief among them.<sup>31</sup> Psychologists, dentists, pharmacists, and accountants—to only name a few—are likely part of the group as well. The list has expanded historically, and some occupations that were once considered only marginally professionalized have now come to be understood as professions.<sup>32</sup> The process of professionalization is contested, and I do not aim to offer my own theory. Rather, I am concerned with the question of what First Amendment protection for professional speech looks like once an occupation has attained professional status. Thus, for the remainder of this Article, whatever the current debates are at the margins, I am primarily concerned with the core professions. And although the clergy is historically considered the third quintessential learned profession next to

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31. See, e.g., Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 7 (1976) (“At one time the learned professions were those of theology, law, and medicine.”); Maxwell J. Mehlman, *Professional Power and the Standard of Care in Medicine*, 44 ARIZ. ST. L.J. 1165, 1225 (2012) (“Medicine is one of the three classic learned professions, the other two being law and the clergy.”).

32. The historical development is evident in this 1964 enumeration from the sociology literature:

Established solidly since the late Middle Ages have been law, the clergy, university teaching (although the church did dominate universities, medieval faculty were by no means all clergy), and to some extent medicine (especially in Italy). During the Renaissance and after, the military provided professional careers . . . . Dentistry, architecture, and some areas of engineering (e.g., civil engineering) were professionalized by the early 1900’s; certified public accounting and several scientific and engineering fields came along more recently. Some are still in process—social work, correctional work, veterinary medicine, perhaps city planning and various managerial jobs for nonprofit organizations—school superintendents, foundation executives, administrators of social agencies and hospitals. There are many borderline cases, such as schoolteaching, librarianship, nursing, pharmacy, optometry. Finally, many occupations will assert claims to professional status and find that the claims are honored by no one but themselves. I am inclined to place here occupations in which a market orientation is overwhelming—public relations, advertising, and funeral directing.

Harold L. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137, 141-42 (1964).

medicine and law,<sup>33</sup> I explicitly exclude that group from my discussion of professions and professional speech.<sup>34</sup>

Definitions of “the professions” vary,<sup>35</sup> but the most relevant defining feature for present purposes—and one generally shared among the numerous definitions—is their knowledge-based character.<sup>36</sup> As we have already

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33. See *supra* text accompanying note 31.

34. Aside from the protection of religious speech otherwise afforded by the Free Exercise Clause of the First Amendment, it seems problematic to fit the clergy into the knowledge community concept, particularly across denominations. Exclusive claims to ultimate truth will be difficult to reconcile with a knowledge community’s underlying shared notions of validity and a common way of knowing and reasoning.

35. See Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 1 (1998) (“The terms ‘profession’ and ‘professionalism’ have an incredibly large and vaguely bounded range of meanings, the despair of sociology, the discipline that has done most to study the professions.”); see also, e.g., HORWITZ, *supra* note 13, at 247 (offering James Brundage’s definition of a profession as “a line of work that . . . claims to promote the interests of the whole community as well as the individual worker, that requires mastery of a substantial body of esoteric knowledge, and that is closely bounded by a body of ethical rules different from and more demanding than those incumbent on all respectable members of society”); Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 743 (1988) (providing Abraham Flexner’s “classic definition of a profession” that “an occupation must: (1) possess and draw upon a store of knowledge that was more than ordinarily complex; (2) secure a theoretical grasp of the phenomena with which it dealt; (3) apply its theoretical and complex knowledge to the practical solution of human and social problems; (4) strive to add to and improve its stock of knowledge; (5) pass on what it knew to novice generations not in a haphazard fashion but deliberately and formally; (6) establish criteria of admission, legitimate practice, and proper conduct; and (7) be imbued with an altruistic spirit” (citing Abraham Flexner, *Is Social Work a Profession?*)); Wilensky, *supra* note 32, at 138 (“The job of the professional is *technical*—based on systematic knowledge or doctrine acquired only through long prescribed training . . . . The professional man adheres to a set of *professional norms*.”).

For examples from the sociology literature on professions, see, for example, ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988); ELIOT FREIDSON, *PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY* (1994); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); and KEITH M. MACDONALD, *THE SOCIOLOGY OF PROFESSIONS* (1995). For historical perspectives, see JAMES A. BRUNDAGE, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS* (2008); and ELLIOTT A. KRAUSE, *DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT* (1996). In the legal literature, see Sande L. Buhai, *Profession: A Definition*, 40 FORDHAM URB. L.J. 241 (2012).

36. Cf. Bowie, *supra* note 35, at 743 (“Flexner’s first four criteria for a profession require the mastery of a complex body of knowledge.”). It might be debatable whether the possession of actual knowledge is in fact necessary. Discussing “professional mystique,” Richard Posner—citing the lack of real therapeutic knowledge in medicine “in the Middle Ages in Italy, where medicine was a highly prestigious profession”—suggests that “[t]he key to classifying an occupation as a profession . . . is not the actual possession of specialized,

observed, the professional-client relationship is asymmetric: the professional has knowledge the client does not have, which leads the client to seek out her advice. The reason the professional's advice is valuable to the client is that she possesses knowledge that the client lacks.<sup>37</sup>

Because the professions are knowledge-based, I contend that they should be thought of as knowledge communities. Individual professionals "may differ in their individual judgments about particular issues, [but] their role as professionals traditionally implies their subscription to a body of knowledge that is shared among their peers."<sup>38</sup>

What are knowledge communities?<sup>39</sup> I use the term to describe a network of individuals who share common knowledge and experience as a result of

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socially valuable knowledge; it is the *belief* that some group has such knowledge . . . ." Posner, *supra* note 35, at 2. But "[t]he fact that a profession cultivates professional mystique does not prove that it lacks real knowledge; modern medicine is a case in point." Posner, *supra*, at 4; see also Peter M. Haas, *Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 35 (1992) (identifying the professions as a knowledge-based group).

37. See Bowie, *supra* note 35, at 743-44 ("Walter Metzger, addressing the question 'What Is A Profession?,' argued that 'the paramount function of professions . . . is to ease the problems caused by the relentless growth of knowledge.' . . . In a complex world, people become increasingly ignorant of information necessary to run their lives. The job of the professional is to protect the client from his or her own ignorance."); see also *King v. Governor of N.J. (King II)*, 767 F.3d 216, 232 (3d Cir. 2014) ("Licensed professionals, through their education and training, have access to a corpus of specialized knowledge that their clients usually do not. Indeed, the value of the professional's services stems largely from her ability to apply this specialized knowledge to a client's individual circumstances."); Steven Brint, *Professionals and the "Knowledge Economy": Rethinking the Theory of Postindustrial Society*, 49 CURRENT SOC. 101, 116 (2001) (including in the discussion of "knowledge-centered" industries those "industries in which the primary activity is providing service to clients and the knowledge necessary for providing the service is embedded in the providers themselves (as in the medical, education and legal services industries)").
38. Halberstam, *supra* note 1, at 772; see also Brint, *supra* note 37, at 130 n.9 (discussing sociology literature indicating that "many professionals . . . do not use much expert knowledge on their jobs. Studies of two leading professions, doctors and lawyers, show that rank-and-file practitioners frequently rely on standard reference works and accumulated experience as a basis for many of their decisions." (citing DANIEL B. HOGAN, *THE REGULATION OF PSYCHOTHERAPISTS* (1979) and DONALD SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983))). Brint's observation would suggest a very close connection of the individual professional to the knowledge community in day-to-day operations.
39. My definition of "knowledge community" builds on various definitions of that concept offered in the management and social science literature and draws on related concepts, such as "epistemic communities" or "epistemic institutions." See, e.g., Ash Amin & Joanne Roberts, *Knowing in Action: Beyond Communities of Practice*, 37 RES. POL. 353, 359-61 (2008) (discussing "professional knowing"); Mai'a K. Davis Cross, *Rethinking Epistemic Communities Twenty Years Later*, 39 REV. INT'L STUD. 137, 149-51 (2013) (distinguishing

training and practice.<sup>40</sup> They are engaged in solving similar problems by drawing on a shared reservoir of knowledge, which, at the same time, they help define and to which they contribute. Their common understandings allow for the generation and exchange of insights within the community. Consequently, members of knowledge communities have shared notions of validity<sup>41</sup> and a common way of knowing and reasoning (consider the old adage of “thinking like a lawyer”).<sup>42</sup> Additionally, the knowledge community shares certain norms and values: professional norms. This is not to say that knowledge communities are monolithic. But their shared notions of validity limit the range of acceptable opinions found within them.

The connection to a knowledge community is a distinctive feature of the role of professionals. In a recent case, the Fourth Circuit considered the question of professional speech protection for the “spiritual counselor” (fortune teller) known as Psychic Sophie, who assertedly engaged in providing predictive advice just like a lawyer.<sup>43</sup> The Fourth Circuit, relying on Justice White’s concurrence in *Lowe v. SEC*, stated: “Professional speech analysis applies . . . where a speaker ‘takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client’s individual needs and circumstances’ . . . .”<sup>44</sup> This definition of professional speech allowed the court to conclude that Psychic Sophie’s “activities fit comfortably within the confines of professional speech analysis.”<sup>45</sup> Whether or not this assessment of her profession is accurate,<sup>46</sup> it importantly lacks the connection to a knowledge community.

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epistemic communities and professions); Michael Earl, *Knowledge Management Strategies: Toward a Taxonomy*, 18 J. MGMT. INFO. SYS. 215, 223-25 (2001) (discussing knowledge communities in the oil industry); Haas, *supra* note 36, at 3 & n.4 (defining epistemic communities and their interrelatedness with professions).

40. See Haas, *supra* note 36, at 18-19 (explaining that professions have shared causal beliefs and a consensual knowledge base).
41. Cf. *id.* at 3 (including professions in his discussion of knowledge-based groups whose members may share criteria of validity).
42. Cf. *id.* at 16 (discussing analytic methods and techniques of professions).
43. *Moore-King v. County of Chesterfield*, 708 F.3d 560, 567 (4th Cir. 2013). See generally Volokh, *supra* note 5, at 1345 n.352 (discussing fortune teller cases).
44. *Moore-King*, 708 F.3d at 569 (citations omitted) (quoting *Lowe v. SEC*, 472 U.S. 181, 232 (1985)).
45. *Id.*
46. Cf. Posner, *supra* note 35, at 5 (“Sorcery and prophecy enjoy professional status in many primitive societies, and are overthrown when practitioners face competition from groups that use rational methods.”).



First Amendment scholars concerned with professional speech have hinted at the connection between the professions and institutions.<sup>47</sup> This emerging institutionalist First Amendment literature is concerned with colleges and universities, libraries, and the press.<sup>48</sup> But knowledge communities, while related to these institutions, are in a sense less “institutionalized.”

Their most institutionalized incarnations are professional associations. The Fourth Circuit, for example, invoked the presence or absence of “accrediting institution[s] like a board of law examiners or medical practitioners” in the *Psychic Sophie* case.<sup>49</sup> Likewise, Justice Breyer in dissent once noted that when speech “is subject to independent regulation by canons of the profession[s] . . . the government’s own interest in forbidding that speech is diminished.”<sup>50</sup> My account of the role of knowledge communities in the professional speech context makes sense of these intuitions. But professional norms are generated outside of these associations as well. Conferences and the professional literature, for example, are sites of professional knowledge formation, even though they are not necessarily embodied in specific institutions or professional associations.<sup>51</sup>

Of course, professional associations have held, at one point or another, positions they now consider erroneous or outdated. For instance, the American Medical Association was at the forefront of the campaign to criminalize abortion in the nineteenth century,<sup>52</sup> and the American Psychological

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47. See, e.g., HORWITZ, *supra* note 13, at 350 n.38.

48. Schauer, *Institutional First Amendment*, *supra* note 15, at 1274-75. Frederick Schauer also includes “scientific research that does not have a home within a university” as an analog. *Id.* According to Schauer, “For all of these institutions, the argument would be that the virtues of special autonomy—special immunity from regulation—would in large part serve important purposes of inquiry and knowledge acquisition, and that those purposes are not only socially valuable, but also have their natural (or at least most comfortable) home within the boundaries of the First Amendment.” *Id.*

Paul Horwitz also includes churches and associations in his discussion. See HORWITZ, *supra* note 13, at 107-238.

49. *Moore-King*, 708 F.3d at 570 (further stating that where such accrediting institutions do not exist, “a legislature may reasonably determine that additional regulatory requirements are necessary”).

50. *Garcetti v. Ceballos*, 547 U.S. 410, 446 (2006) (Breyer, J., dissenting).

51. While outside of the professional-client relationship, and therefore outside of the immediate scope of this discussion, the speech interests of professionals speaking to each other are similar to those underlying academic speech. See generally ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 61-93 (2012) [hereinafter POST, *DEMOCRACY*].

52. See Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1000-02; Reva Siegel, *Reasoning from the*

Association (APA) did not declassify homosexuality as a mental disorder until 1973.<sup>53</sup> But the professions themselves can and do revise their positions on the basis of their ongoing intellectual development, as these examples attest.<sup>54</sup> In adopting, changing, or updating these positions, the knowledge communities use their own professional standards, elaborated by and through their own community.<sup>55</sup>

Knowledge communities have specialized expertise and are closest to those affected; they must have the freedom to work things out for themselves. The professions as knowledge communities have a fundamental interest in not having the state (or anyone else, for that matter) corrupt or distort what amounts to the state of the art in their respective fields.<sup>56</sup> This is the key feature of professional discourse and the limiting principle of professional speech. The resulting benefit is the generation of insights within the knowledge community that would not otherwise occur. As knowledge communities, then, the professions should be granted deference.<sup>57</sup> But where knowledge communities—and, by extension, individual professionals—do not possess such specialized knowledge or competence, such deference is not required as a matter of professional speech. No amount of specialized training, for instance, by itself makes a professional more competent to render value judgments.

The individual professional is linked to the knowledge community in multiple ways. She “is understood to be acting under a commitment to the ethical and intellectual principles governing the profession and is not thought of as free to challenge the mode of discourse or the norms of the profession

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*Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 280-318 (1992).

53. HORWITZ, *supra* note 13, at 352 n.51.
54. See *id.* (pointing out that the APA declassified homosexuality “not as a result of legal pressure but in response to changing professional views and broader social norms”).
55. This mechanism is analogous to that described in epistemic communities: “In response to new information generated in their domain of expertise, epistemic community members may still engage in internal and often intense debates leading to a refinement of their ideas and the generation of a new consensus about the knowledge base.” Haas, *supra* note 36, at 18.
56. See Halberstam, *supra* note 1, at 773 (“The State may ensure professionals’ faithfulness to the public aspects of their calling, but it may not usurp their role or determine independently the bodies of knowledge that may be accessed or the individual judgments that may be rendered in a given case.”).
57. Cf. Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 136 (1989) (“There is also wide agreement that advancement in understanding among persons capable of assessing scientific claims is promoted by freedom of communication within the scientific community, that government intervention to suppress some scientific ideas in favor of others would not promote scientific truth.”).

while remaining within the parameters of the professional discussion.”<sup>58</sup> The individual professional thus serves as the conduit between the knowledge community and the client. Malpractice liability likewise assumes this connection in imposing the profession’s standard of care on the individual professional.<sup>59</sup>

I will return to the role of professional associations and state involvement in regulating the professions in Part III. For now, conceptualizing the professions as knowledge communities allows us to focus our discussion on professional speech as distinct from other forms of speech.

## 2. *Distinguishing Private Speech*

Turning to the second and third constitutive elements of professional speech – (2) that it is communicated by a professional within the professional-client relationship, (3) for the purpose of providing professional advice – it is fundamentally important to recognize that professional speech is not private speech. Daniel Halberstam and Robert Post define professional speech as “‘speech . . . uttered in the course of professional practice,’ as distinct from ‘speech . . . uttered by a professional.’”<sup>60</sup> This definition crucially distinguishes professional speech from private speech.<sup>61</sup>

The line between the professional’s private speech and professional speech, then, can be drawn by considering the presence or absence of a professional-

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58. Halberstam, *supra* note 1, at 834.

59. See *infra* Section III.B.1.

60. Post, *Informed Consent to Abortion*, *supra* note 1, at 947 (quoting Halberstam, *supra* note 1, at 843).

61. This distinction is sometimes obscured or disregarded in the case law and literature. See, e.g., *Wollschlaeger v. Governor of Fla. (Wollschlaeger I)*, 760 F.3d 1195, 1218 (11th Cir. 2014) (denying First Amendment protection “when the professional speaks privately, in the course of exercising his or her professional judgment, to a person receiving the professional’s services”), *vacated and superseded on reh’g*, 797 F.3d 859 (11th Cir. 2015), *vacated and superseded on reh’g*, No. 12-14009, 2015 WL 8639875 (11th Cir. Dec. 14, 2015); *Pickup v. Brown (Pickup II)*, 740 F.3d 1208, 1227 (9th Cir. 2014) (placing professional speech on a continuum and asserting that “where a professional is engaged in a public dialogue, First Amendment protection is at its greatest”), *cert. denied*, 134 S. Ct. 2871 (2014); Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment’s Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2351-52 (2013) (discussing “physician speech” as a form of private speech of the physician: “[A]lthough physicians’ speech to patients during the course of medical practice, what I will refer to as ‘physician speech,’ may be regulated without offending the First Amendment, this does not mean that physicians lose their First Amendment rights as ordinary citizens against compelled ideological speech.” Thus, “compelled ideological speech . . . violates physicians’ First Amendment rights as ordinary citizens.” (emphasis added)).

client relationship. “Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted,”<sup>62</sup> the speaker is not engaged in professional speech. When the professional’s advice is distributed generally or to the public at large, outside of the professional-client relationship, it is most likely not professional speech.<sup>63</sup> Investment advice distributed to the general public, for example, does not constitute professional speech;<sup>64</sup> nor do books on how to avoid probate,<sup>65</sup> diet plans,<sup>66</sup> or mushroom guides,<sup>67</sup> even though inaccurate information so disseminated may be harmful. When professionals speak in such a manner, they act as ordinary citizens participating in public discourse and accordingly enjoy ordinary First Amendment protection.

The third element of professional speech—that it is for the purpose of providing professional advice—constrains what the professional may say in the context of the professional-client relationship, and so helps distinguish professional speech from other kinds of speech a professional might engage in, whether in public or private. It bears emphasis that First Amendment protection for speech that is not professional advice is unrelated to the speaker’s membership in a knowledge community.<sup>68</sup> Although the speaker’s

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62. *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring).

63. See Halberstam, *supra* note 1, at 851 (“Publication of advice for indiscriminate distribution generally will defeat a conclusion that the advice was rendered within the professional-client relationship . . . .”); see also *Pickup I*, 728 F.3d at 1054 (“Thus, outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment.”).

64. *Lowe*, 472 U.S. at 207-08.

65. Catherine J. Lanctot, *Does Legalzoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 266-69 (2011) (discussing the litigation culminating in *New York County Lawyers’ Ass’n v. Dacey*); see also *N.Y. Cty. Lawyers’ Ass’n v. Dacey*, 234 N.E.2d 459, 459 (N.Y. 1967) (holding that publication of defendant’s book, *How To Avoid Probate*, did not constitute unauthorized practice of law because it gave “general advice on common problems” rather than “personal advice on a specific problem peculiar to a designated or readily identified person”).

66. See *Smith v. Linn*, 563 A.2d 123 (Pa. Super. Ct. 1989) (holding that a publisher was not liable for a death caused by following a diet book).

67. See *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991) (holding that a publisher of a mushroom encyclopedia was not liable for liver damage caused by eating mushrooms).

68. See Keighley, *supra* note 61, at 2349 n.3 (“Of course, physicians retain the ordinary protections of the First Amendment when they speak in the public sphere, outside of the practice of medicine.”); cf. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 FORDHAM L. REV. 569, 569 (1998) (asserting that “lawyers are sometimes perceived as classic speakers in public

professional training may inform the content of such speech, she is not disseminating the knowledge community's insights within a professional-client relationship for the purpose of providing professional advice. In fact, in many instances, the speaker may be articulating disagreement with the knowledge community's consensus, which the professional is not free to do when providing professional advice.<sup>69</sup>

Post, for instance, recounts the "controversy over the safety of dental amalgams."<sup>70</sup> There, a dentist questioned the professional consensus that dental fillings containing certain substances were safe. Although the dentist no doubt was informed by his professional background, the expression of his opinion was entirely private speech.<sup>71</sup> "Within public discourse," Post explains, "traditional First Amendment doctrine systematically transmutes claims of expert knowledge into assertions of opinion."<sup>72</sup> Any non-dentist's speech questioning the safety of such fillings would enjoy the same First Amendment protection, though the public would probably ascribe less persuasive force to a non-professional's assessment of the matter.<sup>73</sup>

The same reasoning makes political statements like "vote for Obama," even if uttered within the context of a professional-client relationship, not professional speech but the professional's private speech.<sup>74</sup> It is not communicated for the purpose of providing professional advice, and it is likely not connected to the insights of the knowledge community—even if the

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discourse, free of state control and entitled to all the ordinary protections of speech and association available to other speakers").

69. See, e.g., Halberstam, *supra* note 1, at 848-49.

70. Post, *Informed Consent to Abortion*, *supra* note 1, at 947-49; see also HORWITZ, *supra* note 13, at 249; POST, DEMOCRACY, *supra* note 51, at 12-13.

71. POST, DEMOCRACY, *supra* note 51, at 43 ("If an expert chooses to participate in public discourse by speaking about matters within her expertise, her speech will characteristically be classified as fully protected opinion."); Post, *Informed Consent to Abortion*, *supra* note 1, at 949 ("When a physician speaks to the public, his opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion within the medical establishment.").

72. POST, DEMOCRACY, *supra* note 51, at 44.

73. And professionals' private opinions do not necessarily have to reflect the insights of the knowledge community. *Cf. id.* ("Biologists can with impunity write editorials in the *New York Times* that are such poor science that they would constitute grounds for denying tenure within a university. Members of the general public can rely on expert pronouncements within public discourse only at their peril. Such pronouncements are ultimately subject to political rather than legal accountability." (footnote omitted)).

74. *Cf.* Keighley, *supra* note 61, at 2350-51 (suggesting that the free speech implications of regulating physician speech differ between "medical judgment" contexts and "political message" contexts).

knowledge community may have reached a consensus that one candidate for public office will better serve their interests than another.<sup>75</sup>

3. *Distinguishing Government Speech*

Another important distinction is between professional speech and government speech. Professional speech must be communicated by a professional, and professionals can operate in different institutional settings with varying degrees of government involvement. The professional may be a government employee, or a government program may fund the professional's service. Alternatively, the government sometimes seeks to have private individuals disseminate its own message. Under the government speech doctrine, "[t]he government alone may determine its message to the exclusion of all others."<sup>76</sup> Just as the state can be anti-smoking or anti-obesity, it may express a preference on abortion.<sup>77</sup> Thus, when the state tries to enlist a private speaker, a key concern is whether the message is attributed to the state or the professional.<sup>78</sup>

As I have argued elsewhere, effective control over speech should determine responsibility for the message.<sup>79</sup> This, in turn, can distinguish government speech from professional speech, and so mark the boundary up to which the state can prescribe speech. When, for example, the state demands that physicians communicate certain claims to their patients in materials of the physicians' own design, the state effectively tries to obscure authorship even though it is the state that retains effective control over the message communicated.<sup>80</sup> Such speech, then, should be understood as an attempt by

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75. If a medical professional makes the statement, it may convey an opinion regarding the candidate's health policy. *See id.* at 2350 & n.14.

76. Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571, 573 (2011).

77. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) ("It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other."); *id.* at 872 ("[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." (alteration in original) (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989))); *id.* at 916 (Stevens, J., concurring in part and dissenting in part) ("I agree with the joint opinion that the State may "'expres[s] a preference for normal childbirth[.]'" (first alteration in original) (quoting *id.* at 872)).

78. *See Keighley*, *supra* note 61, at 2361.

79. Haupt, *supra* note 76, at 591-600.

80. The concern is that "the government may make puppets out of doctors." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2012 WL 373132, at \*3 (W.D. Tex. Feb. 6, 2012).

the government to co-opt or dictate professional speech. According to the theory developed here, such prescriptions would constitute inappropriate regulation of professional speech. But the situation is different where state regulation permits professionals to disavow the state's message. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the state demanded that a certain message be communicated,<sup>81</sup> but the Court's decision suggested that disclaimers were permissible. The next section more closely examines the doctrinal status of professional speech in light of *Casey* and other cases that concern government speech.

### B. Professional Speech in First Amendment Doctrine

Whether a "professional speech doctrine" currently exists is subject to debate. The Fourth Circuit recently asserted that "[t]he Supreme Court has recognized the regulation of occupational speech under the 'professional speech' doctrine at least since Justice Jackson's concurrence in *Thomas v. Collins*," a 1945 case.<sup>82</sup> Similarly, some commentators point to Justice White's concurrence in *Lowe v. SEC* as declaring the existence of the professional speech doctrine.<sup>83</sup> Others are more skeptical.<sup>84</sup>

Although the Supreme Court has never identified a category of "professional speech" for First Amendment purposes, its existence is implicit in a number of cases.<sup>85</sup> The Court most directly addressed the question of First Amendment protection for professional speech in the joint opinion in *Casey*.<sup>86</sup> But the concept is embedded in other decisions as well.<sup>87</sup>

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81. See *Casey*, 505 U.S. at 881 (opinion of O'Connor, Kennedy, and Souter, JJ.).

82. *Moore-King v. County of Chesterfield*, 708 F.3d 560, 568 (4th Cir. 2013) (citing *Thomas v. Collins*, 323 U.S. 516 (1945) (Jackson, J. concurring)). Relying on *Moore-King* as well as *Wollschlaeger I*, 760 F.3d 1195, and *Pickup I*, 728 F.3d 1042, the Third Circuit identified professional speech as "a recognized category of speech." *King II*, 767 F.3d at 233.

83. 472 U.S. 181, 211-36 (1985) (White, J., concurring in the judgment). For such commentators, see sources cited in Keighley, *supra* note 61, at 2368 n.82.

84. Keighley, *supra* note 61, at 2367-69; Jacob M. Victor, Note, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 123 YALE L.J. 1532, 1537, 1552-53 (2014) (calling professional speech "an ill-defined and controversial area of First Amendment doctrine").

85. Cf. *Conant v. McCaffrey*, 172 F.R.D. 681, 694 (N.D. Cal. 1997) ("Although the Supreme Court has never held that the physician-patient relationship, as such, receives special First Amendment protection, its case law assumes, without so deciding, that the relationship is a protected one.").

86. 505 U.S. at 884 (opinion of O'Connor, Kennedy, and Souter, JJ.).

87. See, e.g., HORWITZ, *supra* note 13, at 253 (asserting that "[t]he Court in *Rust* and *Velazquez* has the right idea about professional speech, but it lacks proper language with which to

With *Casey*—arguably the most on-point treatment—as a starting point, the doctrinal basis of professional speech appears indeterminate at best. But a wide-angle view reveals that, despite the initial lack of clarity in *Casey*, the Court seems to have at least a hunch that speech communicated by professionals in a professional-client relationship for the purpose of providing professional advice is somehow distinctive.

In *Casey*, the joint opinion addressed the First Amendment in a somewhat cryptic paragraph:

All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician’s First Amendment rights not to speak are implicated . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State . . . . We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.<sup>88</sup>

Scholars have been struggling to make sense of this.<sup>89</sup> Some appellate courts have arguably taken this obscure statement as license to espouse an exceedingly narrow view of professional speech.<sup>90</sup> There is now marked and explicit disagreement among the circuits regarding its proper interpretation.<sup>91</sup>

But beyond this puzzling paragraph, *Casey* hints at the doctrinal status of professional speech. The joint opinion directly addressed government speech, compelled speech, and the right to receive information (or not). The government, as the joint opinion and Justice Stevens’s opinion agreed, may communicate its own preference with respect to abortion.<sup>92</sup> Regarding compelled speech, the joint opinion found that the government may demand, as part of obtaining the woman’s informed consent, that physicians distribute

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express it” (citing *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001))). *But see* Wells, *supra* note 30, at 1725 (asserting that the Court in *Rust* and *Casey* failed to consider abortion counseling as speech).

88. *Casey*, 505 U.S. at 884 (opinion of O’Connor, Kennedy, and Souter, JJ.) (citations omitted).

89. See Halberstam, *supra* note 1, at 773-74, 837-38; Post, *Informed Consent to Abortion*, *supra* note 1, at 945-46; Volokh, *supra* note 5, at 1344-45.

90. Keighley, *supra* note 61, at 2357 (“Both the Fifth and the Eighth Circuits have expanded *Casey*’s cursory First Amendment discussion into broad holdings that eviscerate physicians’ First Amendment rights within the practice of medicine.”).

91. See, e.g., *Stuart v. Camnitz*, 774 F.3d 238, 248-49 (4th Cir. 2014) (rejecting the Fifth and Eighth Circuits’ interpretation), *cert. denied sub nom.* *Walker-McGill v. Stuart*, 135 S. Ct. 2838 (2015).

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



state-drafted materials and make certain statements to their patients that are “truthful and not misleading.”<sup>93</sup> However, the state neither required that the providers communicate this information as their own – which could have made it more difficult for patients to attribute the message to the state – nor prohibited the providers from expressing their disagreement with the state’s policy. Moreover, there was a provision for physicians to refrain from providing certain information if they deemed it harmful to their patients.<sup>94</sup> Finally, with respect to the right to receive information or not, women could decline to view the materials.<sup>95</sup>

As a matter of existing First Amendment doctrine, then, *Casey* may be read as suggesting that while the government is free to express its own opinion, it may not enlist (potentially unwilling) professionals as mouthpieces to disseminate its message.<sup>96</sup>

Also in the abortion context, and pre-dating the *Casey* decision by a year, *Rust v. Sullivan* further illuminates the doctrinal status of professional speech.<sup>97</sup> Although Chief Justice Rehnquist framed the issue as concerning “abortion-related activities,”<sup>98</sup> thus apparently avoiding the specific question of professional speech,<sup>99</sup> that is in fact what the case concerned.<sup>100</sup> The Court noted that “[it] could be argued . . . that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the

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93. *Casey*, 505 U.S. at 881-82 (opinion of O’Connor, Kennedy, and Souter, JJ.) (“The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State . . . .” (emphasis added)).

94. *Id.* at 883-84.

95. *Id.* at 881 (“An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.” (emphasis added)).

96. See *Stuart*, 774 F.3d at 253 (stating that “the viewpoint conveyed by the pamphlet is clearly the state’s – not the physician’s”).

97. 500 U.S. 173 (1991).

98. *Rust*, 500 U.S. at 178 (emphasis added); *id.* at 194 (“This is not a case of the Government ‘suppressing a dangerous idea,’ but of a prohibition on a project grantee or its employees from engaging in activities outside of the project’s scope.” (emphasis added)).

99. Halberstam, *supra* note 1, at 774.

100. The Court did conflate professional speech and professional activities, as some commentators have pointed out. See Wells, *supra* note 30, at 1748-49. This conflation is exemplified by statements such as the following: “But we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded.” *Rust*, 500 U.S. at 194-95 (emphasis added).

Government.”<sup>101</sup> But it did not resolve the question, suggesting that the regulations in question “[did] not significantly impinge upon the doctor-patient relationship.”<sup>102</sup> The Chief Justice gave the following reasons: first, the doctor was not compelled “to represent as his own any opinion that he does not in fact hold;” second, the professional relationship was not “sufficiently all encompassing” because it “does not provide post-conception medical care” and consequently, “the doctor’s silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her.”<sup>103</sup> Finally, “[t]he doctor [was] always free to make clear that advice regarding abortion is simply beyond the scope of the program.”<sup>104</sup>

Justice Blackmun’s dissent rejected the “direct regulation of dialogue between a pregnant woman and her physician.”<sup>105</sup> In Justice Blackmun’s view, “the regulations impose[d] viewpoint-based restrictions upon protected speech . . . .”<sup>106</sup> Importantly for this discussion, Justice Blackmun framed the problem of limiting the scope of advice in terms of both the patient’s expectations as well as professional demands.<sup>107</sup> Full, comprehensive advice, in other words, was not only what a pregnant woman expected of her physician—government-funded or not—but also what the medical profession expected of its members.

*Rust* anticipated the points made in *Casey* with respect to attribution of speech within government speech doctrine.<sup>108</sup> Whether or not the Chief Justice appropriately characterized the extent of the doctor-patient relationship, it is noteworthy that the *Rust* Court did acknowledge the possibility of First Amendment protection in this professional context. Moreover, it is striking that the Chief Justice suggested drawing an analogy between the doctor-patient relationship and the treatment of universities under the First

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101. *Rust*, 500 U.S. at 200.

102. *Id.*

103. *Id.*

104. *Id.* “One permissible response to such an inquiry [for referral to an abortion provider] is that ‘the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion.’” *Id.* at 180 (quoting 42 C.F.R. § 59.8(b)(5) (1989)).

105. *Id.* at 204 (Blackmun, J., dissenting).

106. *Id.* at 205.

107. *See id.* at 213-14 (“Indeed, the legitimate expectations of the patient and the ethical responsibilities of the medical profession demand no less.”).

108. Though the Court did not expressly analyze *Rust* under the government speech doctrine, “when interpreting the holding in later cases, . . . [the Court] explained *Rust* on this understanding.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

Amendment.<sup>109</sup> This particular institutional analogy likely supports conceptualizing the professions as knowledge communities.

Several decisions concerning legal advice give further doctrinal guidance on professional speech. In *Legal Services Corp. v. Velazquez*, the Court held unconstitutional a restriction on providing legal advice that “prohibit[ed] legal representation funded by recipients of [Legal Services Corporation (LSC)] moneys if the representation involve[d] an effort to amend or otherwise challenge existing welfare law.”<sup>110</sup> As Justice Kennedy explained, “the LSC program was designed to facilitate private speech, not to promote a governmental message. Congress funded LSC grantees to provide attorneys to represent the interests of indigent clients.”<sup>111</sup> This makes the legal advice different from government speech—according to Justice Kennedy, “[t]he lawyer is not the government’s speaker”<sup>112</sup> and the legal advice is a form of private speech.<sup>113</sup> Yet the *Velazquez* Court did recognize that there is a professional dimension to this speech. The legal system depends on the traditional role of the attorney,<sup>114</sup> which includes “complete analysis of the case, *full advice to the client*, and proper presentation to the court.”<sup>115</sup> Limiting the range of permissible speech “prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power.”<sup>116</sup> In light of these statements, it is evident that the Court understands professional speech to be distinct from government speech, even when funded by the government. And, although the Court did not make the point explicitly, it appeared to recognize the special import of professional speech—at least that of a lawyer—as distinct from ordinary private speech.

Finally, the two attorney speech cases from 2010, *Milavetz v. United States*<sup>117</sup> and *Holder v. Humanitarian Law Project*,<sup>118</sup> have implications “for those desiring

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109. See *Rust*, 500 U.S. at 200.

110. *Velazquez*, 531 U.S. at 536-37.

111. *Id.* at 542.

112. *Id.* Further, Justice Kennedy explained: “The Government has designed this program to use the legal profession . . . to accomplish its end . . . . The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of that concept.” *Id.* at 542-43.

113. *Id.* at 543.

114. *Id.* at 544 (“Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys . . .”).

115. *Id.* at 546 (emphasis added).

116. *Id.* at 545.

117. 559 U.S. 229 (2010).

118. 561 U.S. 1 (2010).

advice about any other area of law where Congress may decide to legislate away the attorney’s ability to advise her client and the client’s right to receive that advice.”<sup>119</sup> *Milavetz* concerned limitations on attorney speech imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).<sup>120</sup> The Act prohibits “debt relief agencies” – which the Court held attorneys to be – from advising clients “to incur more debt in contemplation of such person filing” for bankruptcy under the applicable provisions.<sup>121</sup> In *Milavetz*, the Court disagreed with the Eighth Circuit’s characterization of the “statute as a broad, content-based restriction on attorney-client communications that is not adequately tailored to constrain only speech the Government has a substantial interest in restricting.”<sup>122</sup> As Justice Sotomayor explained, the phrase “in contemplation of bankruptcy” indicates abusive conduct.<sup>123</sup> So understood, “advice to incur more debt because of bankruptcy . . . will generally consist of advice to ‘load up’ on debt with the expectation of obtaining its discharge – *i.e.*, conduct that is abusive *per se*.”<sup>124</sup> Importantly, Justice Sotomayor cited Rule 1.2(d) of the ABA Model Rules of Professional Conduct in rejecting the claim that the BAPCPA provisions prohibit frank discussion between lawyer and client.<sup>125</sup> Under the crime-fraud provision, lawyers are not prohibited from discussing fraudulent or criminal conduct, but they may not advise their clients to engage in it. In other words, the Court looked to professional standards to provide guidance on the scope of the Act’s prohibition as it concerned “attorney speech.”<sup>126</sup> The Court here demonstrated not only an appreciation for the type of professional speech that occurs within the lawyer-client relationship, but also for the role of the professional rules of conduct in defining the scope of this relationship.

The speech at issue in *Holder v. Humanitarian Law Project*,<sup>127</sup> by contrast, occurred outside the boundaries of the lawyer-client relationship; the statute

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119. Knake, *supra* note 25, at 657.

120. *Milavetz*, 559 U.S. at 231-32. See generally Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571 (2005).

121. *Milavetz*, 559 U.S. at 233 (quoting 11 U.S.C. § 526(a)(4) (2012)).

122. *Id.* at 239.

123. *Id.* at 243.

124. *Id.* at 244.

125. *Id.* at 246.

126. *Id.* at 247 (“Against this backdrop, it is hard to see how a rule that narrowly prohibits an attorney from affirmatively advising a client to commit this type of abusive pre-filing conduct could chill attorney speech or inhibit the attorney-client relationship.”).

127. 561 U.S. 1 (2010).

prohibited the formation of that relationship in the first place.<sup>128</sup> Various domestic groups and individuals sought to provide information and training to groups designated as “foreign terrorist organizations” on how to assert their own legal claims.<sup>129</sup> The Court upheld the “material support” provision of the Antiterrorism and Effective Death Penalty Act against a First Amendment challenge.<sup>130</sup> In dictum, Chief Justice Roberts acknowledged that the decision does not suggest “that any future applications of the material-support [for terrorism] statute to speech or advocacy will survive First Amendment scrutiny.”<sup>131</sup> Nonetheless, some commentators assert that the decision “is likely to have a chilling effect on attorney advice.”<sup>132</sup> The Court in this case allegedly underappreciated the role of attorneys who provide “speech that constitutes legal ‘expert advice or assistance.’”<sup>133</sup>

In sum, all of these decisions hint at the Court’s incipient conception of professional speech. While professional speech is conceptualized as somehow distinctive, however, the Court lacks the theoretical foundation to properly evaluate First Amendment protection of such speech.

### C. *The Commercial Speech Analogy*

Courts<sup>134</sup> and scholars<sup>135</sup> have analogized professional speech to commercial speech. But, I argue, the analogy is tenuous; the underlying speech interests are fundamentally different. The content of professional speech, distinctively, is defined by the professional’s connection to the knowledge community.

Most prominently perhaps, Halberstam and Post each propose and defend models that serve as a basis for the analogy. In doing so, however, Halberstam reconceptualizes commercial speech doctrine itself; Post cautions against its

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128. 18 U.S.C. § 2339B (2012); *see also* Tarkington, *supra* note 25, at 24 (noting that the statute criminalizes the attorney-client relationship).

129. *Humanitarian Law Project*, 561 U.S. 1, 14 (2010).

130. *Id.* at 7.

131. *Id.* at 39.

132. Knake, *supra* note 25, at 656.

133. Tarkington, *supra* note 25, at 67 (noting that the Court’s distinction between speech in coordination with a Foreign Terrorist Organization and independent speech “is distinctively and acutely problematic for attorney speech. The attorney’s essential role requires speaking in coordination with and on behalf of clients. Attorneys, when acting as attorneys, do not speak for themselves or independently”).

134. *See, e.g.*, *Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014); *King II*, 767 F.3d at 233; *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff’d in part, rev’d in part*, 505 U.S. 833 (1992); *SEC v. Lowe*, 725 F.2d 892 (2d Cir. 1984).

135. Halberstam, *supra* note 1, at 777; Post, *Informed Consent to Abortion*, *supra* note 1, at 974-90.

wholesale adoption. Halberstam advances the “bounded speech institutions” model, and Post advances a professional speech variation of the democratic self-government model. Both focus on the structure of the communication.

The doctrinal starting point for assessing commercial speech remains the canonical, though increasingly criticized,<sup>136</sup> *Central Hudson* test.<sup>137</sup> The Court has ostensibly relied on this doctrinal basis in its expansion of First Amendment protection for commercial speech.<sup>138</sup> Writing at the turn of the twenty-first century, Halberstam observed that the classic position of minimal protection of commercial speech was beginning to appear in flux.<sup>139</sup> Since then, there has indeed been a considerable expansion of First Amendment protection for commercial speech. The Court now affords what comes close to strict scrutiny review in commercial speech cases.<sup>140</sup>

But the extent of protection should not be the primary reason to analogize the two types of speech unless doctrine is tethered to theory. This requires “a deeper kinship between the two forms of communication.”<sup>141</sup> For Halberstam, this deeper kinship is rooted in the “paradigm of bounded speech institutions.”<sup>142</sup> Both professional and commercial speech in this model can be seen as “relational” or “bounded speech institutions,” though Halberstam acknowledges that “the relationship between physician and patient and the duties attendant to that relationship are substantially deeper than those

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136. See, e.g., Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000) [hereinafter Post, *Commercial Speech*] (contending that *Central Hudson* itself is indeterminate and therefore provides an insufficient constitutional basis for resolving questions of commercial speech protection).

137. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (“In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”).

The First Amendment was originally inapplicable to “purely commercial advertising.” See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). The modern category of “commercial speech” was first identified in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

138. See Halberstam, *supra* note 1, at 787-89; Post, *Commercial Speech*, *supra* note 136, at 42.

139. Halberstam, *supra* note 1, at 776-77.

140. Post, *Commercial Speech*, *supra* note 136, at 42.

141. Halberstam, *supra* note 1, at 776.

142. *Id.* at 778.

between vendor and purchaser.”<sup>143</sup> He makes an (ostensibly descriptive) institutional or structural argument, suggesting that

the Court may be seen as implementing a constitutional theory of bounded speech institutions, based on its perception of various socially defined relationships between interlocutors and, accordingly, rendering contextual judgments about the extent of government intervention that is both necessary for and compatible with the preservation of the particular institution.<sup>144</sup>

With respect to both professional and commercial speech “[t]he boundaries of the discourse . . . may be policed, but, conversely, as long as the speaker remains within the boundary of the institution, the speaker would be engaged in protected speech.”<sup>145</sup> In other words, state regulation serves a definitional purpose—mapping the boundaries of discourse. While speakers remain within those bounds, interference with their speech is impermissible.<sup>146</sup> The so-bounded communicative relationships are subject to “contextual First Amendment review that is specifically centered around the social relation, as opposed to an abstract review such as that traditionally applied to the street-corner speaker.”<sup>147</sup> Under this model, in both the professional and the commercial speech contexts, “[t]he government may neither suppress the speech entirely nor remodel the institution to its liking.”<sup>148</sup>

Conceptually, it seems plausible to view both commercial and professional speech in this way. But, while I agree with the differentiation between speech within and outside of a bounded discourse and with awarding First Amendment protection accordingly, I do not embrace the suggested parallel between commercial and professional speech. The “bounded speech

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<sup>143.</sup> *Id.* at 851. “Indeed, as compared to commercial speech, we might even expect the deeper relationship between physician and patient to lead, at least in some cases, to protection beyond that afforded to commercial speech.” *Id.* at 838.

<sup>144.</sup> *Id.* at 778.

<sup>145.</sup> *Id.* at 857.

<sup>146.</sup> *Id.* at 828 (“On the one hand, the Court welcomes government regulation as partially constitutive of the communicative interaction, that is, as assuring that communications that are dependent on predefined communicative goals remain within the boundaries of that discourse. On the other hand, the Court rejects government prescriptions as unconstitutional when they infringe on the integrity of an established framework for discourse.”).

<sup>147.</sup> *Id.* at 834. This is true “whether the relationships are ones of trust, such as those between lawyer and client or doctor and patient, or are merely common material enterprises, such as those between buyers and sellers.” *Id.*

<sup>148.</sup> *Id.* at 862.

institutions” model assumes the equal position of professional and commercial speech in contrast to political or private speech, which is traditionally unbounded.<sup>149</sup> However, it does not sufficiently account for the differences between professional and commercial speech. In order to do so, such a structural view is not enough.<sup>150</sup> The bounded discourse approach encompasses the individual professional-client relationship, but, in doing so, undervalues the role of the professional’s connection to the knowledge community. In terms of content, the individual professional serves as a conduit for the knowledge community’s insights.

The content of the communication and its relation to the body of knowledge possessed by a knowledge community is distinctive in the *professional* speech context. So is the imposition of professional malpractice liability and its relation to the professional standard of care. This unique relationship with the knowledge community demands a thicker account of the communication. Thus, the analogy falls short if it is based solely on the structural “bounded speech institutions” model. It explains why the state may impose liability as a structural boundary, but it does not define the content of the boundedness. This makes Halberstam’s model conceptually useful, but ultimately incomplete. To establish a theoretical basis for evaluating professional speech, this model should be supplemented with the theory of knowledge communities.

Post, in setting up the commercial speech-professional speech analogy, focuses on three distinctive features of commercial speech: first, the concern about the flow of information to the public; second, the value attached only to truthful, non-misleading information (and, consequently, the application of content- and viewpoint-based regulations); and third, the permissibility of disclosure requirements based on the emphasis on the public’s right to receive truthful and non-misleading information.<sup>151</sup> These three features, in Post’s

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149. *Id.* at 832.

150. Halberstam concedes as much, for at least some situations, pointing out that while “it is the relationship that defines the discourse within which both speakers and listeners have rights under the First Amendment,” *id.* at 851, the “deeper relationship” between, for example, a physician and patient may “lead, at least in some cases, to protection beyond that afforded to commercial speech,” *id.* at 838. The structural view also seems problematic on its own terms in defining the boundedness of commercial speech itself. *See id.* at 852 (“With regard to the regulation of commercial speech, the question of what is considered part of the bounded discourse is more difficult to answer, because we cannot rely on the relatively clear consideration of whether the speaker is reasonably understood by the interlocutors as applying considered judgment to the listener’s particular circumstances for the benefit of the listener. To the contrary, most commercial speech today occurs in the impersonal realm of mass communication.”).

151. Post, *Informed Consent to Abortion*, *supra* note 1, at 975.



assessment, closely track the concerns in the professional speech context. In contrast to speech as part of public discourse, the focus of commercial speech, like that of professional speech, is its informational value.<sup>152</sup> The knowledge-enhancing character of both types of speech provides the link to the democratic self-government values underlying the First Amendment.<sup>153</sup>

However, Post offers two distinctions between commercial speech and professional speech, which complicates the analogy.<sup>154</sup> The first concerns dissemination of commercial information to the public at large as opposed to the dissemination of professional information only to the client. In an age of sophisticated, highly personalized advertising, however, this characterization of the dissemination of commercial speech may no longer be descriptively accurate.<sup>155</sup> The second distinction lies in the presupposed equality of the speaker and the listener in commercial speech and their relative inequality in professional speech. Of course, extensive psychological research on the part of advertisers makes the speaker and the listener unequal in the commercial speech context as well. Product placement, subconscious messaging, and the like give a distinct advantage to commercial speakers over their audiences. The Court may have originally had it right in assuming the vulnerability of consumers, though not because the consumer “lacks sophistication,”<sup>156</sup> but because the advertiser has an overabundance of it.<sup>157</sup> Thus, Post rightly cautions against pushing the analogy.<sup>158</sup>

The commercial speech analogy, then, while initially appealing, falls short. It lacks descriptive accuracy and analytical force on numerous counts. A preferable approach, therefore, considers the theoretical justifications for protecting professional speech on its own merits.

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152. POST, DEMOCRACY, *supra* note 51, at 41; Post, *Commercial Speech*, *supra* note 136, at 4 (“Commercial speech . . . consists of communication about commercial matters that conveys information necessary for public decision making, but that does not itself form part of public discourse.”); Post, *Informed Consent to Abortion*, *supra* note 1, at 974-75.

153. See *infra* Section II.C.

154. POST, DEMOCRACY, *supra* note 51, at 46-47.

155. See generally Ryan Calo, *Digital Market Manipulation*, 42 GEO. WASH. L. REV. 995 (2014).

156. See *In re R.M.J.*, 455 U.S. 191, 200 (1982) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977)).

157. Cf. Post, *Commercial Speech*, *supra* note 136, at 41 (speaking of the inability of the Court “to transcend older images of consumers as vulnerable and reliant, images that underlay the Court’s earlier refusal to extend any First Amendment protection to commercial speech”).

158. Post, *Informed Consent to Abortion*, *supra* note 1, at 980 (“The analogy to commercial speech should not be pressed too far. Commercial speech has its own tormented doctrinal history, with far too many confusions and imprecisions. It would be disheartening to see these imported wholesale into the context of professional speech.” (footnote omitted)).

## II. THEORIZING PROFESSIONAL SPEECH

Conceptualizing the learned professions as knowledge communities allows us to rethink professional speech in light of the traditional theoretical justifications for First Amendment protection. Professional speech as a distinctive form of speech is worthy of First Amendment protection. Situating professional speech within the standard theoretical accounts illustrates the unique ways in which this type of speech intersects with the underlying interests. While some scholars have emphasized the democratic self-government justification for protecting professional speech,<sup>159</sup> this Part suggests that other First Amendment theories, based on autonomy interests and the marketplace of ideas, also justify—in a way distinct from other speech contexts—First Amendment protection for professional speech. Without taking a position on which of these traditional theories best justifies First Amendment protection,<sup>160</sup> and without ascribing any particular ranking to them,<sup>161</sup> I suggest that professional speech interests sound in all standard theories.

With respect to autonomy interests, the role of the professions as knowledge communities reframes the importance of professional autonomy. Although the emphasis is traditionally on the listener when the informational value of the communication is at issue, the speaker's autonomy interests are implicated as well. Likewise, the knowledge community idea reframes the application of the marketplace theory. The individual professional, under this view, is closely connected to the marketplace of ideas that may be found within the discourse of the profession. Finally, with respect to democratic self-government, the knowledge community concept influences the application of that theory of First Amendment protection for speech. Its effect can be seen in two directions. First, it explains how the individual client can benefit from professional advice directly and how the knowledge basis of the entire community can be enhanced by the individual professional's communication of the knowledge community's insights to one client. Second, by providing a close link between the individual professional and the knowledge community,

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159. *Id.* at 974 (suggesting that “the single most useful theory of First Amendment value is the concept of democratic self-governance”). Other commentators have followed Post in this assessment. *See, e.g.,* Knake, *supra* note 25, at 674-75 (dismissing marketplace and autonomy justifications).

160. *Cf.* Greenawalt, *supra* note 57, at 119-20 (suggesting that there is not one exclusive approach to justifying First Amendment protection).

161. *But see* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2373 (2000) [hereinafter Post, *Reconciling Theory and Doctrine*] (suggesting a “lexical priority” among First Amendment theories that places the participatory democracy theory at the top).

it brings together the individual focus of those who favor a participatory perspective of democratic self-government with those who would focus on the role of the collective.<sup>162</sup>

A. *Autonomy Interests*

The autonomy interests implicated by professional speech are somewhat distinct from other speech contexts.<sup>163</sup> I will call “decisional autonomy interests” the interests of the listener who needs the information to make an informed decision.<sup>164</sup> Decisional autonomy in the professional speech context is very different from the commercial speech context. While commercial speech targets the autonomy of the listener to make commercial choices—thereby contributing to the ability to make independent decisions—the target of professional speech is much more closely connected to the self, at times concerning the physical or psychological integrity of the listener’s own person. Moreover, the *speaker* pays for the speech in the commercial speech context (though, of course, the goal of commercial speech is often to persuade the consumer to buy a product or service) whereas it is the *listener* who pays for the speech in the professional speech context, indicating that the economic interests do not align. In professional speech, by contrast with commercial speech, payment for services is secondary to the knowledge-based nature of the service provided.<sup>165</sup>

The other autonomy interests are those of the speakers, which I will call “professional autonomy interests.” The qualifier “professional” signals that it is

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162. See *id.* at 2368-69 (distinguishing “Meiklejohnian and participatory perspectives”). According to Post, “the Meiklejohnian approach interprets the First Amendment primarily as a shield against the ‘mutilation of the thinking process of the community,’ whereas the participatory approach understands the First Amendment instead as safeguarding the ability of individual citizens to participate in the formation of public opinion.” *Id.* at 2368 (citation omitted).

163. See generally C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (describing individuals’ autonomy interests as a theoretical justification for unrestricted speech); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991) (arguing for the persuasion principle in freedom of expression).

164. The Court’s failure to consider the patient’s interest in receiving information has been criticized in the reproductive rights context. See, e.g., Berg, *supra* note 16, at 219-20.

165. Cf. Halberstam, *supra* note 1, at 838 (discussing the distinct interests at stake in the commercial and professional speech contexts); Knake, *supra* note 25, at 690 (recounting that payment may not be decisive in determining the interests at stake in professional speech contexts). This is true in commercial speech cases as well. See *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (stating that “speech does not lose its First Amendment protection because money is spent to project it”).

not so much the autonomy interest to freely express one's personal opinions – as is the case in free speech theory concerning public discourse – but rather to communicate insights of the knowledge community as a member of the profession.

1. *Decisional Autonomy Interests*

The professional relationship is typically characterized by an asymmetry of knowledge. Clients seek professionals' advice precisely because of this asymmetry. "Clients are presumed to be dependent upon professional judgment and unable themselves independently to evaluate its quality."<sup>166</sup> This is not unique to the learned professions. As Kathleen Sullivan has pointed out, "Lawyers know far more about law than their clients, but information asymmetry creates moral hazards (such as the incentive to lie about the gravity of a problem) for auto mechanics as well."<sup>167</sup> These hazards are exacerbated when the client's personal health or freedom or significant financial interests are at stake. Thus, "the government may properly try to shield the client from the professional's incompetence or abuse of trust."<sup>168</sup>

The listener's interests are only served if the professional communicates information that is accurate (under the knowledge community's current assessment), reliable, and personally tailored to the specific situation of the listener. The client's agency requires that the ultimate decision rest with her. The nature of the professional-client relationship gives rise to fiduciary duties.<sup>169</sup> To bridge the knowledge gap, and to ensure the protection of the client's decisional autonomy interests, the professional has to communicate all information necessary to make an informed decision to the client.

Thus, the interest in full disclosure is linked to the autonomy interests of those seeking the advice of professionals. To the extent that this is facilitated by an informed consent requirement, as in the medical context, the potential for corruption of the information by outside interference is particularly troublesome. As Justice Stevens pointed out in his opinion in *Casey*, "Decisional autonomy must limit the State's power to inject into a woman's

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<sup>166</sup>. POST, DEMOCRACY, *supra* note 51, at 47; *see also, e.g.*, *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) ("The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision.").

<sup>167</sup>. Sullivan, *supra* note 68, at 580.

<sup>168</sup>. Volokh, *supra* note 5, at 1344.

<sup>169</sup>. *See Halberstam, supra* note 1, at 845; Keighley, *supra* note 61, at 2374.

most personal deliberations its own views of what is best.”<sup>170</sup> But while this concern is perhaps most obvious in cases involving bodily integrity,<sup>171</sup> other forms of professional advice should be equally uncorrupted for the same reason. Concerns regarding the agency of the listener obtain in all professional speech contexts.

## 2. *Professional Autonomy Interests*

To the extent autonomy interests matter in professional speech, the focus tends to be on the listener’s interests.<sup>172</sup> But the speaker’s autonomy interests are also at stake. Some commentators fall back solely on the professional’s personal autonomy interests.<sup>173</sup> Professionals as individuals of course have a First Amendment right to speak their own mind in public discourse, perhaps even challenging the knowledge community’s insights.<sup>174</sup> But this is not a primary concern in the professional speech context. Quite to the contrary, there is an expectation within the professional-client relationship that the professional does *not* challenge the knowledge community’s insights in dispensing professional advice.<sup>175</sup>

The professional not only speaks for herself, but also as a member of a learned profession—that is, the knowledge community. And that community has an interest of its own. Only if the community remains autonomous can it develop and refine the specialized knowledge that is its essence and the source of its social value. The professional speaker has a unique autonomy interest in communicating her message according to the standards of the profession to

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170. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 916 (1992) (Stevens, J., concurring in part and dissenting in part).

171. It is also arguably recognized—at least implicitly—as a matter of existing doctrine. “The *Rust* majority’s recognition, at least in principle, of the protected status of physician-patient communications, comports with the Court’s judgment elsewhere in the legal and medical contexts that professionals play a special role in assisting individuals in the exercise of personal autonomy in the vindication of basic rights.” Halberstam, *supra* note 1, at 775.

172. See, e.g., Keighley, *supra* note 61, at 2405. But see Halberstam, *supra* note 1, at 844 (“As in the case of commercial speech, the focus on the listener in professional speech would again be, strictly speaking, misplaced, because a professional’s interest in communicating to a client should be constitutionally relevant.”).

173. Keighley, *supra* note 61, at 2373 (“While physicians may have more limited autonomy interests when engaging in the practice of medicine, this does not mean that they surrender all of their ordinary First Amendment rights against compelled ideological speech. Physicians retain the core First Amendment right of *ordinary citizens* to refuse to be the mouthpiece for the state’s ideological advocacy.” (emphasis added)).

174. See *supra* Section I.A.2.

175. Halberstam, *supra* note 1, at 834.

which she belongs, precisely in order to uphold the integrity of its knowledge community. Physicians, for instance, should not be compelled to speak in a way that undermines their profession's scientific insights.

This goes beyond the *structural* interest in protecting the “bounded speech institutions.”<sup>176</sup> It also concerns the *content* of the communication. While some commentators assert that the professional's autonomy interests guard against compelled speech “on matters of religion, politics, and values,”<sup>177</sup> the professional autonomy interests reach much further. Corrupting the content of a communication to a client within the professional-client relationship fundamentally concerns the professional autonomy interests of the professional. This is an interest that goes to the identity of the professional as a member of a profession,<sup>178</sup> rather than the professional's individual autonomy interest, which is entirely unrelated to her professional role. Conceptualizing the professional as a member of a knowledge community brings the autonomy interest in articulating the uncorrupted insights of the knowledge community into focus.

### B. Marketplace Interests

In the realm of professional speech, the classic Holmesian notion of a “free trade in ideas”<sup>179</sup> would seem to have little purchase.<sup>180</sup> While “the best test of truth is the power of the thought to get itself accepted in the competition of the market,”<sup>181</sup> the professional does not seek to subject her professional opinion to this test when speaking within the confines of the professional-client

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176. See *supra* notes 137-147 and accompanying text; cf. Halberstam, *supra* note 1, at 848 (“The First Amendment protects not the individual listener's subjective desire for information, but the practice of the profession.”); *id.* at 867 (“The First Amendment protects the doctor-patient dialogue as an important forum for the exercise of individual autonomy through the communication of knowledge that is generally free from government control. At the same time, however, the First Amendment allows for state regulation of the physician's statements in order to ensure the integrity of the communicative institution.”).

177. Keighley, *supra* note 61, at 2376.

178. Cf. Knake, *supra* note 25, at 678 (noting that in the narrower context of attorney speech, “[a]n attorney's identity as a member of the legal profession also holds First Amendment significance”).

179. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

180. Cf. POST, DEMOCRACY, *supra* note 51, at xii (“Contemporary technical expertise is created by practices that demand *both* critical freedom to inquire *and* affirmative disciplinary virtues of methodological care . . . . The maintenance of these virtues quite contradicts the egalitarian tolerance that defines the marketplace of ideas paradigm of the First Amendment.”).

181. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

relationship.<sup>182</sup> The pragmatic dimension of the market metaphor does not apply: experience and truth in the current assessment of the knowledge community are quite obviously located with the professional, making it inapposite “to capture the idea that truth must be experimentally determined from the properties of experience itself.”<sup>183</sup> Indeed, the state may ensure that clients seeking professional advice are not harmed by “false” ideas by way of imposing professional malpractice liability.<sup>184</sup> Thus, the classic marketplace paradigm is inapplicable to professional speech within the professional-client relationship.

Nonetheless, there is another facet to the idea of the marketplace theory as applied to professional speech.<sup>185</sup> Although scholars have observed that professional speech is distinct from other speech, “which generally treats the truth as just ‘another opinion,’”<sup>186</sup> the details remain underexplored. As Paul Horwitz has put it, in the professional speech context, “expertise based on a body of specialized knowledge is the very basis of the value and legitimacy of the speech.”<sup>187</sup> It is here that the considerations underlying professional speech intersect with those underlying scientific and academic speech.<sup>188</sup>

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182. See, e.g., Post, *Reconciling Theory and Doctrine*, *supra* note 161, at 2366 (“It makes no sense, for example, to locate a ‘truth-seeking function’ in the speech between lawyers or doctors and their clients . . .”).

183. *Id.* at 2360.

184. *Id.* at 2364. See *infra* Part III.

185. The issues addressed here are, however, discussed in the First Amendment literature concerned with scientific and academic speech. See, e.g., Greenawalt, *supra* note 57, at 136 (“There is also wide agreement that advancement in understanding among persons capable of assessing scientific claims is promoted by freedom of communication within the scientific community, that government intervention to suppress some scientific ideas in favor of others would not promote scientific truth.”); Post, *Reconciling Theory and Doctrine*, *supra* note 161, at 2365 (“The social practices necessary for a marketplace of ideas to serve a ‘truth-seeking function’ are perhaps most explicitly embodied in the culture of scholarship inculcated in universities and professional academic disciplines.”). Indeed, some suggest that the marketplace metaphor itself originally was influenced by Justice Holmes’s readings on “the method of science.” See Post, *Reconciling Theory and Doctrine*, *supra* note 161, at 2365 & n.43 (“It is likely that Holmes was exposed to [CHARLES S. PEIRCE, *The Fixation of Belief*, in *VALUES IN A UNIVERSE OF CHANCE* 91, 110-11 (Philip P. Wiener ed., 1958)] while he was a member of the Metaphysical Club.”).

186. HORWITZ, *supra* note 13, at 248 (quoting MICHAEL WALZER, *THINKING POLITICALLY: ESSAYS IN POLITICAL THEORY* 19 (2007)); see *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (striking down the Stolen Valor Act).

187. HORWITZ, *supra* note 13, at 248; see also POST, *DEMOCRACY*, *supra* note 51, at 8 (“We rely on expert ‘knowledge’ precisely because it has been vetted and reviewed by those whose judgment we have reason to trust. All living disciplines are institutional systems for the production of such ‘knowledge.’”).

188. See *supra* note 51 and accompanying text.

There exists a marketplace of ideas internal to each profession. The issue here is the formation of professional knowledge (rather than, as we saw with the autonomy justification, its dissemination). Within the discourse of the profession, the acceptance of professional insights will depend on the rules established by the profession. Scientific insights, for example, will be subjected to peer review and hypotheses will be subjected to the test of falsification.<sup>189</sup> These internal processes serve a purpose akin to that of the Holmesian marketplace of ideas. But, to the extent that such a marketplace of ideas exists as what we might call an epistemic marketplace, and that professional standards are generated by testing insights on that marketplace, nonprofessionals do not participate in it. The current state of the art provides the foundation of the professional's advice (though current debates within the field may influence what counts as a defensible professional position).<sup>190</sup> As knowledge communities, then, the professions should be awarded deference.

As Post notes, the marketplace theory “requires the protection only of speech that communicates ideas and that is embedded in the kinds of social practices that produce truth.”<sup>191</sup> It is the professional's connection to the knowledge community that makes the marketplace theory relevant. If the account offered here is an accurate portrayal of the formation of professional knowledge within the knowledge community, the step from the community to the individual professional follows straightforwardly. In reciprocal fashion, the individual professional's interest lies in preserving the integrity of the knowledge community's insights, just as the knowledge community's interest lies in having the individual professional communicate its insights correctly. While this complements the professional autonomy interests, as just described,<sup>192</sup> the focus of this theory is on preserving the integrity of the search for truth—that is, the formation of professional knowledge—within the discourse of the knowledge community.

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189. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). For similar observations from the legal academy, see POST, *DEMOCRACY*, *supra* note 51, at 8 (“Scholarship requires not only a commitment to vigorous debate and critical freedom, but also and equally a commitment to enforcing standards of judgment and critical rigor.”).

190. Cf. POST, *DEMOCRACY*, *supra* note 51, at 67 (“In contrast to the marketplace of ideas, therefore, academic freedom protects scholarly speech only when it complies with ‘professional norms.’”). In the context of professional liability, the tort regime accounts for the range of valid opinions with “multiple schools of thought” or “respectable minority” rules. See *infra* Section III.B.

191. Post, *Reconciling Theory and Doctrine*, *supra* note 161, at 2366 (contending further that “[e]xactly where the theory could appropriately be applied . . . would be highly debatable” and, in his assessment, “the scope of its application would be quite narrow”).

192. See *supra* Section II.A.



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C. *Democratic Self-Government Interests*

Focusing on the informational value of professional speech, the democratic self-government theory would find such speech worthy of First Amendment protection because it “cognitively empowers public opinion” and thus “serves the value of democratic competence.”<sup>193</sup> (This idea is also reflected in the commercial speech analogy, as discussed earlier.)<sup>194</sup> But the democratic self-government value of professional speech might be greater still. Professionals supply information to clients that not only concerns the clients’ own lives but may also “require collective action to change rights and responsibilities in society.”<sup>195</sup> For example, courts<sup>196</sup> and scholars<sup>197</sup> have emphasized the role of lawyers in democratic self-government. Other professionals, too, may contribute to expanding the knowledge base upon which citizens can make informed decisions.

Yet the democratic self-government theory builds on some debatable assumptions. It may seem questionable whether a client or patient would, in fact, be primarily concerned with the policy implications of the professional advice she receives. Is the lawyer’s client really thinking about broad questions of access to justice? Is the physician’s patient really thinking about health policy? Or are both primarily concerned with having their individual problems solved? While these questions are sometimes acknowledged in the literature, the abstract possibility of taking political action based on the individualized professional advice received appears sufficient to justify applying the theory to professional speech.<sup>198</sup>

Within the theory of democratic self-government, two distinct strands arguably stand in opposition to each other: one emphasizes the “safeguarding of collective processes”; the other emphasizes individual rights.<sup>199</sup>

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193. POST, *DEMOCRACY*, *supra* note 51, at 40-41 (making this observation with respect to commercial speech).

194. *See supra* Section I.C.

195. Halberstam, *supra* note 1, at 812.

196. *See, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361-62 (1977) (“[L]awyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’” (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975))).

197. Halberstam, *supra* note 1, at 812 (“Indeed some professionals, such as attorneys, take an active part in assisting in the vindication of existing legal and constitutional rights in courts and other government fora.”).

198. *See, e.g., id.* at 813; Keighley, *supra* note 61, at 2371-72; Knake, *supra* note 25, at 676.

199. Post, *Reconciling Theory and Doctrine*, *supra* note 161, at 2367 (discussing the Meiklejohnian theory and the participatory self-government theory). Post argues that the Meiklejohnian perspective has been “decisively reject[ed]” by proponents of participatory self-government.

Conceptualizing individual professionals as part of the larger knowledge community—as conduits communicating the knowledge community’s insights, and thus as trustees for the speech of others—reconciles the two democratic self-government approaches in the professional speech context. The close connection between the individual professional and the knowledge community links the individual role of the professional and the collective role of the knowledge community to which the professional belongs.

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As this Part has demonstrated, the traditional theoretical justifications for First Amendment protection apply to professional speech in a unique way. All standard theories suggest that professional speech deserves robust First Amendment protection.

### III. LIMITING PROFESSIONAL SPEECH

This Part considers the appropriate limits on professional speech. The state may regulate the professions, but “[b]eing a member of a regulated profession does not . . . result in a surrender of First Amendment rights.”<sup>200</sup> And as Eugene Volokh has noted, “it’s far from clear that the government should be completely free to regulate professionals’ speech to their clients.”<sup>201</sup> Therefore, it is worth unpacking what state regulation of the professions means and determining when such regulation directly and impermissibly affects professional speech.

Section III.A briefly considers the history of regulating the learned professions. Initially self-regulating, the professions developed a set of norms that solidified over time. State involvement in professional regulation followed. Turning to three typical kinds of regulations—namely concerning advertising, access to the profession, and unauthorized practice—I will demonstrate that professional speech concerns do not ordinarily arise in these contexts. These types of regulations do not generally concern the body of professional knowledge that forms the repository for individual professionals’ advice to clients and its subsequent communication. Thus, while these types of

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*Id.* at 2369. Nonetheless, as Post points out, there are certain contexts—such as federal regulation of the broadcast media—that build on the Meiklejohnian theory. There, the specific role of the “broadcast licensees as trustees for the speech of others” allowed an approach that Post deems “compatible with the participatory approach.” *Id.* at 2370.

200. *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002).

201. Volokh, *supra* note 5, at 1344.

regulations may have far-reaching consequences, they do not implicate professional speech interests as defined here.<sup>202</sup> This makes the importance of distinguishing between regulation of the *profession* and regulation of *professional speech* palpable.

Section III.B then turns to the interplay between the First Amendment and tort liability for professional malpractice. The tort regime in this context functions as a form of regulation.<sup>203</sup> The imposition of malpractice liability has never been found to offend the First Amendment. But the conventional answer as to why that is so is unsatisfactory. Stated in an oversimplified way, the argument is that the state may regulate the professions, and the permissibility of regulation is incompatible with the First Amendment.<sup>204</sup>

There is an expansive body of literature on professional malpractice law—its effects on professionals and clients, larger policy implications, and possible need for reform. All of this is well beyond the scope of this discussion. My point here is relatively narrow and conceptual. Professionals may be held liable for “unprofessional” speech—that is, speech within the professional-client

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202. There are other forms of regulation that may apply to the speech of professionals. Perhaps the most apparent, in the legal realm, are rules of procedure. *See, e.g.,* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) (“It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.”); *see also* Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687 (1997); Sullivan, *supra* note 68, at 569 (“Rules of evidence and procedure, bans on revealing grand jury testimony, page limits in briefs, and sanctions for frivolous pleadings, to name a few, are examples of speech limitations widely accepted as functional necessities in the administration of justice . . . .”); Wendel, *supra* note 25, at 348, 381-82. Agreeing to the many restrictions on attorney speech is simply accepted and explained as “a condition of being admitted into the bar.” Tarkington, *supra* note 25, at 31. These restrictions limit a wide swath of what should be protected professional speech. Perhaps a better explanation is that these kinds of rules seem closely related to the types of time, place, and manner restrictions permissible in public discourse as well. But these limits on speech do not give rise to professional speech concerns in the strict sense. The speech so constrained does not communicate the knowledge community’s insights, within the professional-client relationship, for the purpose of providing professional advice. Hence they fall outside the scope of this discussion.

203. *See* Nathan B. Oman & Jason M. Solomon, *The Supreme Court’s Theory of Private Law*, 62 DUKE L.J. 1109, 1118 (2013) (“[V]irtually all commentators assume that private law is a form of public regulation.”). *See generally* REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002).

204. *See, e.g.,* *King I*, 981 F. Supp. 2d at 319 (“[T]here is a more fundamental problem with [the argument that professional counseling is speech], because taken to its logical end, it would mean that *any* regulation of professional counseling necessarily implicates fundamental First Amendment free speech rights, and therefore would need to withstand heightened scrutiny to be permissible. Such a result runs counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services.”).

relationship, for the purpose of providing professional advice, that fails accurately to communicate the knowledge community's insights.

The liability scheme thus draws on the same body of professional knowledge that I have argued deserves First Amendment protection. If liability is appropriately allocated against this benchmark, the liability scheme normatively supports—rather than undermines—protection of professional speech. In order to achieve fair results under this scheme, professionals may be held liable only under a standard that is exclusively determined by the profession. It follows that the knowledge community's insights and their communication to the client by the individual professional must remain uncorrupted.

*A. Regulation of the Professions*

State regulation of the professions is not incompatible with protecting professional speech. Maintaining a focus on the role of knowledge communities, this section outlines the extent of permissible regulation of the professions in light of its history. The historical perspective illuminates the nexus between licensing, state power, and regulation of professions and professionals. There is a long history of self-regulation of knowledge communities.<sup>205</sup> Traditionally, certain professions themselves created barriers to entry into the profession, policed membership, and established a distinct professional “culture.” This culture then solidified into a set of professional norms, enforced by professional bodies overseeing the standards of entry and membership. The state assumed some of these functions over time, either taking on the role of regulator directly or through its interaction with professional associations.<sup>206</sup> Licensing requirements for law and medicine in the United States likely date back to the founding period,<sup>207</sup> although there was

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205. See MODEL RULES OF PROF'L CONDUCT pmbll. ¶¶ 10–11 (AM. BAR ASS'N 2013). See generally BRUNDAGE, *supra* note 35; KRAUSE, *supra* note 35; William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485 (1995); Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1 (1998).

206. See, e.g., Mehlman, *supra* note 31, at 1172–75 (describing efforts of the American Medical Association to lobby state legislatures regarding licensing laws in the mid-nineteenth century and its later involvement in setting licensing standards); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

207. Douglas A. Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 WM. & MARY L. REV. 46, 46 n.1 (1972) (“The licensing of lawyers and doctors in this country began in the latter part of the eighteenth century and the first years of the nineteenth.”).

a noticeable retreat from licensing in the Jacksonian era.<sup>208</sup> The relationship between the regulated professions and the regulating state generally remained one of collaboration; in the case of licensing, for instance, state involvement was overwhelmingly welcomed—even “eagerly sought”<sup>209</sup>—by the professions.<sup>210</sup>

There are now numerous ways in which the state regulates the professions. For example, “[t]he medical and legal professions . . . have long been subject to licensing and supervision by the State ‘for the protection of society,’ and the Court has indicated that such regulations would be upheld if they ‘have a rational connection with the applicant’s fitness or capacity to practice’ the profession.”<sup>211</sup> I will consider briefly three prototypical areas of state regulation of the professions: advertising, access to the profession, and unauthorized practice. None of them, as the following discussion demonstrates, directly address the types of professional speech issues with which I am concerned. Therefore, they do not constitute “limits on professional speech” in the strict sense of the term. The takeaway is simple, but important: protecting professional speech does not make state regulation of the professions impossible.

One prominent context in which professional regulation as a matter of free speech has been litigated in the past has been advertising.<sup>212</sup> In a series of cases, the Supreme Court has dealt with questions of advertising and solicitation regulations for professional services, such as legal services,<sup>213</sup> accounting

208. Mehlman, *supra* note 31, at 1171-72.

209. Gellhorn, *supra* note 31, at 11.

210. Mehlman, *supra* note 31, at 1172-73.

211. Halberstam, *supra* note 1, at 834 (first quoting *Dent v. West Virginia*, 129 U.S. 114, 122 (1889)); then quoting *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 239 (1957)); see also *King II*, 767 F.3d at 229 (“The authority of the States to regulate the practice of certain professions is deeply rooted in our nation’s jurisprudence. Over 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.’” (quoting *Watson v. Maryland*, 218 U.S. 173, 176 (1910) and citing *Dent v. West Virginia*, 129 U.S. 114, 122 (1889))).

212. See Chemerinsky, *supra* note 120, at 572-76; Judith L. Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules under Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONST. L.Q. 487 (1986); Ronald D. Rotunda, *Lawyer Advertising and the Philosophical Origins of the Commercial Speech Doctrine*, 36 U. RICH. L. REV. 91 (2002); Sullivan, *supra* note 68, at 574-80.

213. Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (holding that a ban on lawyer direct mailing to victims for thirty days after an accident or disaster was permissible); Peel v. Att’y Registration & Disciplinary Comm’n, 496 U.S. 91 (1990) (holding that a ban on advertising lawyer specialist certification was unconstitutional); Shapero v. Ky. Bar Ass’n, 486 U.S. 466 (1988) (holding that letters advertising specific legal issues were permissible); Zauderer v.

services,<sup>214</sup> and dental<sup>215</sup> or medical services.<sup>216</sup> The gist of these decisions is that professional advertising is largely—though not uniformly<sup>217</sup>—protected as a matter of commercial speech.<sup>218</sup> Advertising for professional services is commercial speech, and “[c]onstitutional protection for attorney advertising, and for commercial speech generally, is of recent vintage.”<sup>219</sup>

Historically, professional ethics prohibited advertising, and courts consistently deferred to professional ethics in upholding advertising restrictions. As Walter Gellhorn noted in the mid-1970s, “[t]he unethicity of advertising has long been an article of faith among professionals, and the courts have generally shared this faith.”<sup>220</sup> This deference to professional

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Office of Disciplinary Counsel, 471 U.S. 626 (1985) (holding that a ban on print ads targeting victims was permissible); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) (holding that the regulation of lawyer in-person solicitation was permissible); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding that the prohibition of newspaper ads for routine legal services was unconstitutional).

214. *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 138-39 (1994) (holding that a censure for using the truthful designations “CPA” and “CFP” was unconstitutional); *Edenfield v. Fane*, 507 U.S. 761, 763 (1993) (holding that a ban on in-person solicitation by the CPA was unconstitutional).
215. *Semler v. Ore. State Bd. of Dental Exam’rs*, 294 U.S. 608, 613 (1935) (holding that a statute regulating certain forms of advertising by dentists was permissible).
216. *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (holding that the application of a statute forbidding “encourag[ing] or promot[ing]” an abortion to medical advertising was unconstitutional).
217. See *Sullivan*, *supra* note 68, at 580-84 (noting the disparate treatment of lawyer advertising—where “the Court gives greater deference to state interests” in upholding regulations—from that of other professionals). *Sullivan* criticizes this distinction between lawyers and other professionals, finding it “hardly clear that broad assumptions about public regard for the legal profession—especially if only weakly empirically demonstrated—ought to provide the basis for limiting lawyer promotional practices that cannot be shown to cause clients demonstrable material harm.” *Id.* at 588. Instead, she concludes, “[t]he question . . . is whether lawyer-specific speech regulations are really needed . . . or whether problems of fraud, misrepresentation, and overreaching may be adequately controlled by generally applicable background consumer protection laws . . . .” *Id.*
218. See, e.g., *Chemerinsky*, *supra* note 120, at 575.
219. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 622 (1995).
220. Gellhorn, *supra* note 31, at 21 n.53. Gellhorn further points out that not until 1976 did the ABA permit “a lawyer . . . to indicate ‘in dignified form’ in professional announcements and in the yellow pages of telephone directories his preferred areas of practice and his educational background.” *Id.* at 21. See also Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 712-16 (1977) (discussing the ABA House of Delegates 1976 amendment permitting this type of advertising). Morgan noted in response to the 1976 amendment to the ABA rules on lawyer advertising that the changes “make information more accessible than before, but they perpetuate many barriers to information—barriers which are of no benefit to anyone but attorneys.” *Id.* at 716.

norms was long-standing. Chief Justice Hughes, in a 1935 case involving dentists' advertising, stated: "What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards."<sup>221</sup>

But, as Kathleen Sullivan observed, "[t]he decisions upholding professional ethics regulations against First Amendment challenges are difficult to square with the Court's other advertising decisions."<sup>222</sup> And Chief Justice Hughes's statement—that professional ethics are part of the profession's expert opinion—goes too far. No specialized knowledge is needed for the question of whether advertising for professional services is appropriate; it is a purely economic question. As a matter of institutional competence, courts can rely on their own expertise in economic matters.<sup>223</sup>

This helps us understand why courts have turned away from their earlier deference to professional norms prohibiting advertising and why, in embracing commercial speech protection for advertising against professionals' wishes, they have nevertheless begun to regulate professional speech. On matters of regulation that do not directly concern the specialized knowledge of knowledge communities that constitutes the basis for professional advice, professional speech protection should not require broad deference to the profession. The professional advertising her services is not speaking as part of the knowledge community to transmit advice to a client. She speaks only as a private commercial actor. Professional advertising, like commercial advertising, thus is properly reviewed as a matter of commercial speech.<sup>224</sup>

Beyond advertising, the state may determine educational and other fitness standards for the profession. Imposing limits on access to a profession by establishing educational standards or licensing and certification requirements does not affect professional speech directly. To be sure, there is a long-recognized tension between restricting access to ensure competent advice and restricting access in order to limit competition.<sup>225</sup> And there certainly is potential for abuse.<sup>226</sup> "On the one side is the need to preserve the integrity of

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221. *Semler v. Ore. State Bd. of Dental Exam'rs*, 294 U.S. 608, 612 (1935).

222. Sullivan, *supra* note 68, at 578.

223. Cf. Stein, *supra* note 22, at 1245 (discussing in the medical malpractice context the competence of courts and their impartiality as compared to the professions in decisions concerning economic considerations and social welfare).

224. This is true conceptually irrespective of the Court's doctrinal approach to commercial speech, which may well be flawed. See *supra* notes 136-140 and accompanying text.

225. See, e.g., Gellhorn, *supra* note 31.

226. See, e.g., *id.* at 14-15 (discussing citizenship and residency requirements); *id.* at 18 (discussing discrimination in licensing on ethnic and economic grounds).

professional knowledge; on the other side is the fact that professional knowledge sometimes reflects sociological prerogatives of class and power that should be disciplined by democratic political purposes.”<sup>227</sup> Indeed, some have pointed out that “there is a large body of historical, economic, and sociological literature that suggests that the primary motivation for professional licensing laws is economic self-interest.”<sup>228</sup> Without taking a position on the extent of self-interest in professional licensing, it seems relatively unproblematic from a First Amendment perspective to permit some form of access control.<sup>229</sup>

Sometimes, First Amendment problems can arise if access to the profession is denied because of the content of an applicant’s speech. One prominent example is the case of George Anastaplo, whose bar application was denied by the Illinois Bar due to his refusal to answer questions regarding his views on the Communist party.<sup>230</sup> (He famously argued his own case before the Supreme Court, lost in a 5-4 decision, and became a law professor instead.)<sup>231</sup> But the types of First Amendment problems arising here are different from those in the professional speech context. Here, it is not the knowledge community’s specialized knowledge that the state interferes with but rather the individual professional’s opinion.<sup>232</sup> Thus, an appropriate shield against such restrictions may be found in the professional’s individual First Amendment rights.

Finally, unauthorized practice regulations raise issues similar to regulations concerning access to the profession. First Amendment challenges to unauthorized practice rules—complicated by definitional opacity<sup>233</sup>—have mainly centered on the question of whether individuals may disseminate certain “information” (as distinct from professional “advice”). Here, unlike in the professional speech context, however, regulation polices the formation of a professional-client relationship rather than the communication of professional advice within such a relationship.

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227. Post, *Informed Consent to Abortion*, *supra* note 1, at 987.

228. Robert Kry, *The “Watchman for Truth”: Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 888 (2000).

229. *But see id.* at 889 (asserting that “the license requirement arguably acts as a prior restraint on speech”).

230. *In re Anastaplo*, 366 U.S. 82 (1961).

231. *See id.*; *Storied Law Professor George Anastaplo Dies*, HYDE PARK HERALD (Feb. 19, 2014), <http://hpherald.com/2014/02/19/storied-law-professor-george-anastaplo-dies> [<http://perma.cc/X2YT-MJ8F>].

232. *See supra* notes 60-75 and accompanying text (distinguishing professional speech from private speech of the professional).

233. *See, e.g.*, Lanctot, *supra* note 65, at 261-65 (discussing the failed efforts to define “practice of law”).



The state regulations just discussed establish the boundaries of professional-client discourse without directly affecting its content. Structurally, they define the speakers' "social roles" within the "specific communicative relationship."<sup>234</sup> In this respect, Halberstam correctly observes that "government regulation is not invariably destructive of communicative interests, but may indeed foster the communicative relationship and assist in institutionalizing the bounded discourse."<sup>235</sup> In other words, "content-based government regulation may enhance, rather than compromise, the speech practice."<sup>236</sup> Yet, as already discussed, this structural understanding does not go far enough in determining the substance of the bounded discourse—the knowledge community's insights provide this dimension.

In sum, then, state regulation may limit access to the professions or what professionals may do in certain circumstances. The wishes of the professions in these respects may be laudable or not. But as long as state regulation remains disconnected from the knowledge that forms the basis of the professionals' advice, it does not pose the type of First Amendment professional speech problems I am concerned with here. State regulation of the professions is far from unproblematic, but the problems that arise are not of the same kind as those directly concerning professional speech—that is, the communication of the knowledge community's insights, within the professional-client relationship, for the purpose of providing professional advice. The mere fact that the state may regulate the professions therefore has little bearing on the question of First Amendment protection for professional speech.

### *B. Tort Liability*

The tort regime directly addresses harms caused by "unprofessional" speech, that is, bad professional advice. Conventionally, the relationship between the First Amendment and professional malpractice liability—in this case, medical malpractice—is framed as follows:

Medical activity that consists primarily of speech does not automatically deserve First Amendment protection. There are instances when speech essentially amounts to the practice of medicine and could be considered a regulated activity. For example, physician advice regarding the necessity or wisdom of a particular surgical procedure could give rise to

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<sup>234</sup>. Halberstam, *supra* note 1, at 869.

<sup>235</sup>. *Id.*

<sup>236</sup>. *Id.* at 868.

malpractice liability, which many would agree has few First Amendment implications even though the advice is itself speech.<sup>237</sup>

But this common framing is not entirely accurate in light of the role the knowledge community plays.

Juxtaposing professional speech protection and professional malpractice liability leads to conceptual inaccuracy. It is an exaggeration to assert that professional speech is not—and ought not be—protected because the professional is subject to tort liability for “unprofessional” speech. The contrast between permissible regulation and protection is not as stark as it is commonly portrayed—and the two are certainly not irreconcilable.<sup>238</sup> In fact, as already indicated, they are complementary. Protection and liability are best conceptualized as two sides of the same coin, and the substantive content of both is determined by the insights of the knowledge community.

1. *Professional Malpractice*

It is correctly understood that “[m]alpractice law protects the vulnerability of clients by requiring professionals to maintain strict standards of expert knowledge.”<sup>239</sup> But the imposition of liability for professional malpractice is not actually the same as regulation of the profession, or even a limit on professional speech in the strict sense of that term. Malpractice liability ensures that the professional’s speech accurately communicates the knowledge community’s insights within the professional-client relationship. On the flip side, “unprofessional” speech is unprotected.<sup>240</sup>

Post explains the connection between malpractice liability and professional knowledge as follows:

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237. Wells, *supra* note 30, at 1739 n.83; see also Post, *Informed Consent to Abortion*, *supra* note 1, at 961 (“Professional medical speech is continuously regulated without seeming to run afoul of First Amendment constraints. Doctors are sanctioned for engaging in certain communicative acts and they are compelled to engage in others.”).

238. Halberstam, *supra* note 1, at 868 (noting that “government regulation and First Amendment protection are not mutually exclusive concepts”).

239. POST, DEMOCRACY, *supra* note 51, at 47.

240. Cf. Post, *Reconciling Theory and Doctrine*, *supra* note 161, at 2364 (“[C]ontent-based regulation of speech is routinely enforced without special constitutional scrutiny, as for example when lawyers or doctors are held liable in professional malpractice for the communication of irresponsible opinions.”); Volokh, *supra* note 5, at 1347 (“Some speech . . . is indeed unprotected, for reasons related to why criminal law or tort law seeks to punish it.”).

[M]alpractice law outside of public discourse rigorously polices the authority of disciplinary knowledge. It underwrites the competence of experts. Doctors, dentists, lawyers, or architects who offer what authoritative professional standards would regard as incompetent advice to their clients face strict legal regulation. In such contexts, law stands as a surety for the disciplinary truth of expert pronouncements. By guaranteeing that clients can plan to rely on expert professional judgment, law endows such communication with the status of knowledge.<sup>241</sup>

Post's presentation is compelling. But it has some unstated premises. In particular, for his gloss to be correct, the knowledge community must decide for itself what "disciplinary truth" is, and any outside interference with their determination ought to be met with great skepticism.

This is already implicit in the way malpractice liability works. The standard of care against which a given professional is judged to determine malpractice liability is whether she has exercised the profession according to the degree and skill of a well-qualified professional. A lawyer "must exercise the competence and diligence normally exercised by lawyers in similar circumstances."<sup>242</sup> Likewise, "a doctor commits malpractice when he treats a patient in a way that deviates from the norms established by the medical profession."<sup>243</sup> It is thus the knowledge community that determines the standard of care. Moreover, only the knowledge community's specific insights matter. Deference is thus awarded to the core knowledge, not to peripheral interests.<sup>244</sup> This mirrors conceptually the First Amendment interests of the knowledge community and its members.

There may be variations as to who constitutes the appropriate reference group (i.e. whether a national standard or a local standard is applied as the baseline).<sup>245</sup> But the technical approach is generally the same: a professional

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241. POST, DEMOCRACY, *supra* note 51, at 44-45.

242. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(1) (AM. LAW INST. 2000).

243. Stein, *supra* note 22, at 1209.

244. *Id.* at 1243 ("Rules that the profession is authorized to make need to utilize medical knowledge to diagnose and cure patients. Those rules consequently must be based on medical reasons. Courts scrutinize those reasons for minimal plausibility to make sure that the profession's rules are not blatantly unsafe to patients. Furthermore, the profession has no exclusive authority to base its rules of patient treatment upon reasons extraneous to medicine. Correspondingly, courts fully scrutinize the profession's non-medical reasons and decisions.").

245. See, e.g., *id.* at 1210 (asserting that in the medical malpractice context, "the locality benchmark does not significantly differ from the uniform benchmark"); Mehlman, *supra*

standard is juxtaposed against the individual professional's activities.<sup>246</sup> The imposition of liability does not encompass which specific advice may be given. It only asks whether the advice rendered is appropriate as a matter of professional care.<sup>247</sup> As one commentator points out in the medical malpractice context, "the medical profession single-handedly determines the entries into treatment-related liability for malpractice."<sup>248</sup>

The extent of liability under the common law should be congruent with the scope of protection of the knowledge community's discourse under the First Amendment. Only if liability and protection are coextensive can this liability mechanism yield fair results. If liability is properly measured against the standard of care determined by the profession, the knowledge community's formation of this standard should remain uncorrupted and its application within the professional-client relationship should receive robust First Amendment protection. Post hinted at this mechanism in asserting that "we should expect to see First Amendment coverage triggered whenever government seeks . . . to disrupt the communication of accurate expert knowledge."<sup>249</sup>

## 2. *Informed Consent*

Independent of the professional malpractice claim, a separate cause of action exists in the medical context based on the physician's duty to inform the patient of relevant information relating to the treatment.<sup>250</sup> There is a troubling history of paternalism in the medical profession that limited the amount of information shared with patients.<sup>251</sup> But the last century has seen the

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note 31, at 1180-81 (discussing the emergence of the locality rule in medical malpractice and tracing its origin to the case *Hathorn v. Raymond*, 48 Vt. 557 (1876)).

246. Stein, *supra* note 22, at 1239-40 (discussing medical malpractice).

247. *Id.* at 1240-41 ("Courts and legislators do not know medicine and are consequently not competent to devise rules for medical diagnoses and treatments. . . . [Instead, they delegate] the rulemaking power to an institutionally competent rulemaker—the medical profession. . . . All jurisdictions across the United States require care providers to treat patients in accordance with the rules, protocols, and practices that have been devised by the medical profession.").

248. *Id.* at 1235.

249. POST, DEMOCRACY, *supra* note 51, at 48.

250. See generally Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899 (1994).

251. Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489, 509-10 (1998); Sonia M. Suter, *The Politics of Information: Informed Consent in Abortion and End-of-Life Decision Making*, 39 AM. J.L. & MED. 7, 12 (2013) ("Historically, physicians disclosed medical information only to persuade patients to do what physicians thought was best for them or to try to offer hope and

recognition of patients' autonomy interests and, as a result, significant changes in the doctor-patient relationship.<sup>252</sup> "Autonomy soon became the driving principle used to resolve issues within medicine,"<sup>253</sup> and, with it, "informed consent doctrine . . . driven in large part by a desire to combat the paternalism of medicine."<sup>254</sup>

The doctrinal origins of informed consent are often traced to a 1914 New York Court of Appeals decision authored by then-Judge Cardozo in which he stated: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ."<sup>255</sup> The real turn toward information, however, occurred in decisions from the 1970s. In *Canterbury v. Spence*, emblematic of the trend, the D.C. Circuit emphasized the need for information in self-determination.<sup>256</sup> Accordingly, this shift was accompanied by a shift in the treatment of informed consent from sounding in battery to negligence.<sup>257</sup>

There is continued debate over whether the current tort paradigm appropriately accounts for patients' interests, or whether it continues to be too physician-centric.<sup>258</sup> Courts have adopted a negligence approach to informed consent with "the principle of self-determination as the bedrock of modern informed consent doctrine."<sup>259</sup> But the variations that persist tend to value

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comfort. Indeed, deception in certain cases was not only acceptable, but sometimes considered necessary, to achieve those goals.").

252. Suter, *supra* note 251, at 12-13.

253. *Id.* at 13.

254. *Id.* at 15.

255. *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914); *see also* Suter, *supra* note 251, at 11-17 (providing an overview of the doctrinal development of informed consent).

256. *See* 464 F.2d 772, 784 (D.C. Cir. 1972).

257. Suter, *supra* note 251, at 12.

258. *See* Northern, *supra* note 251, at 510-11. Some also argue that the law overemphasizes patient autonomy. *See* Suter, *supra* note 251, at 16 (summarizing Schneider and Ben-Shahar's objections); *see also* Stein, *supra* note 22, at 1227 ("Consider doctors' provision of medical information to their patients. When a doctor keeps her patient uninformed about the available treatment options and the chosen treatment, she may—and often will—achieve a medically outstanding result: she may actually cure the patient completely. Whether the doctor achieves this result depends on what she knows, not on what the patient knows. The doctor's failure to properly inform the patient about the treatment consequently damages the patient's autonomy, but not her anatomy.").

259. Northern, *supra* note 251, at 511; *see also* Natanson v. Kline, 350 P.2d 1093, 1104 (Kan. 1960) ("Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment. A doctor might well believe that an operation or form of treatment is desirable or

either the physician's role or the patient's autonomy more heavily.<sup>260</sup> The two standards are the reasonable patient standard and the reasonable physician standard.<sup>261</sup>

With respect to the First Amendment, then, “[a]ny physician who has been held liable for failure to obtain the informed consent of his patient could argue that the law impairs his autonomy because it requires him to speak in ways that he would prefer not to.”<sup>262</sup> But here, too, the knowledge community's standards limit the extent to which a physician could reasonably assert such a thing. This is because “the scope of disclosure is bound only by what is material to medical, as opposed to non-medical, interests. Cabining the information that physicians must disclose to that which is material to patients' *medical* decisions avoids holding physicians accountable for matters that go beyond their expertise.”<sup>263</sup> It is again the knowledge community's professional knowledge that circumscribes the relevant information.<sup>264</sup> And it is therefore necessary to keep the knowledge community's information-formation process free from outside interference. Thus, imposing an informed consent requirement does not technically restrict the professional's First Amendment rights if appropriate disclosure is considered a part of medically necessary information flow within the doctor-patient relationship. It is “unprofessional” speech – or “unprofessional” silence – that is punished.

#### IV. WHEN PROFESSIONS SPEAK

When state regulation directly targets “unprofessional” speech as a matter of tort liability, as discussed in the previous Part, it ensures that information consistent with the knowledge community's insights is conveyed. As long as state regulation reinforces the knowledge community's insights – which it does when the knowledge community's standard is applied as the liability benchmark – no significant problems arise. State regulation delineates the professional-client relationship. And state regulation appropriately tracks concerns related to safeguarding the flow of accurate information from the

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necessary but the law does not permit him to substitute his own judgment for that of the patient by any form of artifice or deception.”).

260. See Northern, *supra* note 251, at 511-13 (contrasting the “medical paternalism” and “patient sovereignty” models in the medical decision-making process).

261. See Suter, *supra* note 251, at 14.

262. Post, *Informed Consent to Abortion*, *supra* note 1, at 973.

263. Suter, *supra* note 251, at 15 (footnote omitted).

264. *Cf. id.* at 15-16 (“[T]he law is reluctant to intrude too much into the medical decision-making process. Courts struggle to strike a balance that promotes autonomy while preserving some element of professional discretion for physicians.”).

knowledge community through the conduit of the individual professional.<sup>265</sup> As is well understood in the literature, “[g]overnment regulation and licensing of the profession as well as the legal enforcement of professional norms thus may assist in establishing the trust that patients can place in their physicians.”<sup>266</sup> Indeed, “content-based government regulation may enhance, rather than compromise, the speech practice.”<sup>267</sup> But this is only true as long as the regulation mirrors, and does not contradict, professional norms.

When the state overreaches, significant problems arise. This is the fundamental problem with new types of state regulation we are seeing now. This Part demonstrates how the knowledge community-focused theory of professional speech works when applied to controversial First Amendment questions, returning to the cases referenced at the outset.<sup>268</sup> Some of these regulations directly target and attempt to alter the core of the knowledge community’s insights and their communication from professional to client. The following three sections illustrate a spectrum of regulations that defer to the professional standard, (partially) codify the professional standard, or compel professionals to speak in a manner that contradicts the professional standards of the knowledge community (or prohibits the professional from communicating the knowledge community’s insights). These forms of regulatory interaction between legislatures and knowledge communities suggest that state regulation of the professions can sometimes be supportive of professional speech rights and sometimes be in tension with them.

The types of facts relevant in professional speech cases—as in a variety of other constitutional cases that turn on questions of fact—“are not of the ‘whodunit’ variety of what happened between the parties. They are instead more generalized facts about the world: Is a partial-birth abortion ever medically necessary?”<sup>269</sup> Or, in the professional speech context, is legal advice to load up on debt in anticipation of bankruptcy always fraudulent? Is SOCE therapy harmful? Does terminating a pregnancy result in an increased risk of suicide? The crux lies in determining whose knowledge we should rely on to provide answers.

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<sup>265</sup>. See Halberstam, *supra* note 1, at 844-45.

<sup>266</sup>. *Id.* at 844.

<sup>267</sup>. *Id.* at 868. Further, Halberstam explains, “[G]overnment regulation is not invariably destructive of communicative interests, but may indeed foster the communicative relationship and assist in institutionalizing the bounded discourse.” *Id.* at 869.

<sup>268</sup>. See *supra* notes 2-3 and accompanying text (discussing SOCE therapy and suicide advisories).

<sup>269</sup>. Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1255 (2012) (citing *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

The following discussion is embedded in a larger jurisprudential context. A long-standing typology distinguishes between legislative and adjudicative facts.<sup>270</sup> Legislative facts are not only the facts found by legislatures in enacting legislation but also the facts that adjudicative bodies find to apply beyond the confines of a particular case.<sup>271</sup> The distinction has important implications for the questions of fact review that come into sharp relief when findings of fact deviate from the knowledge community's insights. The following discussion considers how First Amendment theory plays out in litigation, a problem that has not traditionally received much attention from First Amendment theorists. In doing so, it takes into account important aspects of procedure surrounding the litigation of First Amendment claims.<sup>272</sup>

*A. Deference to the Professional Standard*

In *Milavetz*, the Court upheld the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) relying in part on the grounds that it aligned with the profession's own definition of permissible communication within the lawyer-client relationship.<sup>273</sup> Interpreting the restriction on attorney speech from the perspective of the knowledge community ensured that professional speech concerns did not arise.

From the First Amendment perspective, this approach constitutionalizes the professional standard. This happens in other doctrinal areas as well. In Sixth Amendment doctrine, for instance, the right to effective counsel to a certain degree constitutionalizes professional standards.<sup>274</sup> Thus, in *Padilla v. Kentucky*, the Court noted that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”<sup>275</sup> Beyond applying professional standards in effective counsel

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270. See Kenneth Culp Davis, *Official Notice*, 62 HARV. L. REV. 537, 549-60 (1949).

271. Larsen, *supra* note 269, at 1256-57.

272. See generally Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518 (1970) (discussing procedural guarantees in free speech protection).

273. *Milavetz v. United States*, 559 U.S. 229, 246-47 (2010). See *supra* notes 110-126 and accompanying text.

274. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“[The Sixth Amendment] relies . . . on the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” (citation omitted)).

275. 559 U.S. 356, 367 (2010).



cases,<sup>276</sup> this conceptual approach aligns speech regulations in a manner consistent with First Amendment protection of professional speech. This “constitutionaliz[ation] of individuals’ professional roles”<sup>277</sup> goes beyond delineating the professional-client relationship. It gives the relationship substantive content by deferring to the knowledge community’s insights.

It also has procedural implications.<sup>278</sup> Here, it is important to note as a threshold matter that the Supreme Court “never set forth a general test to determine when a procedural safeguard is required by the First Amendment.”<sup>279</sup> Yet “[t]he institutional characteristics of the American judicial system are . . . of central importance in realizing the constitutional guarantees.”<sup>280</sup> Reconceptualizing the role of the professions as knowledge communities, and advancing a theory of professional speech as I propose, has significant implications for the allocation of authority in the judicial process.

The integrity of professional advice is protected by the First Amendment, as well as by ordinary tort law, which subjects “unprofessional” advice to malpractice liability. But whereas in an ordinary tort law case the jury verdict is conclusive, First Amendment protection of the professional standard gives the professional potentially valuable legal protection. At a procedural level, constitutionalizing the professional standard hands important questions to the judge. On review, these questions are subject to independent assessment of the facts by the court. The resulting procedural allocation of fact review takes account of the interest in maintaining the integrity of professional speech.<sup>281</sup> Ultimately, the knowledge community-focused theory of professional speech results in a significant shift of decision-making and review authority to the judge. This gives procedural protections to the professional who speaks in

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276. See Knake, *supra* note 25, at 682-83 (discussing the role of professional standards in Sixth Amendment cases).

277. Cf. Halberstam, *supra* note 1, at 870.

278. See *Waters v. Churchill*, 511 U.S. 661, 669 (1994) (plurality opinion) (“[I]t is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures. This is why we have often held some procedures—a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on—to be constitutionally required in proceedings that may penalize protected speech.”); *id.* at 686 (Scalia, J., concurring in the judgment) (“I do not doubt that the First Amendment contains within it some procedural prescriptions . . .”).

279. *Id.* at 671 (plurality opinion).

280. Monaghan, *supra* note 272, at 523.

281. See *Waters*, 511 U.S. at 671 (plurality opinion) (“[T]he propriety of a proposed procedure must turn on the particular context in which the question arises—on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase.”).

accordance with the knowledge community's insights, but does not protect the professional who fails to do so.

The justification for contracting the jury's role flows directly from the First Amendment interests underlying professional speech, discussed in Part II. The fundamental interest lies in accurately communicating the knowledge community's insights to a client seeking professional advice. Whether speech is protected as professional speech rests on whether it accurately conveys the knowledge community's insights.

*B. Codification of the Professional Standard*

California's SOCE ban<sup>282</sup> and similar legislation modeled after it<sup>283</sup> arguably "tread[] on ill-defined areas of First Amendment law."<sup>284</sup> Following the Supreme Court's denial of certiorari in the California cases upholding the ban against First Amendment challenges, the ban will go into effect,<sup>285</sup> and legislatures elsewhere may be emboldened to enact similar legislation.<sup>286</sup>

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<sup>282</sup>. An Act To Add Article 15 (Commencing with Section 865) to Chapter 1 of Division 2 of the Business and Professions Code, Relating to Healing Arts, 2012 Cal. Stat. 6569 (codified at CAL. BUS. & PROF. CODE §§ 865-865.2 (West 2015)).

<sup>283</sup>. The New Jersey SOCE ban, N.J. STAT. ANN. § 45:1-55 (West 2015), for instance, is modeled after the California statute. Victor, *supra* note 84, at 1536.

<sup>284</sup>. Victor, *supra* note 84, at 1536 (arguing that therefore California's SOCE ban "is particularly amenable to First Amendment challenges").

<sup>285</sup>. David S. Joachim, *Supreme Court Declines Case Contesting Ban on Gay "Conversion Therapy,"* N.Y. TIMES (June 30, 2014), <http://www.nytimes.com/2014/07/01/us/supreme-court-declines-case-contesting-ban-on-gay-conversion-therapy.html> [<http://perma.cc/7CJQ-MJTV>].

<sup>286</sup>. The District of Columbia, Illinois, and Oregon have since banned conversion therapy on minors. See Aditya Agrawal, *Illinois Bans Conversion Therapy for Minors*, TIME (Aug. 21, 2015), <http://time.com/4006675/illinois-bans-gay-conversion-therapy-on-minors> [<http://perma.cc/L937-7656>]; Aaron C. Davis, *D.C. Bans Gay Conversion Therapy of Minors*, WASH. POST (Dec. 2, 2014), [http://www.washingtonpost.com/local/dc-politics/dc-bans-gay-conversion-therapy/2014/12/02/58e6aae4-7a67-11e4-84d4-7c896b90abdc\\_story.html](http://www.washingtonpost.com/local/dc-politics/dc-bans-gay-conversion-therapy/2014/12/02/58e6aae4-7a67-11e4-84d4-7c896b90abdc_story.html) [<http://perma.cc/BLJ4-CBEF>]; Katy Steinmetz, *Oregon Becomes Third State To Ban Conversion Therapy on Minors*, TIME (May 19, 2015), <http://time.com/3889687/oregon-conversion-therapy-ban> [<http://perma.cc/YS8R-KCQ2>]. States that actively considered legislative efforts to ban conversion therapy in 2015 are Arizona, Colorado, Connecticut, Florida, Iowa, Massachusetts, Minnesota, Nevada, New York, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, and West Virginia. See *#BornPerfect: Laws & Legislation by State*, NAT'L CTR. FOR LESBIAN RIGHTS (2015), <http://www.nclrights.org/bornperfect-laws-legislation-by-state> [<http://perma.cc/CTJ3-JFXM>] (providing an overview of state legislative activity regarding conversion therapy).

The Ninth Circuit held the SOCE ban to regulate conduct rather than speech.<sup>287</sup> Following the Ninth Circuit, a federal district court in New Jersey likewise concluded that that state's SOCE ban does not regulate speech but conduct.<sup>288</sup> However, "the 'conduct-speech' distinction is likely to be more misleading than helpful here. When the government restricts professionals from speaking to their clients, it's restricting speech, not conduct."<sup>289</sup> Creating a circuit split on the issue, the Third Circuit disagreed with the Ninth Circuit in holding that conversion therapy is speech.<sup>290</sup> I contend that the Ninth Circuit and the Third Circuit rightly upheld the respective SOCE bans, though for the wrong reasons.<sup>291</sup> Under my account, the activity regulated by the SOCE legislation—"talk therapy"—is speech.<sup>292</sup> But as professional speech, it is a specific kind of speech. It is the speech that communicates a knowledge community's insights within a professional-client relationship for the purpose of providing professional advice.

The California and New Jersey legislatures enacted their findings by referring to various professional organizations' statements on SOCE.<sup>293</sup> Nonetheless, the codification approach is not entirely unproblematic. For one,

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287. *Pickup I*, 728 F.3d at 1048.

288. *King I*, 981 F. Supp. 2d at 313-20.

289. Volokh, *supra* note 5, at 1346 ("Such regulation may be valid because of the harm that negligent speech can cause, the potential value of the mandated speech to the patient or to third parties, or the risk that the speech may exploit the patient's psychological dependency on the speaker—but not because the regulated speech is somehow conduct.").

290. *King II*, 767 F.3d at 228-29.

291. For alternative approaches to SOCE regulation, see, for example, Shawn L. Fultz, Comment, *If It Quacks Like a Duck: Reviewing Health Care Providers' Speech Restrictions Under the First Prong of Central Hudson*, 63 AM. U. L. REV. 567 (2013); and Victor, *supra* note 84, at 1562-81. See also Clifford J. Rosky, *No Promo Hetero: Children's Right To Be Queer*, 35 CARDOZO L. REV. 425 (2013); Elizabeth Bookwalter, Comment, *Getting It Straight: A First Amendment Analysis of California's Ban on Sexual Orientation Change Efforts and Its Potential Effects on Abortion Regulations*, 22 J. GENDER SOC. POL'Y & L. 451 (2014) (discussing *Pickup I*); William Travis, Case Note, *Bad Medicine: The Ninth Circuit Reviews Issues of Free Speech, Professional Regulations, and California's Ban on Sexual Orientation Change Efforts in Pickup v. Brown*, 23 TUL. J.L. & SEXUALITY 191 (2014).

292. This discussion is not concerned with physically invasive forms of SOCE therapy.

293. An Act To Add Article 15 (Commencing with Section 865) to Chapter 1 of Division 2 of the Business and Professions Code, Relating to Healing Arts, 2012 Cal. Stat. 6569 (codified at CAL. BUS. & PROF. CODE §§ 865-865.2 (West 2015)); An Act Concerning the Protection of Minors from Attempts To Change Sexual Orientation and Supplementing Title 45 of the Revised Statutes, 2013 N.J. Laws 1206 (codified at N.J. STAT. ANN. §§ 45:1-54, 45:1-55 (West 2015)).

there is the problem of legislative findings.<sup>294</sup> The bill passed by the California legislature entangles the factual and normative elements typical for legislative findings: “Being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming. The major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years.”<sup>295</sup> Instead of deferring entirely to the knowledge community, the legislature adopts a factual assertion as the premise underlying the legislation. In this instance, the premise is shared by the knowledge community, but it is conceivable that a legislature may enact as a legislative finding a position that has not yet reached majority status or consensus within the knowledge community. In the most egregious instances, as discussed in the next section, the legislative findings may be diametrically opposed to the knowledge community’s insights.

Some suggest that there is no consensus within the “psychological establishment” regarding the harms of talk-therapy SOCE.<sup>296</sup> Thus, “[a]ccounting only for clinical evidence of SOCE’s harmfulness could, at least at this point, rationalize only a ban on physical interventions like aversion therapy . . . .”<sup>297</sup> But it is difficult for both legislatures and courts to evaluate the scientific literature and determine whether a consensus exists. Here, the more workable approach is to defer to the knowledge community. Indeed, the APA follows a broad definition of harm caused by SOCE therapy.<sup>298</sup> The legislature may rightly defer to that professional standard. As a corollary, we would also expect tort liability for licensed professionals who engage in conversion therapy.<sup>299</sup> Yet the codification approach may prove inefficient. In order to accurately reflect the knowledge community’s insights, the statute has

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294. See generally Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1 (2009) (discussing the judicial treatment of legislative fact-finding and proposing a new paradigm for judicial review of social facts); Daniel A. Crane, *Enacted Legislative Findings and the Deference Problem*, 102 GEO. L.J. 637 (2014) (discussing judicial deference to enacted and unenacted legislative fact-finding).

295. § 1(a), 2012 Cal. Stat. at 6569.

296. Victor, *supra* note 84, at 1546.

297. *Id.* at 1545-46.

298. Victor, *supra* note 84, at 1539 (“This broad definition of SOCE is generally in keeping with the approach of organizations like the American Psychological Association (APA), which has treated SOCE as a cohesive category that encompasses any attempt by a mental health professional to change sexual orientation.”).

299. Others have argued in favor of a cause of action under the tort of intentional infliction of emotional distress. See Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. PUB. INT. L.J. 219, 245-46 (1999).

to be flexible over time, since the knowledge community's insights might change.<sup>300</sup>

Consider here also the ban's limited scope. In addition to the legislature having to choose among scientific opinions that may not be entirely clear within the profession, the legislation's limited scope might raise concerns. If the knowledge community deems conversion therapy harmful for everyone, limiting the ban to minors may not properly reflect the knowledge community's insights.<sup>301</sup> On the one hand, the underinclusiveness resulting from the law's limited reach might be seen as First Amendment protective: less speech is restricted. On the other hand, under the knowledge communities-centered theory of professional speech I offer, it raises the problem of selective enactment. Under my account of coextensive liability and protection, consider an adult patient who receives conversion therapy, which is not prohibited by the legislation. The adult later suffers adverse effects and sues the mental health provider for malpractice. Given the statute's limited reach, the mental health provider might invoke the First Amendment as a defense. But if the First Amendment is properly understood as protecting the knowledge community's insights and their subsequent communication and if malpractice liability properly mirrors that understanding by sanctioning "unprofessional" speech, the limited scope of the statute should be of no help to the mental health provider.

How would the theory of professional speech offered here play out in practice? Consider first the example in which a licensed mental health provider (a) wants to engage in conversion therapy—attempting to use the First Amendment as a sword (as in *Pickup*)—or (b) engages in conversion therapy and, under the ban, faces revocation of her license and attempts to use the First Amendment as a shield. Consider then a second example in which a licensed psychologist engages in conversion therapy and is sued for malpractice by a patient.<sup>302</sup>

In the two scenarios set out in the first example, the procedural story would play out as follows: In (a), the licensed mental health provider would argue that SOCE is protected under the First Amendment. The question of First

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300. Cf. Stein, *supra* note 22, at 1240 (discussing similar concerns in the medical malpractice context).

301. See Victor, *supra* note 84, at 1572 ("The proponents of SB 1172 [2012 Cal. Stat. 6569] originally favored more comprehensive legislation, which would have mandated that practitioners receive a non-minor patient's 'informed consent' before commencing SOCE treatments, but later withdrew these proposals.").

302. An earlier version of California's SB 1172 "included provisions allowing former or current SOCE patients to sue a therapist engaging in SOCE." *Pickup v. Brown*, 42 F. Supp. 3d 1347, 1353 (E.D. Cal. 2012).

Amendment coverage is one for the judge. If professional speech coverage is determined by deference to the knowledge community, the judge will not find that SOCE is protected under the First Amendment as a matter of professional speech. In scenario (b), the licensed mental health provider would argue that revocation of the license is impermissible because the SOCE ban infringes on her First Amendment rights, and the subsequent events would unfold as in scenario (a). The shift to the judge is mirrored in the malpractice example. Only “unprofessional” speech is subject to malpractice liability. Professional speech – that is, communication of the knowledge community’s insights within the professional-client relationship for the purpose of providing professional advice – however, is not.

### C. *Compelled Speech Contradicting the Professional Standard*

The most problematic – and, under this theory of professional speech, most likely impermissible – type of regulation is one in which the state either demands that the professional communicate information that is incompatible with the knowledge community’s insights or prohibits the professional from communicating the knowledge community’s insights.<sup>303</sup> In addition to offending the individual professional’s interest in communicating accurate and relevant professional information, these types of regulation also offend the knowledge community’s interests in having its insights disseminated accurately by members of the profession.<sup>304</sup> An example of compelling the professional to convey inaccurate information is the informed consent requirement at issue in the *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds* litigation, in which physicians have to inform patients of an “[i]ncreased risk of . . . suicide.”<sup>305</sup> An example of the state prohibiting the professional from communicating accurate information to the client is on display in the medical marijuana cases. Similar problems arise when the state determines what constitutes relevant information, such as in the mandatory ultrasound cases, or attempts to proscribe some information as irrelevant, a constellation that recently arose in Florida, where doctors are prohibited from inquiring about gun use or ownership. I address these examples in turn.

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303. See Post, *Informed Consent to Abortion*, *supra* note 1, at 978-79 (“If First Amendment concerns arise whenever the state proscribes physician speech in ways that prevent physician-patient relationships from serving as a source of accurate, reliable, professional knowledge, constitutional questions should also arise if the state corrupts physician speech by requiring doctors to transmit misleading information in the context of informed consent.”).

304. See *supra* Part II.

305. See *Rounds II*, 686 F.3d at 892 (en banc) (quoting S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(ii) (2015) (alteration in original)).

The suicide advisory at issue in the *Rounds* litigation represents a recent instance of direct state interference with the knowledge community's insights. A South Dakota statute requires "the disclosure to patients seeking abortions of an increased risk of suicide ideation and suicide."<sup>306</sup> The district court and a panel of the Eighth Circuit held that the suicide advisory infringed doctors' First Amendment rights.<sup>307</sup> The South Dakota statute required doctors to disclose "all known medical risks of abortion."<sup>308</sup> The Eighth Circuit panel emphasized the importance of the word "known." It crucially noted: "Legislatures have 'wide discretion to pass legislation in areas where there is medical and scientific uncertainty,' but the suicide advisory asserts certainty on the issue of medical and scientific knowledge where none exists."<sup>309</sup> What is "known" as a matter of professional knowledge is for the knowledge community to decide, not the state legislature.

On partial rehearing en banc, limited to the issue of the suicide advisory, however, the Eighth Circuit reversed, holding that the required disclosure of increased risk of suicide ideation and suicide was truthful, non-misleading, and relevant.<sup>310</sup> The en banc plurality stressed the state's ability to regulate in the face of "medical and scientific uncertainty,"<sup>311</sup> relying on *Gonzales v. Carhart*,<sup>312</sup> and demand that physicians provide the suicide advisory.<sup>313</sup> But two separate concurrences interpreted the plurality's opinion to "require only a disclosure as to relative risk *that the physician can adapt to fit his or her professional opinion* of the conflicting medical research on this contentious subject"<sup>314</sup> and that "the physician [is] free to augment that description [of the relative risks as reflected in the peer-reviewed literature] *based on his or her professional judgment*."<sup>315</sup> The concurrences thus give somewhat more weight to professional knowledge and deference to the individual professional.

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306. *Id.* (quoting S.D. CODIFIED LAWS § 34-23a-10.1(1)(e)(ii) (2015)) (alteration omitted).

307. *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds I)*, 653 F.3d 662, 673 (8th Cir. 2011) ("By compelling untruthful and misleading speech, the advisory also violates doctors' First Amendment right to be free from compelled speech that is untruthful, misleading, or irrelevant.").

308. *Id.* at 670.

309. *Id.* at 672 (citation omitted).

310. *Rounds II*, 686 F.3d at 905.

311. *Id.* at 904 (citation omitted).

312. 550 U.S. 124, 163 (2007).

313. *Rounds II*, 686 F.3d at 904-05. *But see* *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (offering a strong critique of this use of *Carhart*).

314. *Rounds II*, 686 F.3d at 906 (Loken, J., concurring) (emphasis added).

315. *Id.* at 907 (Colloton, J., concurring) (emphasis added).

One critic of *Rounds II* suggests that “the Eighth Circuit should have performed a more robust First Amendment inquiry, calibrated toward ensuring clinically and professionally appropriate speech within the doctor-patient relationship.”<sup>316</sup> Doing so would have required the court to anchor its inquiry in a theory of professional speech. My theory would allow it to do so. Under the theory I propose, the knowledge community’s insights are the first element of professional speech. In deciding whether the speech is protected by the First Amendment, the judge would have to determine whether the knowledge community’s insights are being communicated.

The suicide advisory controversy also illustrates the problem of using terminology in legislative fact-finding that may be inconsistent with the knowledge community’s usage. The South Dakota statute “used ‘risk factor’ in a manner inconsistent with its medical meaning, leaving doctors ‘to guess as to the meaning the legislature intended to give to the phrase.’”<sup>317</sup> The district court noted that “the legislative drafters ‘may not have fully understood the meaning of this phrase as used in the medical profession.’”<sup>318</sup> Deference to the profession avoids confusion as to the meaning of terms of art within the discourse of the knowledge community.

The contemporaneous reproductive rights controversy over mandatory ultrasounds, while compelling doctors to speak in a state-mandated manner, is slightly different in that it does not require the disclosure of *false* information.<sup>319</sup> Rather, it demands the communication of *irrelevant* information toward an arguably nonscientific ideological end (dissuading women from obtaining an otherwise legal professional service).<sup>320</sup> As compelled ideological speech, it suggests proper First Amendment analysis

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316. Recent Case, *First Amendment—Compelled Speech—Eighth Circuit Applies Planned Parenthood of Southeastern Pennsylvania v. Casey to South Dakota “Suicide Advisory”—Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (*en banc*), 126 HARV. L. REV. 1438, 1438 (2013).

317. *Rounds I*, 653 F.3d 662, 671 (8th Cir. 2011) (citation omitted).

318. *Id.*

319. *Compare* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012) (upholding mandatory sonogram requirement), *with* Stuart v. Loomis, 992 F. Supp. 2d 585 (M.D.N.C. 2014) (holding mandatory ultrasound law violates First Amendment), *aff’d sub nom.* Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014), *cert. denied sub nom.* Walker-McGill v. Stuart, 135 S. Ct. 2838 (2015).

320. *See, e.g.,* Stuart, 774 F.3d at 242 (“This compelled speech . . . is ideological in intent and in kind.”); Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 377 (2008) (“[M]andatory ultrasound is . . . meant to persuade women against abortion.”).



should be based on the principles set forth in *Wooley v. Maynard*<sup>321</sup> and *West Virginia State Board of Education v. Barnette*.<sup>322</sup> But the Fifth Circuit upheld a Texas mandatory ultrasound and sonogram statute as “the epitome of truthful, non-misleading information” that can be required by the state in the course of regulating medical practice.<sup>323</sup> The Fourth Circuit, by contrast, struck down a similar piece of North Carolina legislation.<sup>324</sup> Judge Wilkinson did note that “[t]his compelled speech . . . is a regulation of the medical profession.”<sup>325</sup> Nonetheless, it “extend[s] well beyond” the measures the state has ordinarily employed to ensure informed consent.<sup>326</sup> In the end, the Fourth Circuit rejected the regulation as compelled speech violating the First Amendment. In so doing, the court “borrow[ed] a heightened intermediate scrutiny standard used in certain commercial speech cases.”<sup>327</sup> Yet, as discussed in Section I.C above, that analogy is unsatisfactory. Thus, while the Fourth Circuit reaches the right outcome in the case, it does so on feeble theoretical footing. The Texas and North Carolina mandatory ultrasound regulations represent precisely the new type of aggressive state regulation directly targeting professional-client communications. Under the knowledge community-focused theory of professional speech, the professional is to decide what is relevant professional information. The knowledge community’s insights not only determine what accurate information is, but also what is relevant in any given situation according to the specific circumstances of the client.

The flip side of compelling professionals to make statements that do not correspond to the knowledge community’s insights is prohibiting them from giving accurate advice. One prominent example involves the threat to “prosecute physicians, revoke their prescription licenses, and deny them participation in Medicare and Medicaid for recommending medical marijuana.”<sup>328</sup> Prohibiting this type of professional communication raised the

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321. 430 U.S. 705 (1977) (holding mandatory display of “Live Free or Die” motto on license plate unconstitutional as compelled speech).

322. 319 U.S. 624 (1943) (holding mandatory flag salute unconstitutional as compelled speech); see *Stuart*, 774 F.3d at 255 (citing *Wooley* and *Barnette*); see also Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277 (2014) (discussing mandatory ultrasounds in light of compelled speech doctrine).

323. *Lakey*, 667 F.3d at 578.

324. *Stuart*, 774 F.3d at 256.

325. *Id.* at 242; see also *id.* at 252 (“[I]t imposes a virtually unprecedented burden on the right of professional speech that operates to the detriment of both speaker and listener.”).

326. *Id.* at 242.

327. *Id.* at 248.

328. *Conant v. McCaffrey*, 172 F.R.D. 681, 686 (N.D. Cal. 1997), *aff’d sub nom.* *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

question of the extent to which regulation of professional speech is permissible under the First Amendment.<sup>329</sup> The district court held that “the First Amendment protects physician-patient communication up until the point that it becomes criminal . . . .”<sup>330</sup> Therefore, “[t]he First Amendment allows physicians to discuss and advocate medical marijuana, even though use of marijuana itself is illegal.”<sup>331</sup> The Ninth Circuit affirmed.<sup>332</sup>

Under the theory of professional speech advanced here, communication about the medical benefits of marijuana use would be protected as a matter of professional speech. Even if insights regarding the benefits of marijuana were not uniformly shared within the knowledge community,<sup>333</sup> communicating them within the physician-patient relationship does not offend the knowledge community’s insights in the way communicating erroneous statements does. This highlights the difference between unclear (or emerging and as yet untested) insights and false (tested and rejected) assertions. It is for the knowledge community to decide the content of its insights rather than for the state to determine them. The legislatively enshrined *Rounds* suicide advisory thus patently offends the professional knowledge formation and dissemination process. So does the classification of marijuana as a drug listed in Schedule I of the Controlled Substances Act, according to which it has “no currently accepted medical use.”<sup>334</sup>

Just as the state may not decide for professionals what constitutes relevant information and compel them to communicate it (as in the mandatory ultrasound example), the state may not decide in their stead what constitutes *irrelevant* information and prohibit professionals from communicating it. The State of Florida, for instance, prohibits doctors from asking questions about

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329. *Walters*, 309 F.3d at 634.

330. *McCaffrey*, 172 F.R.D. at 701.

331. *Id.* at 695.

332. *Walters*, 309 F.3d at 639.

333. Editorial, *Repeal Prohibition, Again*, N.Y. TIMES (July 27, 2014), <http://www.nytimes.com/interactive/2014/07/27/opinion/sunday/high-time-marijuana-legalization.html> [<http://perma.cc/8P8D-Q8WZ>] (“There is honest debate among scientists about the health effects of marijuana . . .”).

334. David Firestone, *Let States Decide on Marijuana*, N.Y. TIMES (July 26, 2014), <http://www.nytimes.com/2014/07/27/opinion/sunday/high-time-let-states-decide-on-marijuana.html> [<http://perma.cc/HM2F-6VQF>] (“No medical use? That would come as news to the millions of people who have found that marijuana helped them through the pain of AIDS, or the nausea and vomiting of chemotherapy, or the seizures of epilepsy.”).

guns as a matter of course.<sup>335</sup> The Eleventh Circuit held this restriction on a professional's speech to be constitutional as "a legitimate regulation of professional conduct."<sup>336</sup> Just as the state may impose malpractice liability "for all manner of activity that the state deems bad medicine,"<sup>337</sup> it may decide "that good medical care does not require inquiry . . . regarding firearms when unnecessary to a patient's care."<sup>338</sup> Under the court's view, it is thus up to the state to determine what constitutes appropriate care.

But it is misleading to assert, as the Eleventh Circuit did, that the state imposes liability for activities that the *state* deems bad medicine. Rather, the state's imposition of liability should track what the *knowledge community* deems bad medicine.<sup>339</sup> Applying the knowledge community-focused theory of professional speech proposed here, the state legislature impermissibly deemed all routine inquiries concerning firearms to be irrelevant. Under this theory, it is for the professional to decide—based on the knowledge community's insights—what constitutes relevant information within the professional-client relationship.

These examples illustrate how the exchange of information between a client and a professional suffers in the face of regulatory overreach. A focus on the role of the knowledge community's body of knowledge brings the attendant distortions into sharp relief. As demonstrated above, the fundamental defect in these types of regulation is the direct state interference with the content of the body of professional knowledge itself.

## CONCLUSION

As noted at the outset, some professionals speak a lot: "Most of what many lawyers, investment advisors, accountants, psychotherapists, and even doctors do is speech."<sup>340</sup> It is therefore all the more troubling that there has not yet been a comprehensive theory of professional speech advanced in the courts and

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335. *Wollschlaeger I*, 760 F.3d 1195; see also Paul Sherman & Robert McNamara, Editorial, *Censorship in Your Doctor's Office*, N.Y. TIMES (Aug. 1, 2014), <http://www.nytimes.com/2014/08/02/opinion/censorship-in-your-doctors-office.html> [<http://perma.cc/D3GF-LSPU>].

336. *Wollschlaeger I*, 760 F.3d at 1203.

337. *Id.*

338. *Id.*

339. See *supra* notes 242-244 and accompanying text.

340. Volokh, *supra* note 5, at 1343; see also Schauer, *supra* note 202, at 688 ("As lawyers, speech is our stock in trade. Speech is all we have."); Tarkington, *supra* note 25, at 37 ("Attorneys perform nearly all of their work through speech—the written and spoken word.").

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PROFESSIONAL SPEECH

the legal literature. Understanding the nature of the professions as knowledge communities allows us to reconceptualize this type of speech.

State regulation interacts with knowledge communities' insights in multiple and varied ways. Sometimes it aligns with professional insights; sometimes it contradicts them. If 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.

# UNPROFESSIONAL ADVICE

Claudia E. Haupt\*

19 U. PA. J. CONST. L. \_\_\_\_ (forthcoming 2017)

*Professional speech should receive robust First Amendment protection. It should be shielded from state interference that seeks to prescribe or alter the content of professional advice. But how should we decide what advice falls within the scope of defensible professional knowledge? Where, in other words, does First Amendment protection for professional speech end and tort liability for professional malpractice begin? This Article provides a theoretical foundation to distinguish professional from unprofessional advice.*

*The professions are best conceptualized as knowledge communities whose main reason for existence is the generation and dissemination of knowledge. But knowledge communities are not monolithic; there is a range of knowledge that is acceptable as good professional advice. Advice falling within this range should receive robust First Amendment protection. Conversely, bad advice is subject to professional malpractice liability, and the First Amendment provides no defense. Protecting good professional advice and sanctioning bad advice requires a normative and doctrinal defense for excluding outliers from First Amendment protection. In providing such a defense, this Article puts the First Amendment into conversation with the tort law of professional malpractice and the law of evidence governing the admissibility of expert testimony. Conceptualizing professionals as members of knowledge communities, this Article provides a theory to identify the range of valid professional knowledge for First Amendment purposes.*

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## INTRODUCTION

When you go to your doctor, lawyer, therapist, or pharmacist, you do so because you want to access a useful body of knowledge these professionals possess. In order to solve your individual problem, you rely on the professional's competent, accurate, and comprehensive advice. But what if your advice-giving professional departs from, or refuses to deploy, the full range of professional knowledge? Imagine she has a political, philosophical, or religious disagreement with her profession: your lawyer objects to same-sex marriage and refuses to draft marriage-related documents for you and your same-sex spouse;<sup>1</sup> your therapist believes homosexual behavior is sinful and homosexuality ought to be remedied by conversion therapy;<sup>2</sup> your pharmacist considers abortion to be a grave moral wrong, believes some forms of birth control to be abortifacients,

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<sup>1</sup> Cf. Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 707 (2014) (lawyers could refuse to prepare prenup for same sex couple).

<sup>2</sup> See *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013), *cert. denied* 134 S.Ct. 2871 (2014) (upholding California conversion therapy law against Free Speech challenge); *King v. Christie*, 767 F.3d 216 (3d Cir. 2014), *cert. denied* 135 S.Ct. 2048 (2015) (upholding New Jersey conversion therapy law against Free Speech and Free Exercise challenge); *Doe v. Christie*, 33 F.Supp.3d 518 (D.N.J. 2014) *aff'd* *Doe v. Christie*, 783 F.3d 150 (3d Cir. 2015).

and refuses to advise on the availability of such drugs.<sup>3</sup> Or your advice-giving professional has a scientific disagreement with her profession: your doctor thinks marijuana is medically beneficial;<sup>4</sup> perhaps she finds mammograms useless.<sup>5</sup>

Professional speech should receive robust First Amendment protection. In particular, it should be shielded from state interference that seeks to prescribe or alter the content of professional advice.<sup>6</sup> While new forms of aggressive state intervention into professional advice-giving have made the need for such protection particularly salient,<sup>7</sup> the federal appellate courts are in marked disagreement on the proper treatment of these issues.<sup>8</sup> A panel of the Eleventh Circuit alone has now issued three consecutive conflicting opinions in the same case, highlighting the profound difficulties courts face in analyzing the underlying theoretical and doctrinal questions.<sup>9</sup>

<sup>3</sup> *Cf.* *Stormans v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015) (upholding Washington requirement that pharmacies dispense all prescription medications) *cert. denied* 136 S.Ct. 2433 (2016).

<sup>4</sup> *Cf.* *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

<sup>5</sup> *Cf.* Denise Grady, *American Cancer Society, in a Shift, Recommends Fewer Mammograms*, NEW YORK TIMES, Oct 20, 2015, <http://nyti.ms/1kmsLFE> (reporting on Kevin C. Oeffinger et al., *Breast Cancer Screening for Women at Average Risk: 2015 Guideline Update From the American Cancer Society*, 314 J. AM. MED. ASS'N 1599 (2015); Evan R. Myers et al., *Benefits and Harms of Breast Cancer Screening: A Systematic Review*, 314 J. AM. MED. ASS'N 1615 (2015); Nancy L. Keating & Lydia E. Pace, Editorial, *New Guidelines for Breast Cancer Screening in US Women*, 314 J. AM. MED. ASS'N 1569 (2015)); Gina Kolata, *Vast Study Casts Doubts on Value of Mammograms*, NEW YORK TIMES, Feb 12, 2014, A1, available at: <http://nyti.ms/1eSbFcm> (reporting on Mette Kalager, Hans-Olov Adami, Michael Bretthauer, Editorial, *Too Much Mammography*, BRIT. MED. J. (2014); Anthony Miller, Claus Wall, Cornelia J. Baines, Ping Sun, Teresa To, Steven A. Narod, *Twenty Five Year Follow-up for Breast Cancer Incidence and Mortality of the Canadian National Breast Screening Study: Randomised Screening Trial*, BRIT. MED. J. (2014)).

<sup>6</sup> *See generally* Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016) (developing a theory of First Amendment protection for professional speech based on an understanding of the professions as knowledge communities).

<sup>7</sup> *See, e.g.*, Rick Rojas, *Arizona Orders Doctors to Say Abortions with Drugs May Be Reversible*, NEW YORK TIMES, March 31, 2015, available at <http://nyti.ms/1DpDo0Q> (reporting that Arizona “became the first state to pass a law requiring doctors who perform drug-induced abortions to tell women that the procedure may be reversible, an assertion that most doctors say is wrong.”). *See also* *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (upholding state law requiring doctors to inform patients seeking an abortion of an increased risk of suicide to obtain informed consent).

<sup>8</sup> *Compare* *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013) (upholding California conversion therapy law as permissible regulation of conduct) *aff'd in part, rev'd in part, and remanded by* *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (denying rehearing en banc) *cert. denied* 134 S.Ct. 2871 (2014) *with* *King v. Christie*, 981 F.Supp.2d 296 (D. N.J. 2013) (upholding New Jersey conversion therapy law as permissible regulation of speech) *aff'd* 767 F.3d 216 (3d Cir. 2014) *cert. denied* 135 S.Ct. 2048 (2015). *See also* *Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014) *cert. denied sub nom* *Walker-McGill v. Stuart*, 135 S.Ct. 2838 (2015) (rejecting the Fifth and Eighth Circuits’ interpretation of constitutionality of abortion regulations under the First Amendment).

<sup>9</sup> *Wollschlaeger v. Florida*, 760 F.3d 1195 (11th Cir. 2014) [hereinafter *Wollschlaeger I*] (upholding Florida law prohibiting doctors from inquiring about gun ownership as “a legitimate regulation of professional conduct.” *Wollschlaeger I* at 1203) *vacated and superseded on reh'g* *Wollschlaeger v. Florida*, 797 F.3d 859 (11th Cir. 2015) [hereinafter *Wollschlaeger II*] (upholding the Florida law as “a permissible restriction on physician speech.” *Wollschlaeger II* at 869. The court (continued next page)

Existing accounts of professional speech pay insufficient attention to theorizing about the scope of defensible professional advice.<sup>10</sup> If the First Amendment protects good professional advice, how should we decide what advice falls within the scope of defensible professional knowledge? Where, in other words, does First Amendment protection for professional speech end and tort liability for professional malpractice begin? Answering these questions requires a firm theoretical foundation to distinguish professional from unprofessional advice. The larger jurisprudential endeavor in this Article, then, is to chart the boundaries between the First Amendment and tort law.

This Article provides a theory of the scope of First Amendment protection for professional advice, and explains and justifies corollaries in other areas of law. The professions, as I have argued before, are best conceptualized as knowledge communities whose main reason for existence is the generation and dissemination of knowledge.<sup>11</sup> But knowledge communities are not monolithic: there is a range of knowledge that is acceptable as good professional advice. Advice falling within this range should receive robust First Amendment protection. Conversely, bad advice—that is, advice falling outside of the acceptable range—is subject to professional malpractice liability, and the First Amendment provides no defense.<sup>12</sup> Conceptualizing the professions as knowledge communities provides a theoretical basis for this doctrinal truism.

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reached its decision applying “a lesser level of scrutiny” commonly applied in commercial speech cases. *Wollschlaeger II* at 892-94) *vacated and superseded on reh’g* *Wollschlaeger v. Florida*, 2015 WL 8639875 (11th Cir. Dec 14, 2015) [hereinafter *Wollschlaeger III*] (upholding the Florida law as “a permissible restriction on physician speech.” *Wollschlaeger III* at \*1. This time, however, the court applied strict scrutiny. *Wollschlaeger III* at \*19). The Eleventh Circuit will now hear the case en banc. Order of rehearing en banc, *Wollschlaeger v. Governor of Florida*, No. 12-14009 (11th Cir. Feb. 2, 2016).

<sup>10</sup> There is renewed academic interest in the topic of professional speech, but the focus of inquiry tends to be primarily on the question of its constitutional protection rather than the scope of what constitutes good professional advice. *See, e.g.*, Martha Swartz, *Are Physician-Patient Communications Protected by the First Amendment?* 2015 CARDOZO L. REV. DE NOVO 92; Harrison Blythe, Note, *Physician-Patient Speech: An Analysis of the State of Patients’ First Amendment Rights to Receive Accurate Medical Advice*, 65 CASE W. RES. L. REV. 795 (2015); Patrick Bannon, Note, *Intermediate Scrutiny vs. the “Labeling Game” Approach: King v. Governor of New Jersey and the Benefits of Applying Heightened Scrutiny to Professional Speech*, 23 J.L. & POL’Y 649 (2015); Erika Schutzman, Note, *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); Ryan T. Weiss, Note, *Removing the “Silencer”: Coverage and Protection of Physician Speech Under the First Amendment*, 65 DUKE L.J. 801 (2016); Shannon Zabel, Note, *Docs v. Glocks: The Need for First Amendment Protection in Preventative Care*, 24 TEMPLE POL. & CIV. RTS L. REV. 483 (2015); Kayla M. Bennett, Comment, *Professional Speech Targeted by the Florida Gun Privacy Law: The Impact of Wollschlaeger on Physician and Attorney Speech*, 54 WASHBURN L.J. 725 (2015).

<sup>11</sup> Haupt, *supra* note 6, at 1241.

<sup>12</sup> It is well-established in the literature that the First Amendment provides no defense against malpractice claims. *See, e.g.*, Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. (continued next page)



Protecting good professional advice and sanctioning bad advice—or, interchangeably, “unprofessional advice”—requires a normative and doctrinal defense for excluding outliers from First Amendment protection when their professional advice diverges too much from the profession’s consensus. But how much is too much—and who decides? As a matter of free speech theory, excluding outliers runs headlong into an otherwise axiomatic First Amendment principle: the prohibition of content discrimination. Robert Post has identified a tension between expert knowledge and the underlying assumptions of First Amendment doctrine, concluding that “[e]xpert knowledge requires exactly what normal First Amendment doctrine prohibits.”<sup>13</sup> Reconsidering the role of experts—in this case, professionals—and their relationship with knowledge communities, however, provides a new perspective. Viewed from this vantage point, this Article argues, First Amendment interests can be reconciled with the “truth”-seeking, preserving, and communicating nature of professional speech. Conceptualizing professionals as members of knowledge communities guides the task of identifying the range of valid professional knowledge for First Amendment purposes.

This Article distinguishes between two kinds of professionals who depart from the consensus of their knowledge community: *internal* outliers and *external* outliers. I define as internal outliers professionals within knowledge communities whose disagreement results from alternative assessments based on the profession’s shared ways of knowing and reasoning, that is, alternative assessments based on a shared methodology. These professionals are part of the knowledge community. By contrast, I define as external outliers those professionals who premise their disagreement on refusing to follow the shared ways of knowing and reasoning due to exogenous beliefs. These professionals place themselves outside the knowledge community.

I suggest that to the extent that a professional’s internal outlier status is based upon disagreement with the knowledge community’s insights based on shared notions of validity, departure from the professional

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REV. 1277, 1342-46 (2005); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 950-51 (2007). Nonetheless, some courts continue to struggle with this. Stated in an oversimplified way, the argument is that the state may regulate the professions, and the permissibility of regulation is incompatible with the First Amendment. *See, e.g.*, King v. Christie, 981 F.Supp.2d 296, 319 (D. N.J. 2013) (“[T]here is a more fundamental problem with [the argument that professional counseling is speech], because taken to its logical end, it would mean that *any* regulation of professional counseling necessarily implicates fundamental First Amendment free speech rights, and therefore would need to withstand heightened scrutiny to be permissible. Such a result runs counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services.”)(emphasis in original).

<sup>13</sup> ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 9 (2012).

standard ought to be permissible. Indeed, dynamic development and refinement of professional insights will often depend on such divergent assessments.<sup>14</sup> Internal outliers, however, can also produce bad advice by misusing the agreed-upon methodologies and bases for reasoning within the discourse of the profession.<sup>15</sup> Yet, even these professionals ostensibly base their findings on the same knowledge foundation. Conversely, external outliers' reliance on exogenous reasons undermines the status of the professional as a member of the knowledge community. An external outlier by definition does not place her professional advice on shared notions of validity and common ways of knowing and reasoning.<sup>16</sup>

This analysis plays out against a larger jurisprudential (and political) backdrop. The role of external outliers is connected to questions surrounding individual exemptions from generally applicable laws. In the wake of *Hobby Lobby Stores, Inc. v. Burwell*<sup>17</sup> and the recent spate of state religious freedom legislation—first in anticipation of, and then in reaction to marriage equality nationwide<sup>18</sup>—these issues have come to the forefront of legal and political debate.<sup>19</sup> Though the focus in this area tends to be on commercial services,<sup>20</sup> the provision of professional services may be even more fraught.<sup>21</sup> Internal outliers, likewise, may find

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<sup>14</sup> See *infra* Part IV.B.

<sup>15</sup> See *infra* Part IV.A.

<sup>16</sup> See *infra* Part II.A.

<sup>17</sup> 134 S.Ct. 2751 (2014).

<sup>18</sup> See *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

<sup>19</sup> See generally Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 100 (2015). It is entirely possible that the *Hobby Lobby* decision will have more political than legal force going forward. See, e.g., Ira C. Lupu, *Moving Targets: Religious Freedom, Hobby Lobby, and the Future of LGBT Rights*, 7 *ALABAMA CIV. RTS. & CIV. LIB. L. REV.* 1 (2015) (arguing “that the political impact of *Hobby Lobby* may be much greater than its legal impact.”). Either way, the decision and its aftermath inform the background of this discussion. See also *Stormans v. Wiesman*, 136 S.Ct. 2433 \*1 (2016) (Alito, J., Roberts, C.J., Thomas, J. dissenting from denial of certiorari) (“This case is an ominous sign. At issue are Washington State regulations that are likely to make a pharmacist unemployable if he or she objects on religious grounds to dispensing certain prescription medications. . . . If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern.”).

<sup>20</sup> One of the paradigmatic cases in this area is *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied* 134 S.Ct. 1787 (2014) (upholding New Mexico Human Rights Act against free speech and free exercise challenge and finding that company refusing to photograph a same-sex commitment ceremony discriminated on the basis of sexual orientation in violation of the Act). See Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodation Law*, 66 *STAN. L. REV.* 1205, 1233-37 (2014) (“Although the New Mexico Supreme Court rejected *Elane Photography*’s First Amendment free speech claim, that claim deserves close analysis, for businesses subject to public accommodations laws will surely raise similar arguments in the future.”). See also Lupu, *Moving Targets*, *supra* note 19, at 33-35 (providing an overview of current litigation in this area).

<sup>21</sup> See, e.g., Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There’s Nothing Illegal About It*, *WASHINGTON POST*, Feb 19, 2015, available at <http://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/> (“A Michigan pediatrician declined to

(continued next page)

themselves in the minority due to shifting understandings of the underlying knowledge basis. What once was accepted in the field may soon be outdated. Scientific, legal, and political forces may interact in a way that sometimes aligns with the insights of the knowledge community, but sometimes contradicts them.

This Article proceeds in four Parts. Part I introduces the concept of knowledge communities, and focuses the analysis on knowledge communities as providers of professional services. It considers how knowledge is formed within these communities, public expectations toward these communities, and state regulation of them. Complicating the picture, it takes into account different institutional settings in which professionals operate.

Part II takes a normative view of professionals' duties and justifications for departure from professional consensus. This Part assesses the role of outliers within and outside of professional knowledge communities and the fundamental expectations of the public served by these professionals. It investigates what constitutes an appropriate basis for justifying a professional's outlier status. The point of departure is the concept of the professions as knowledge communities, and especially the notion of a shared knowledge basis. For all valid claims, I argue, reference to the shared knowledge basis and common ways of knowing and reasoning is necessary. Scientific disagreement within the knowledge community must be based on individual professionals' divergent interpretation of the shared knowledge. The advice-giving function of the individual professional is thus tied back to the range of defensible opinions within the knowledge community. If, however, the advice is based on an assessment of the knowledge rooted in exogenous reasons, the professional places himself outside of the knowledge community. Here, the distinction between internal and external outliers is key. Both internal and external outliers can produce unprofessional advice. But the difference is that internal outliers will base their reasoning on shared knowledge while external outliers will base theirs on exogenous factors. The law should protect the exogenous beliefs of external outliers as a matter of personal belief of the individual. But it should not, as a general matter, accommodate them as justifying departure from professional knowledge.

Part III turns to the treatment of outliers in tort law on professional malpractice and the law of evidence governing the admissibility of expert

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treat the infant daughter of a lesbian couple in yet another example of the growing tensions between advocates for LGBT rights and those who want greater religious expression protections.”); Emma Green, *When Doctors Refuse to Treat LGBT Patients*, THE ATLANTIC, Apr 19, 2016, available at <http://www.theatlantic.com/health/archive/2016/04/medical-religious-exemptions-doctors-therapists-mississippi-tennessee/478797/> (discussing Mississippi law extending conscience objections to treating LGBT patients).

testimony, bringing these areas of law into conversation with the First Amendment. The treatment of outliers in these areas provides the normative corollary of basing good professional advice on a shared methodology and shared ways of knowing and reasoning. The distinction between good and bad advice should be drawn along these lines. It thus supports the division of professionals into internal and external outliers. Whether the substantive content of advice *internal* outliers give—advice that is based on a shared methodology and common ways of knowing and reasoning—clears the bar of good advice, moreover, is also for the knowledge community to decide. Both tort law and evidence already operate on this basis; and both have resolved the overarching “who decides”-questions largely in favor of the knowledge community. Thus, in addition to providing normative support, these areas inform the workability of this approach in litigation practice.

Part IV demonstrates how this theory of the scope of First Amendment protection for professional advice works when applied to the controversies referenced at the outset. These examples illustrate problems associated with identifying the range of valid professional advice. Applying the theory of distinguishing professional from unprofessional advice proposed in this Article provides guidance in resolving these disputes.

### I. THE PROFESSIONS AS KNOWLEDGE COMMUNITIES

The learned professions are best conceptualized as knowledge communities.<sup>22</sup> Taking this view as the starting point has significant implications for the role of the individual professional, both in relation to the client and in relation to her profession. The state regulates the professions in multiple and varied ways, including through licensing requirements and the imposition of professional malpractice liability. When state regulation aligns with professional insights, it is usually unproblematic. But when state regulation is incompatible with professional insights, significant problems arise.

State involvement in professional licensing in particular can lead to considerable tensions. In licensing, the administrative function of granting access to the profession and the substantive evaluation of the knowledge community’s ability to impart its professional knowledge come together. It is appropriate for the state to enforce formal educational standards without implicating professional speech.<sup>23</sup> But the substantive content of the educational programs directly affects the content of

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<sup>22</sup> See Haupt, *supra* note 6. See also Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1294 (2015) (adopting the characterization of the professions as “knowledge communities”).

<sup>23</sup> Haupt, *supra* note 6, at 1277-78.

professional advice. State involvement, accordingly, should be tailored with deference to the knowledge community.

A. *Professionals as Members of Knowledge Communities*

The definition of “profession” and the processes of professionalization are contested. But the key defining feature—and one generally shared across the manifold definitions—is the professions’ knowledge-based character.<sup>24</sup> Thus, “[t]he connection to a knowledge community circumscribes the type of communication rendered as professional advice.”<sup>25</sup> The centrality of knowledge is reflected in the asymmetrical relationship between the professional and the client. The very reason the professional’s advice is valuable to the client is that the professional has knowledge that the client lacks. In order to make important life decisions, the client depends on accessing the knowledge community’s knowledge through the individual professional.

Knowledge communities are

a network of individuals who share common knowledge and experience as a result of training and practice. They are engaged in solving similar problems by drawing on a shared reservoir of knowledge and, at the same time, they define and contribute to that shared body of knowledge. Their common understandings allow for the generation and exchange of insights within the knowledge community. Given the shared knowledge and understandings of this knowledge, members of knowledge communities have shared notions of validity, intersubjective understanding, and a common way of knowing and reasoning.<sup>26</sup>

Despite possible disagreement on individual issues, professionals continue to subscribe to a shared body of knowledge.<sup>27</sup> Yet, it is important to emphasize that “this does not mean that knowledge communities are monolithic. The shared notions of validity, however, limit the range of opinions that may be found valid within the profession.”<sup>28</sup> It is the challenge of defining this range of valid professional opinions that the remainder of this Article addresses.

1. Individual Professionals

Professional speech is speech by a professional, within a professional-client relationship, communicating the insights of the knowledge

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<sup>24</sup> *Id.* at 1249.

<sup>25</sup> *Id.* at 1248.

<sup>26</sup> *Id.* at 1250-51.

<sup>27</sup> *Id.* at 1250.

<sup>28</sup> *Id.* at 1251.

community for the purpose of providing professional advice.<sup>29</sup> Conceptualizing the individual professional in this manner as the conduit between the knowledge community and the client requires distinguishing the professional's personal opinion from his professional advice. It is worth reiterating that distinction.<sup>30</sup> The key to determining what is professional advice is whether the advice is rendered within the confines of a professional-client relationship: "Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted"<sup>31</sup> the speaker is not engaged in professional speech. Thus, speech by a professional<sup>32</sup> outside of the professional-client relationship is not professional speech.<sup>33</sup>

Speaking as a participant in public discourse, professionals' private speech receives ordinary First Amendment protection. It is likely that the speaker's professional training will influence the listeners' perception of the message, in particular its accuracy.<sup>34</sup> But as long as the speaker is not acting within the confines of the professional-client relationship, it is important to recognize that he is not bound by the knowledge community's insights. Indeed, speaking in public discourse, the speaker is free to challenge even the most axiomatic insights of the knowledge community.<sup>35</sup>

Consider a professional—a trained physician, for instance—hosting a television program in which he dispenses advice.<sup>36</sup> Even if the physician disagrees with the profession, he cannot under the First Amendment be held to the standard of medical malpractice that would censor him within the professional-client relationship.<sup>37</sup> In short, a professional may give bad advice to millions of viewers—but not to one client. At the in-

<sup>29</sup> *Id.* at 1247.

<sup>30</sup> *See id.* at 1254-57 (for more detailed discussion).

<sup>31</sup> *Lowe v. SEC*, 472 U.S. 181, 232 (1985)(White, J., concurring).

<sup>32</sup> *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 843 (1999); Post, *supra* note 12, at 947 (defining professional speech as "speech uttered in the course of professional practice as distinct from 'speech uttered by a professional'").

<sup>33</sup> *See* Halberstam, *supra* note 32, at 851 ("Publication of advice for indiscriminate distribution generally will defeat a conclusion that the advice was rendered within the professional-client relationship."). *See also* *Pickup v. Brown*, 728 F.3d 1042, 1054 (9th Cir. 2014) ("Thus, outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment.").

<sup>34</sup> Haupt, *supra* note 6, at 1255-56.

<sup>35</sup> *See, e.g.*, Halberstam, *supra* note 32, at 848. *See also* Post, *supra* note 12, at 947; POST, *supra* note 13, at 12-13 (recounting the "controversy over the safety of dental amalgams.").

<sup>36</sup> For a recent highly publicized controversy that played out along these lines, *see, e.g.*, Bill Gifford, *Dr. Oz is No Wizard, but No Quack, Either*, NEW YORK TIMES <http://nyti.ms/1HDVCwD>

<sup>37</sup> Post, *supra* note 12, at 949 ("When a physician speaks to the public, his opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion within the medical establishment."); POST, *supra* note 13, at 43 ("If an expert chooses to participate in public discourse by speaking about matters within her expertise, her speech will characteristically be classified as fully protected opinion.").

tersection of professional speech and academic speech, the protection of private speech in public discourse plays out in the same way. Imagine the physician on television also holds a medical faculty appointment, and the insights propagated to viewers do not hold up to scientific standards.<sup>38</sup> Here, too, the First Amendment provides protection of private speech in public discourse where academic standards are not fulfilled. As Robert Post puts it, “Biologists can with impunity write editorials in the *New York Times* that are such poor science that they would constitute grounds for denying tenure within a university. Members of the general public can rely on expert pronouncements within public discourse only at their peril. Such pronouncements are ultimately subject to political rather than legal accountability.”<sup>39</sup>

The underlying justification is that the First Amendment should treat speakers in public discourse as equals. Consequently, there is no such thing as the notion of a “false idea” in public discourse.<sup>40</sup> By contrast, while there is a range of valid professional opinions that members of the knowledge community may disagree on, there is also a universe of advice that is plainly wrong as a matter of expert knowledge. What constitutes valid professional knowledge, however, is for the profession to decide. Expert knowledge thus is not treated as equal to other opinions. And we affirmatively do not want it to be: this notion is clearly reflected in the imposition of tort liability for professional malpractice. The tort regime directly, and appropriately, sanctions unprofessional advice.

A critic of distinguishing the role of the professional in public discourse might object that the very notion of “public discourse” is indeterminate. But whatever the controversies at the margins concerning the concept of public discourse might be, the professional-client relationship is affirmatively not part of it. The law already attaches certain distinct features to this particular relationship between speaker and listener, including evidentiary privileges and a duty of confidentiality. In doing so, it singles out the professional-client relationship as distinct.

## 2. Institutional Settings

Many professionals are not solo-practitioners, but rather work within various institutional settings; this complicates the picture significantly. Their obligations to their profession may clash with their obligations to their institutional employer. The entities in which professionals are em-

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<sup>38</sup> *Physicians Want Dr. Oz Gone from Columbia Medical Faculty*, NEW YORK TIMES, April 16, 2015, <http://nyti.ms/1EQ00ID>; Terrence McCoy, *Half of Dr. Oz’s Medical Advice is Baseless or Wrong*, Study Says, WASHINGTON POST, Dec 19, 2014, <http://www.washingtonpost.com/news/morning-mix/wp/2014/12/19/half-of-dr-ozs-medical-advice-is-baseless-or-wrong-study-says/>

<sup>39</sup> POST, *supra* note 13, at 44.

<sup>40</sup> POST, *supra* note 12, 949. See *United States v. Alvarez*, 132 S.Ct. 2537 (2012).

bedded can be governmental or private, religious or secular. Depending on these variables, professionals will be pulled in different directions regarding the content of their advice. But the First Amendment should protect professionals who resist those forces to guard their professional advice against outside interference. Professionals' primary allegiance ought to be to their knowledge community on the one hand, and their clients on the other. If professionals are hired to provide professional services, the content of their advice should not be determined by who pays them, but rather, by the knowledge community's understanding of what constitutes defensible professional advice. This is also the underlying assumption of the tort regime.<sup>41</sup>

With respect to governmental settings, the Supreme Court addressed government-funded professional services perhaps most prominently in *Rust v. Sullivan*,<sup>42</sup> concerning abortion counseling, and *Legal Services Corporation v. Velazquez*,<sup>43</sup> concerning legal advice. While the Court held the limits on abortion counseling in *Rust* to be compatible with the First Amendment, it held unconstitutional the restrictions imposed on legal advice in *Velazquez*.<sup>44</sup>

In *Rust*, recipients of federal funding for "family-planning services" were prohibited from disseminating advice on abortion.<sup>45</sup> Moreover, providers were barred from "referral for abortion as a method of family planning."<sup>46</sup> These limits on professional advice applied "even upon specific request."<sup>47</sup> However, providers were given a "permissible response to such an inquiry": "[T]he project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."<sup>48</sup> The Court upheld the funding scheme against First Amendment challenge, pointing out that the professionals "remain free to say whatever they wish about abortion outside the [government-funded] project."<sup>49</sup> By framing the case as one about selectively funding some activities but not others, Chief Justice Rehnquist obscured the point that professional speech was at the heart of the matter.<sup>50</sup> The opinion expressly left unanswered the question about First Amendment protection of

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<sup>41</sup> See *infra* Part III.A.

<sup>42</sup> 500 U.S. 173 (1991).

<sup>43</sup> 531 U.S. 533 (2001).

<sup>44</sup> See also Haupt, *supra* note 6, at 1259-62 (discussing the relevance of these cases for professional speech doctrine).

<sup>45</sup> *Rust*, at 178-79.

<sup>46</sup> *Id.* at 179.

<sup>47</sup> *Id.* at 180.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 183.

<sup>50</sup> See *id.* at 193 (asserting that the government "has merely chosen to fund one activity to the exclusion of another.").



government-funded professional speech.<sup>51</sup> Under the knowledge community-focused theory of professional speech, however, this question will likely be answered as follows: if a professional is paid to give professional advice, the professional's primary allegiance is to the knowledge community and the client. The First Amendment, therefore, should shield against government interference even when the government funds the professional's advice. Indeed, this is the result—even if not the reasoning—the Court reached in *Velazquez*.

In *Velazquez*, government-funded Legal Services attorneys were prohibited from challenging existing welfare law on behalf of their indigent clients.<sup>52</sup> Justice Kennedy distinguished *Rust* as a government speech case; by contrast, he asserted that the speech in *Velazquez* is private speech.<sup>53</sup> This distinction introduces slippage in the concepts of government, private, and professional speech. As discussed in the previous section, professional speech is distinct from private speech of a professional.<sup>54</sup> Despite this analytical ambiguity, Justice Kennedy focused on the professional role of the lawyer, concluding that “[t]he advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*.”<sup>55</sup> The government-funded lawyer, in other words, has to fulfill the same professional role as any lawyer who is not funded by the government, including “complete analysis of the case, full advice to the client, and proper presentation to the court.”<sup>56</sup>

In terms of the institutional context, it is difficult to distinguish *Rust* and *Velazquez*, as Justice Scalia suggested in his *Velazquez* dissent.<sup>57</sup> The government funds these professional services precisely because they are rendered by professionals. As Justice Blackmun pointed out in his *Rust* dissent, the physicians who are part of the federally funded program are expected to give clients comprehensive advice regarding family planning. The project “[seeks] to provide them with the full range of infor-

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<sup>51</sup> *Id.* at 200 (“It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government. We need not resolve that question here . . .”).

<sup>52</sup> *Velazquez*, at 536.

<sup>53</sup> *Id.* at 540-42 (stating that “the LSC program was designed to facilitate private speech, not to promote a governmental message.”).

<sup>54</sup> *See supra* Part I.A.1.

<sup>55</sup> *Id.* at 542-43.

<sup>56</sup> *Id.* at 546.

<sup>57</sup> *Velazquez*, at 553-59 (Scalia, J., dissenting) (“[T]he majority’s contention that the subsidized speech in these cases is not government speech because the lawyers have a professional obligation to represent the interests of their clients founders on the reality that the doctors in *Rust* had a professional obligation to serve the interests of their patients.”).

mation and options regarding their health and reproductive freedom.”<sup>58</sup> In other words, the government-funded professionals in this case, too, are expected to act like professionals. And, as Justice Blackmun emphasized, “the legitimate expectations of the patient and the ethical responsibilities of the medical profession demand no less.”<sup>59</sup> The government funded, as Justice Scalia put it, “the normal work of doctors” and “the normal work of lawyers” in these cases.<sup>60</sup>

Of course, the outcome under the knowledge community-focused theory of professional speech is exactly the opposite from that of the Scalia dissent in *Velazquez*: both the doctors in *Rust* and the lawyers in *Velazquez* ought to be able to invoke First Amendment protection of their professional speech against outside interference if the government funds them to act as “normal” professionals.

When professionals are directly employed by the government, they are likewise held to the standards of the profession. Government entities can also contract with private parties for the provision of professional services to government employees. In one set of cases, professionals were contracted by the government to provide counseling services to government employees.<sup>61</sup> A company providing counseling services to several police departments, including in Minneapolis, Minnesota, and Springfield, Illinois, for example, sued the respective municipalities over ending the psychological counseling contract due to anti-gay views expressed by the professionals. When their views are expressed outside the professional-client relationship, they are private speech. Within this relationship, they are professional speech. And if they are contrary to the professional consensus, they are unprofessional advice.

Religious organizations have built a large professional services infrastructure in which professionals are embedded. The religious tenets, transferred onto the institutions employing these professionals, may contradict their employees’ professional insights. Elizabeth Sepper has carefully examined such countervailing forces in the health care context where hospital policies may prohibit doctors from employing the full range of their professional knowledge.<sup>62</sup> As the largest nonprofit provider, Catholic healthcare is perhaps the most prominent example.<sup>63</sup> The

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<sup>58</sup> *Rust*, at 213-14 (Blackmun, J., dissenting).

<sup>59</sup> *Id.*

<sup>60</sup> *Velazquez*, at 562 (Scalia, J., dissenting).

<sup>61</sup> See, e.g., *Campion, Barrow & Associates of Illinois, Inc. v. City of Minneapolis*, 652 F.Supp.2d 986 (D. Minn. 2009) (providers of psychological services to police department); *Campion, Barrow & Associates, Inc. v. City of Springfield, Illinois*, 559 F.3d 765 (2009) (same); *Walden v. Centers for Disease Control and Prevention*, 669 F.3d 1277 (11th Cir. 2012) (health and wellness services for CDC employees).

<sup>62</sup> See Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501 (2012).

<sup>63</sup> *Id.* at 1519-20.

United States Conference of Catholic Bishops issues the Ethical and Religious Directives for Catholic Health Care Services.<sup>64</sup> Several provisions contained in the Directives “contradict accepted professional ethical imperatives that require doctors and nurses to place patient welfare above self-interest, respect patient autonomy, guarantee continuity of care, and ensure patients receive adequate information.”<sup>65</sup> Most important for purposes of this discussion is the fact that “[t]he directives limit the information doctors may provide to ‘morally legitimate alternatives,’ with wide-ranging repercussions for physician practice and patient care.”<sup>66</sup> To name only one such limit, “Catholic clinics have refused to instruct HIV-positive patients as to the importance of condoms.”<sup>67</sup> The range of advice that may be rendered in these settings is markedly limited as compared to the full range of available professional knowledge.

In the health care context, however, it is worth noting that “many healthcare institutions that assert an objection to legal, medically necessary care are not affiliated with any religion.”<sup>68</sup> Moreover, the problem is compounded by mergers in the healthcare market. On the one hand, non-Catholic hospitals may merge with Catholic healthcare providers. On the other hand, formerly Catholic hospitals may be required to adhere to the Directives even after they have been acquired by another entity.<sup>69</sup> The continued adherence to the directives by formerly Catholic hospitals that are not readily identifiable as such calls into question one possible remedy, namely disclosure.<sup>70</sup> Consequently, as Sepper notes, “providers will be caught between moral restrictions and medical ethics.”<sup>71</sup> Professionals who view it as their professional obligation to render comprehensive ad-

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<sup>64</sup> United States Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services, Fifth Edition 2009, available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>

<sup>65</sup> Sepper, *supra* note 62, at 1520.

<sup>66</sup> *Id.* at 1521.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1581. As Sepper explains:

Only when an institution refuses to deliver legal, necessary care does the law recognize a concept of “institutional conscience.” Under most provisions, an entire hospital, healthcare system, clinic, or practice group may refuse contested treatments. The legislation typically does not differentiate between religious and secular, public and private, and for-profit and not-for-profit institutions. In several jurisdictions, broad conscience clauses allow *any* corporation or entity associated with healthcare—including insurance companies—to decline to participate in, refer for, or give information about *any healthcare service* for reasons of conscience. Employees and medical staff of all faiths, beliefs, and backgrounds must then abide by the institutional policy of refusal.

*Id.* at 1514.

<sup>69</sup> *Id.* at 1523-25. See also Elizabeth Sepper, *Contracting Religion*, in LAW, RELIGION, AND HEALTH IN THE UNITED STATES (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds. forthcoming 2017) draft available at <http://ssrn.com/abstract=2783518>.

<sup>70</sup> See *infra* Part II.A.3.

<sup>71</sup> Sepper, *supra* note 62, at 1525.

vice will find themselves constrained from communicating the insights of the knowledge community.

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The bottom line is this: professionals may operate in a variety of institutional settings. But if professionals are hired primarily to render professional advice, no matter the institutional setting, they are members of the profession first. As such, they are bound together by the knowledge community and its shared ways of knowing and reasoning, serving as the conduit between the knowledge community and the client. Irrespective of the institutional setting, the First Amendment should therefore protect defensible professional advice.

#### B. *Knowledge Communities, Outliers, and the State*

If shared knowledge is the defining feature, shared education is one of the fundamental aspects that bind the members of knowledge communities together. In this context, significant tensions can arise among knowledge communities, outliers, and the state. Consider an example: Recently, the North Carolina state legislature considered a bill that would have put at risk the accreditation of the University of North Carolina (UNC) medical school.<sup>72</sup> The measure “would prevent employees at the state’s two public medical schools—UNC and East Carolina University’s Brody School of Medicine—from performing or supervising abortion procedures.”<sup>73</sup> However, “[t]he national accrediting body for medical schools requires OB/GYN residents to be educated in performing abortion procedures.”<sup>74</sup> State regulation in this instance would have altered the content of what the knowledge community has determined to be necessary professional knowledge.

Another illustrative example involves the conflict between the American Psychological Association’s (APA) Committee on Accreditation and the Department of Education over accreditation standards for psychology programs. The APA delisted homosexuality as a mental disorder in 1973. The APA Ethics Code prohibits discrimination on the basis of sexual orientation. Yet, the accreditation standards in Footnote 4 permitted preferential hiring and enrollment of coreligionists in psychology programs.<sup>75</sup> This was seen as undermining the professional norms of

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<sup>72</sup> <http://www.dailytarheel.com/article/2015/04/abortion-bill-targets-unc-medical-school>

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> For a brief history of Footnote 4, see Clark D. Campbell, *Religion in Education and Training*, in *THE OXFORD HANDBOOK OF EDUCATION AND TRAINING IN PROFESSIONAL PSYCHOLOGY* 472, 478 (W. Brad Johnson & Nadine J. Kaslow eds., 2014).

psychologists, and the APA was poised to remove the footnote. But in the end, there were concerns over the APA's status as licensing body.<sup>76</sup> The Department of Education, in a letter dated September 6, 2001, urged the APA to retain Footnote 4.<sup>77</sup>

The affair reveals the confluence of substantive concerns over the integrity of the professional knowledge communicated in the programs, and subsequently by professionals who graduated from them, and the seemingly merely administrative question of which programs' graduates are eligible to be licensed psychologists. Voices in the psychology literature have articulated this concern as follows: "The ethical codes of the helping professions, which are fundamental to the profession and the education and training of professionals, have been set against the U.S. Constitution and the personal freedoms it protects (i.e., freedom of religion and freedom of speech)."<sup>78</sup> Persuading (or pressuring, as some suggest<sup>79</sup>) the profession to maintain an exemption for religious programs thus amounts to state interference endorsing the outlier status of certain professionals against the rest of the profession. The state thus enforces a substantive change in the knowledge community's shared training, demanding the permissibility of certain outlier positions against the knowledge community itself.

Similarly, accommodating student claims for exemption from certain training requirements against their educational institutions has the same effect.<sup>80</sup> Future professionals may be trained in secular or religious schools, and the formation of the knowledge basis of each individual professional is influenced accordingly. Upon endorsing the American Psychiatric Association's elimination of homosexuality from its list of mental disorders, the APA set as a goal of psychology training "that psy-

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<sup>76</sup> See D. Smith, *Accreditation Committee Decides to Keep Religious Exemption*, 33 MONITOR ON PSYCHOLOGY 16 (2002) ("Also affecting the committee's decision was the U.S. Department of Education (DOE), which suggested that, if the footnote was removed, it would be forced to consider revoking APA's recognition as an accrediting body. Since APA is the only organization approved by DOE to accredit professional psychology programs, that would have left all psychology students in a lurch – ineligible for some types of federal funding and, in some cases, unable to gain licensure.").

<sup>77</sup> Letter from William D. Hansen to Susan Zlotlow, Director, Office of Program Consultation and Accreditation, American Psychological Association, available at <http://www2.ed.gov/policy/highered/guid/secletter/010906.html>

<sup>78</sup> Kristin A. Hancock, *Student Beliefs, Multiculturalism, and Client Welfare*, 1 PSYCHOLOGY OF SEXUAL ORIENTATION AND GENDER DIVERSITY 4 (2014).

<sup>79</sup> Maryka Biaggio, *Do Some APA-Accredited Programs Undermine Training to Serve Clients of Diverse Sexual Orientation?* 1 PSYCHOLOGY OF SEXUAL ORIENTATION AND GENDER DIVERSITY 93, 94 (2014) (speaking of "significant external pressure").

<sup>80</sup> See, e.g., *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011); *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012). In the psychology literature it has been emphasized that the programs in these cases are not APA accredited psychology programs. See Campbell, *supra* note 75, at 484. While this is certainly relevant for the internal discourse within the psychology profession, it does not affect the larger point: the state is endorsing students' outlier status against the consensus of the profession regarding appropriate education standards.

chologists work to remove the stigma that had been attached to homosexuality.”<sup>81</sup> The internal discourse of the profession concerning accreditation of psychology programs focused on access of LGBT students to psychology programs as well as the substantive training all psychology students receive on LGBT issues.<sup>82</sup>

The particular challenges of religious professional education are well recognized in the psychology literature: “As may be expected, any time minority programs deviate from accepted paradigms for professional preparations, there are issues with which to reckon.”<sup>83</sup> According to estimates, there are less than a dozen APA accredited Christian psychology programs.<sup>84</sup> One comparative study of evangelical protestant psychologists trained in secular and those trained in religiously affiliated programs—counterintuitively—found that “[r]eligious psychologists trained at secular programs were comparatively more conservative and more likely to use and value religious techniques in psychotherapy with religious or nonreligious clients than were religious psychologists trained at religiously affiliated programs.”<sup>85</sup> In response, some suggest that “training provided in religious distinctive programs prepares students for more judicious use of such interventions.”<sup>86</sup> Voices in the psychology literature lament the lack of data in questions surrounding the relationship between religious programs and professional expertise imparted regarding LGBT issues.<sup>87</sup> In any event, it should be the profession that makes this determination internally.

To be sure, the medical and mental health fields are not the only providers of professional training to face such concerns. There is a considerable body of scholarship on religious law schools, for instance.<sup>88</sup> Nor are these issues solely domestic.<sup>89</sup> But the two fields highlighted here con-

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<sup>81</sup> Maryka Biaggio, Sue Orchard, Jane Larson, Kelly Petrino, and Roberta Mihara, *Guidelines for Gay/Lesbian/Bisexual-Affirmative Educational Practices in Graduate Psychology Programs*, 34 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 548 (2003).

<sup>82</sup> *Id.* at 549.

<sup>83</sup> Campbell, *supra* note 75, at 481. (“Specifically, religious distinctive programs have to repeatedly address issues of academic freedom and diversity, particularly as they relate to sexual orientation and the provisions of Footnote 4 in the G&P.”).

<sup>84</sup> *Id.* at 478 (further pointing out that to date, “all religious distinctive programs are founded on the Christian faith tradition.”).

<sup>85</sup> Randall Lehmann Sorenson & Shawn Hales, *Comparing Evangelical Protestant Psychologists Trained at Secular versus Religiously Affiliated Programs*, 39 PSYCHOTHERAPY: THEORY/RESEARCH/PRACTICE/TRAINING 163 (2002).

<sup>86</sup> Campbell, *supra* note 75, at 481.

<sup>87</sup> *Id.* at 483.

<sup>88</sup> See, e.g., Russell G. Pearce, *Symposium Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 FORDHAM L. REV. 1075 (1998) (symposium issue).

<sup>89</sup> See, e.g., *Trinity Western University v. British Columbia College of Teachers*, 2001 S.C.C. 31 (2001) (accreditation of teacher training program); *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250 (July 6, 2015); *Trinity Western University v. Nova Scotia Barris-* (continued next page)

cern today's most politically and socially contested areas. In the end, the important takeaway is that professional outlier status may be created in different ways, including the institutional context in which the professional operates and education in which professional knowledge is imparted. The reference point, however, is the knowledge basis of the profession and its shared ways of knowing and reasoning.

## II. JUSTIFICATIONS FOR PROFESSIONAL OUTLIER STATUS

This Part investigates what constitutes an appropriate basis for justifying a professional's outlier status. It considers the interests of professionals and of knowledge communities, and client expectations toward them. To the extent that a professional's outlier status is grounded in disagreement based on shared notions of validity, departure from the knowledge community's insights must be permissible. Indeed, dynamic development and refinement of professional insights will often depend on such divergent assessments. However, outlier status based on exogenous reasons undermines the status of the professional as a member of the knowledge community founded in shared notions of validity and common ways of knowing and reasoning. This explains the initial distinction between internal and external outliers.

It will be the reasonable expectation of the knowledge community that the individual professional fully and accurately communicates its knowledge to the client.<sup>90</sup> Correspondingly, the client seeking professional advice reasonably may expect that she receives competent and comprehensive professional advice in accordance with the profession's insights. In other words, the client expects that she will access the *entire* body of knowledge relevant to her problem that constitutes the state of the art in the field. The normative corollary can be found in the law of professional malpractice where the standard of care against which the professional's advice is measured is determined by the profession itself: exercise of the profession according to the degree and skill of a well-qualified professional. The knowledge community thus determines the benchmark against which the individual professional's liability is as-

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ters' Society, 2015 NSSC 25 (Jan 28, 2015) (recognition of law degrees from religious law school by provincial licensing bodies).

<sup>90</sup> There is another dimension that I subsume under the knowledge community's expectations of the individual professional, but that others have identified separately as the expectation of the professional: "Reasonable belief about what a job entails is one measure of whether refusals of conscience should be protected." Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?* 9 AVE MARIA L. REV. 47, 55 (2010). Greenawalt points out that nurses trained at a time when abortion was illegal would not reasonably expect to be called upon to assist in such a procedure. That is certainly true. Under my theory of the professions as knowledge communities, however, the job of the individual professional entails whatever the knowledge community defines it to be, even if its scope changes over time.

essed.<sup>91</sup> This does not only mean what the professional says must be correct, it also means that it must be comprehensive.

The distinction between internal and external outliers, is a distinction in kind—namely, a different kind of justification for departure from professional knowledge. While internal outliers justify their alternative assessments by relying on the shared knowledge basis of the profession, external outliers justify their departure by reliance on exogenous factors. Their disagreement is premised on rejecting the shared way of knowing and reasoning due to exogenous beliefs. By doing so, they place themselves outside of the knowledge community. The remainder of this Part will defend the exclusion of external outliers from the knowledge community.

The distinction between internal outliers giving good advice and internal outliers giving bad advice, by contrast, is a distinction in degree. Whether their advice clears the bar of “good advice” is for the knowledge community to decide. Internal outliers may misuse the shared methodology, resulting in bad advice. But it is up to the knowledge community to decide what the bar of good advice is, and what degree of departure is permissible. I will return to this issue in Parts III and IV below.

#### A. *External Outliers*

Taking account of the expectations toward professionals, this section explains why external outliers should be considered to have placed themselves outside of the knowledge community. Through a lens of public reason, the knowledge community’s expectations toward the professional and the client’s expectations toward the professional demand that any departure be based upon the shared knowledge basis. But the defining feature of external outliers’ justifications for departure is that they are based on exogenous reasons.

One recent example involves pharmacists who refuse to advise clients on the availability of drugs they consider to be abortifacients.<sup>92</sup> Oth-

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<sup>91</sup> See *infra* Part III.A.

<sup>92</sup> Cf. *Stormans v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015) (upholding Washington requirement that pharmacies dispense all prescription medications). See also Dennis Rambaud, *Prescription Contraceptives and the Pharmacist’s Right to Refuse: Examining the Efficacy of Conscience Laws*, 4 CARDOZO PUB. LAW., POL. & ETHICS J. 195 (2006); Jane W. Walker, Comment, *The Bush Administration’s Midnight Provider Refusal Rule: Upsetting the Emerging Balance in State Pharmacist Refusal Laws*, 46 HOUSTON L. REV. 939 (2009); Heather A. Weisser, *Abolishing the Pharmacist’s Veto: An Argument in Support of a Wrongful Conception Cause of Action Against Pharmacists Who Refuse to Provide Emergency Contraception*, 80 SO. CAL. L. REV. 865 (2007); Lora Cicconi, *Pharmacist Refusals and Third-Party Interests: A Proposed Judicial Approach to Pharmacist Conscience Clauses*, 54 UCLA L. REV. 709 (2007); Matthew White, *Conscience Clauses for Pharmacists: The Struggle to Balance Conscience Rights With the Rights of Patients and Institutions*, (continued next page)



er examples of restricting the range of available advice may include professional advice on assisted reproductive technology (ART) for same-sex couples.<sup>93</sup> Yet another example involves crisis pregnancy centers, at least to the extent that they hold themselves out as providing professional advice.

The following discussion first distinguishes between motivations and justifications, animated by the idea of public reason. In short, public justifications should be based on reasons that individuals of divergent backgrounds—moral, religious, political—can accept as valid in a pluralist society.<sup>94</sup> Translated to the professional realm, the shared acceptance of advice follows when it is based on justifications internal to the knowledge community. The shared ways of knowing and reasoning are accepted as valid among members of the knowledge community irrespective of their personal commitments. Likewise, clients seeking a professional's advice will accept professional advice justified by the knowledge community's shared ways of knowing and reasoning as such, whether or not their priors otherwise align with the advicegiving professional's. Acceptance of professional advice follows from its nature as expert knowledge, not based on individual exogenous commitments. Applied to the context of professional advice, when the justifications are exogenous, the dissenting professional typically does not serve the expectations of the knowledge community or individual clients.

The two final sections interrogate whether mitigating these expectations is possible by providing disclosures of professionals' exogenous commitments to their clients, or whether departure from the professional

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2005 WISC. L. REV. 16211; Charu A. Chandrasekhar, *RX for Drugstore Discrimination: Challenging Pharmacy Refusals to Dispense Prescription Contraceptives Under State Public Accommodations Laws*, 70 ALB. L. REV. 55 (2006); Sarah J. Vokes, *Just Fill the Prescription: Why Illinois' Emergency Rule Appropriately Resolves the Tension Between Religion and Contraception in the Pharmacy Context*, 24 L. & INEQ. 399 (2006); Melissa Duvall, *Pharmacy Conscience Clause Statutes: Constitutional Religious "Accommodations" or Unconstitutional "Substantial Burdens" on Women?*, 55 AM. U. L. REV. 1485 (2006); Amy Bergquist, Note, *Pharmacist Refusals: Dispensing (With) Religious Accommodation Under Title VII*, 90 MINN. L. REV. 1073 (2006); Brittany L. Grimes, Note, *The Plan B for Plan B: The New Dual Over-the-Counter and Prescription Status of Plan B and Its Impact Upon Pharmacists, Consumers, and Conscience Clauses*, 41 GA. L. REV. 1395 (2007).

<sup>93</sup> Cf. Douglas NeJaime, *Griswold's Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality*, 124 YALE L.J. F. 340, 340-41 (2015) ("As same-sex couples have gained access to marriage, some who opposed same-sex marriage have shifted their views, expressing support for same-sex equality while attempting to limit its impact. In particular, some now accept same-sex marriage while maintaining their commitment to biological, gender-differentiated parenting."). However, it is doubtful that such restrictions specifically targeted at gay parents are tenable: "State laws on assisted reproductive technology may still be based on an exclusive model of different sex couples, but that model will not survive." Lupu, *Moving Targets*, *supra* note 19, at 4 n.18. *But see* Christian Medical & Dental Associations, *Assisted Reproductive Technology Ethics Statement* <http://cmda.org/resources/publication/assisted-reproductive-technology-ethics-statement> (emphasizing the heterosexual, married two-parent family).

<sup>94</sup> *See generally* JOHN RAWLS, *POLITICAL LIBERALISM* (1996).

consensus due to exogenous—and here, primarily religious—reasons is generally justifiable under an exemptions regime.

### 1. Motivations and Justifications

External outliers base their divergence from professional consensus on exogenous reasons; often, their disagreement will be religiously motivated and therefore exogenous to the ways of knowing and reasoning of the knowledge community. Take the pro-life pharmacist as an example. Here, motivation and justification for refusing to provide comprehensive advice align: the motivating reason the pharmacist refuses to advise on certain drugs is his religious, political, or philosophical opposition to abortion. The justification is the same. It does not matter whether scientifically the drugs act in a certain way, as long as the pharmacist believes that they do.

But motivation and justification do not necessarily align. Outliers who justify their departure from the professional consensus in terms exogenous to professional discourse—such as religious outliers—must be distinguished from outliers who may have a religious disagreement with the profession, but who nonetheless purport to share the knowledge basis of the profession to support their views.

For example, the National Association for Research and Therapy of Homosexuality (NARTH)—one of the last remaining professional organizations that supports conversion therapy<sup>95</sup>—portrays itself as an alternative to the American Psychiatric Association. A founding member of NARTH asserts that “NARTH came into existence in response to threats to take away the right of patients to choose therapy to eliminate or lessen same-sex attraction.”<sup>96</sup> The group claims to “defend[] the right of therapists to provide such treatment and provides a forum for the dissemination of research on homosexuality.”<sup>97</sup> Importantly, the group explicitly invokes the knowledge basis and methodology of the profession:

“Concerned that professional organizations and publications in the mental health field have fallen under the control of those who would use them to forward social constructionist theories, political agendas, and advocacy research, NARTH has fought for a return to *established theoretical approaches, solid research*, therapy that puts the patient first, and freedom to discuss, debate, and disagree.”<sup>98</sup>

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<sup>95</sup> On the role of NARTH in the JONAH litigation and exclusion of conversion therapy expert witnesses, see *infra* notes 225 and 239-241 and accompanying text.

<sup>96</sup> Benjamin Kaufman, *Why NARTH? The American Psychiatric Association's Destructive and Blind Pursuit of Political Correctness*, 14 REGENT U. L. REV. 423 (2002).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (emphasis added).

The motivating factor for believing that homosexuality is wrong and must be remedied by therapy may be religious,<sup>99</sup> but the organization explicitly claims to place itself within the discourse of the knowledge community. Thus, despite the perhaps religious motivation, the justification is framed in terms of scientific discourse of the profession.

So what should we make of motivations and justifications for outlier status? When motivation and justification align, and both are based on exogenous reasoning—as in the pro-life pharmacist example—the professional is an *external* outlier placing himself outside of the knowledge community. The justification for departure at its core is a rejection of the knowledge community’s shared ways of knowing and reasoning. But as long as the justification is framed in terms of the discourse of the knowledge community, I am inclined to consider the outliers *internal* outliers. Their justification (at least ostensibly) respects the shared ways of knowing and reasoning. Does this invite dishonesty? This invokes a general problem in the theory of public reason.<sup>100</sup> But as long as a professional justification is possible, I am inclined to disregard the potential dishonesty as to motives. On a functional level, it will be virtually impossible for courts to make judgments about subjectivity in this area. It will generally be possible, however, to presume honesty as to motive and judge the justification in relation to the knowledge community’s standards. Indeed, this is analogous to the tort regime where professional advice is measured against the profession’s standard.

True external outliers will base their justifications on exogenous factors. Here, another useful illustration is provided by professional associations that explicitly frame their mission in religious terms. Individual professionals may understand their professional duty as part and parcel of their religious duty.<sup>101</sup> The Christian Medical & Dental Associations (CMDA), for instance, more than 16,000 members strong, represents such professionals.<sup>102</sup> CMDA’s Ethics and Scientific Statements “are based on scientific, moral and biblical principles.”<sup>103</sup> The Homosexuality

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<sup>99</sup> *Id.* (“When people are discriminated against on the basis of their religious beliefs or denied help that they believe is in their best interests, they need an advocate to defend their rights.”) and *id.* at 440 (“If this trend persists, persons with strongly held religious beliefs may be unwilling to seek help from professional therapists. Religious groups may be forced to act as alternative professional organizations, and the demand for the entire mental health profession will be substantially reduced.”).

<sup>100</sup> See, e.g., Micah Schwartzman, *The Sincerity of Public Reason*, 19 J. POL. PHILOSOPHY 375 (2011).

<sup>101</sup> See, e.g., Christian Medical & Dental Associations, Christian Physician’s Oath Ethics Statement, <http://cmda.org/resources/publication/christian-physicians-oath-ethics-statement> (“With gratitude to God, faith in Christ Jesus, and dependence on the Holy Spirit, I publicly profess my intent to practice medicine for the glory of God.”).

<sup>102</sup> Christian Medical & Dental Associations, About Our Organization, <http://cmda.org/about/>

<sup>103</sup> <http://cmda.org/issues/page/cmdas-ethics-statements>

Ethics Statement, for example, reads: “While recognizing the need to reach out in love to those struggling with same sex attraction, CMDA opposes the practice of homosexual acts on biblical, medical, and social grounds.”<sup>104</sup> The medical grounds largely depart from the scientific consensus.<sup>105</sup> Notably, CMDA embraces conversion therapy and in doing so cites NARTH or NARTH-affiliated individuals.<sup>106</sup>

The religious justification is more clearly articulated in the CMDA statement on ART, in which it sorts available reproductive technologies into “consistent with God’s design for reproduction,” “morally problematic,” and “inconsistent with God’s design for the family.”<sup>107</sup> The family is defined as a married, heterosexual couple, resting on explicitly religious terms where “marriage and the family are the basic social units designed by God. Marriage is a man and a woman making an exclusive commitment for love, companionship, intimacy, spiritual union, and, in most cases, procreation.”<sup>108</sup> Providing professional advice concerning ART consistent with the ethics statement will necessarily limit the range of options otherwise available. And the justification for limiting professional advice will rest purely on exogenous considerations.

Perhaps, then, those professionals whose justifications are based on exogenous factors constitute their own knowledge community, one that should not be held to conform to the standards of the profession. Instead, perhaps they should be held to the standard of the “Christian doctor” or “Christian lawyer,” or the standard of a coreligionist in the same profession. But here, the self-understanding of the group is relevant. The CMDA, for instance, addresses this issue in its Professionalism Ethics Statement in which they define themselves as “medical professionals.”<sup>109</sup>

<sup>104</sup> <http://cmda.org/resources/publication/homosexuality-ethics-statement>

<sup>105</sup> Medical

- The causes of same-sex attraction appear to be multi-factorial and may include developmental, psychosocial, environmental and biological factors. There is no credible evidence at this time that same-sex attraction is genetically determined.
- Acting on homosexual attraction is voluntary. Claims of genetic or environmental determinism do not relieve individuals of moral responsibility for their sexual behavior.
- Homosexual behavior can be changed. There is valid evidence that many individuals who desired to abstain from homosexual acts have been able to do so.
- Some homosexual acts are physically harmful because they disregard normal human anatomy and function. These acts are associated with increased risks of tissue injury, organ malfunction, and infectious diseases. These and other factors result in a significantly shortened life expectancy.
- Among those involved in homosexual acts, there is an increased incidence of drug and/or alcohol dependence, compulsive sexual behavior, anxiety, depression, and suicide.

*Id.*

<sup>106</sup> <http://cmda.org/library/doclib/homosexualityw-references.pdf>

<sup>107</sup> <http://cmda.org/resources/publication/assisted-reproductive-technology-ethics-statement>

<sup>108</sup> *Id.*

<sup>109</sup> <http://cmda.org/resources/publication/professionalism-ethics-statement>

Moreover, the CMDA Malpractice Ethics Statement explicitly references the standard of care applicable in ordinary physician malpractice.<sup>110</sup> By these metrics, the CMDA sees itself as part of the knowledge community, not a particular sub-group or separate community. To the extent that professionals claim to be part of the knowledge community, however, they ought to be bound to its knowledge basis and methodology.

As the CMDA examples illustrate, it may not always be easy to classify the justification as exogenous. Moreover, the justification may differ from issue to issue. With respect to immunization, for example, the CMDA “supports the current scientific literature that validates the general practice of immunization as a safe, effective, and recommended procedure.”<sup>111</sup> Generalizations, in short, are difficult in this area. But the conceptual line to be drawn along a shared knowledge basis and methodology is theoretically consistent. And typically, courts will be able to conduct the necessary fact-specific inquiry, as they already do so in other areas such as tort law and evidence.

## 2. Expectations

The expectations of the knowledge community and of clients toward professionals provide another reason why external outliers should generally be considered to place themselves outside of the knowledge community. With respect to the professional’s advice-giving function, the knowledge community’s interest lies in having individual professionals render accurate, comprehensive advice. This does not occur when the individual professional disseminates advice based on a knowledge basis exogenous to that of the knowledge community. Correspondingly, the individual professional has an autonomy interest in communicating the message according to the standards of the profession to which she belongs.<sup>112</sup> It is this bond that is destroyed when professionals place themselves outside the knowledge community for exogenous reasons. In reciprocal fashion, the individual professional’s interest lies in preserving the integrity of the knowledge community’s insights just as the knowledge community’s interest lie in having the individual professional communicate its insights correctly.

A critic might object that this understanding places the membership in a profession above other constitutive aspects of a professional’s identity. I do not mean to suggest that all other aspects of a professional’s

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<sup>110</sup> <http://cmda.org/resources/publication/malpractice-ethics-statement> (“The ‘standard of care’ refers to those acts which a reasonable physician of like training or skill would do in the same or similar situation.”).

<sup>111</sup> <http://cmda.org/resources/publication/immunization-ethics-statement>

<sup>112</sup> Haupt, *supra* note 6, at 1272-73 (arguing that this interest goes to the identity of the professional as a member of the profession).

identity are secondary, and this is particularly true for the professional's religious beliefs. But the focus here is on the function of knowledge communities and the role of the advice-giving individual professional within the professional-client relationship. In his position as conduit between the knowledge community and the client, the defining feature in that particular relationship is the professional role. In the professional-client relationship, the individual rendering professional advice is a professional first.

The professional-client relationship is typically characterized by an asymmetry of knowledge; the client seeks the professional's advice precisely because of this asymmetry. The very reason the professional's advice is valuable to the client is thus predicated on the knowledge the professional possesses and the client lacks.<sup>113</sup> The client's interests are only served if the professional communicates information that is accurate (under the knowledge community's current assessment), reliable, and personally tailored to the specific situation of the listener. To bridge the knowledge gap, and to ensure the protection of the client's decisional autonomy interests, the professional has to communicate all information necessary to make an informed decision to the client.<sup>114</sup> Viewed through a lens of public reason from the perspective of the client, the client's expectation is that the professional will not operate based on justifications that are not shared by the profession.

If the client does not receive full information, she may not know what is being withheld, or even that any information is being withheld.<sup>115</sup> Furthermore, the client does not know what is contested professional knowledge and what is not. A patient, for example, may encounter a doctor who for religious reasons will not provide advice on certain treatment options or medications. But the justification for these omissions will not be based on professional knowledge. In the spirit of public reason, the client must reasonably be able to expect that professional advice will be based upon reasons internal to the knowledge community rather than individual, exogenous justifications for departure.

### 3. Disclosure

Could this information deficit be cured by disclosure? The advice-giving professional could tell the client that the advice she dispenses is

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<sup>113</sup> See, e.g., *King v. Christie*, 767 F.3d 216, 232 (3d Cir. 2014) ("Licensed professionals, through their education and training, have access to a corpus of specialized knowledge that their clients usually do not. Indeed, the value of the professional's services stems largely from her ability to apply this specialized knowledge to a client's individual circumstances.").

<sup>114</sup> Haupt, *supra* note 6, at 1271.

<sup>115</sup> See, e.g., Jill Morrison & Micole Allekotte, *Duty First: Towards Patient-Centered Care and Limitations on the Right to Refuse for Moral, Religious or Ethical Reasons*, 9 AVE MARIA L. REV. 141, 148-49 (2010).

limited. The state might even require that any professional whose advice departs from the knowledge community's insights due to exogenous justifications provide such a disclosure. The previous discussion already addressed some potential problems of disclosure in the healthcare infrastructure.<sup>116</sup> A prominent current example of litigation over disclosure requirements involves crisis pregnancy centers.<sup>117</sup> Often linked to a religious organization, the mission of these centers is to dissuade women from terminating their pregnancy.<sup>118</sup> This mission, however, is sometimes obscured from the advice-seeking client.<sup>119</sup>

With respect to the counseling provided at these facilities, the threshold question is whether crisis pregnancy centers engage in commercial, professional, or some other kind of speech. Courts have been ambiguous at best in classifying the advice dispensed at the centers.<sup>120</sup> Nonetheless, some commentators have been quick to analyze the speech as commercial.<sup>121</sup> But doing so may rest on a misconception.<sup>122</sup> Other scholars have called this classification as commercial speech into question. As Jessie Hill notes, “[t]he counseling transaction itself looks like

<sup>116</sup> See *supra* Part I.A.2.

<sup>117</sup> See, e.g., *Evergreen Ass'n Inc. v. City of New York*, 801 F.Supp.2d 197 (SDNY 2011) [hereinafter *Evergreen I*] *aff'd in part and vacated in part* *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014) [hereinafter *Evergreen II*] *cert. denied* 135 S.Ct. 435 (2014); *Centro Tepeyac v. Montgomery County*, 779 F.Supp.2d 456 (D. Md. 2011) [hereinafter *Centro Tepeyac I*] *aff'd* *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184 (4th Cir. 2013) [hereinafter *Centro Tepeyac II*]; *Greater Baltimore Center for Pregnancy Concerns v. Mayor and City Council of Baltimore*, 721 F.3d 264 (4th Cir. 2013). See generally Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1340-51 (2014); B. Jessie Hill, *Casey Meets the Crisis Pregnancy Centers*, 43 J. L. MED. & ETHICS 59 (2015); Kathryn E. Gilbert, Note, *Commercial Speech in Crisis: Crisis Pregnancy Center Regulations and Definitions of Commercial Speech*, 111 MICH. L. REV. 591 (2013); Molly Duane, Note, *The Disclaimer Dichotomy: A First Amendment Analysis of Compelled Speech in Disclosure Ordinances Governing Crisis Pregnancy Centers and Laws Mandating Biased Physician Counseling*, 35 CARDOZO L. REV. 349 (2013); Megan Burrows, Note, *The Cubbyhole Conundrum: First Amendment Doctrine in the Face of Deceptive Crisis Pregnancy Center Speech*, 45 COLUM. HUM. RTS. L. REV. 896 (2014); Alice X. Chen, *Crisis Pregnancy Centers: Impeding the Right to Informed Decision Making*, 19 CARDOZO J.L. & GENDER 933 (2013); Kristen Gallacher, *Protecting Women from Deception: The Constitutionality of Disclosure Requirements in Pregnancy Centers*, 33 WOMEN'S RTS. L. REP. 113 (2011).

<sup>118</sup> Corbin, *supra* note 117, at 1340.

<sup>119</sup> *Id.* at 1340-41.

<sup>120</sup> In *Evergreen II*, 740 F.3d at 245, the Second Circuit left open which standard it applied (“[W]e need not decide the issue, because our conclusions are the same under either intermediate scrutiny . . . or strict scrutiny. . .”). The District Court in *Centro Tepeyac I* found the speech to be “neither commercial nor professional” and applied strict scrutiny. *Centro Tepeyac I*, 779 F.Supp.2d at 463. The Fourth Circuit, upon review, “commend[ed] the court for its careful and restrained analysis.” *Centro Tepeyac II*, 722 F.3d at 192.

<sup>121</sup> See, e.g., Kathryn E. Gilbert, Note, *Commercial Speech in Crisis: Crisis Pregnancy Center Regulations and Definitions of Commercial Speech*, 111 MICH. L. REV. 591 (2013). *But see* Corbin, *supra* note 117, at 1343 (“The courts usually found that the speech was not commercial speech.”).

<sup>122</sup> *Cf.* Haupt, *supra* note 6, at 1264-68 (discussing and rejecting the analogy of commercial and professional speech).

the kind of one-on-one, fiduciary relationship that . . . appears to be the hallmark of professional speech.”<sup>123</sup>

Given the stated mission of the centers, it seems clear that the advice rendered would generally not qualify as comprehensive and accurate professional advice.<sup>124</sup> At the same time, at least in some instances employees at these facilities may be holding themselves out as professionals, leading clients to expect professional advice.<sup>125</sup> Assuming, then, that at least some crisis pregnancy centers should be considered to provide professional advice, the advice rendered must measure up to professional standards.<sup>126</sup> Thus, from a professional speech perspective, regulation of such speech is entirely unproblematic—because it is unprofessional advice to begin with.

What about the disclosure requirements imposed by the state?<sup>127</sup> In principle, such disclosure mechanisms will inform the client of the limited scope of professional advice.<sup>128</sup> Similarly, doctor-patient matching, at least theoretically, might provide an attractive solution.<sup>129</sup> In choosing their doctors, “patients may consider not only the physician’s expertise,

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<sup>123</sup> Hill, *supra* note 117, at 66 (“Unlike other false or unsubstantiated health claims that may be made in various fora, the CPC speech occurs within a counseling relationship in which the listener puts trust in the presumed professional and assumes that the professional will act in her best interests, thus invoking the state’s particularly strong interest in protecting the listener.”).

<sup>124</sup> Corbin, *supra* note 117, at 1342 (“Counseling varies, but most versions would violate medical ethics, as the goal is not to fully and accurately inform women of their medical options but to convince them to forgo abortion by any means necessary.”). See also Erwin Chemerinsky, Op Ed, *In California, Free Speech Meets Abortion*, L.A. TIMES Oct 16, 2015, <http://www.latimes.com/opinion/op-ed/la-oe-1016-chemerinsky-reproductive-fact-act-20151016-story.html> (“Crisis pregnancy centers have been known to spread false medical information and use scare tactics to dissuade their clients from seeking abortions.”); Aziza Ahmed, *Informed Decision Making and Abortion: Crisis Pregnancy Centers, Informed Consent, and the First Amendment*, 43 J.L., MED. & ETHICS 51, 52 (2015) (noting that misinformation “includes telling women that there is a link between abortion and breast cancer, that they will experience psychological distress following abortion, and that there is the possibility for future infertility following an abortion.”).

<sup>125</sup> *Id.* at 1342 and *id.* at 1351 (“Women who respond to ‘Pregnant? Need Help? You have options’ advertisements and are administered pregnancy tests by people in white lab coats are led to believe that medical professionals will give them accurate and impartial medical advice. Instead, they are tricked into hearing false information and an ideological message.”).

<sup>126</sup> This does not mean that there may not be other forms of recourse. Certain activities could qualify as consumer fraud, for example, for the speech that falls into this category.

<sup>127</sup> See California Reproductive FACT Act, Cal Health & Saf Code §123470 et seq. (2015).

<sup>128</sup> Under the California Reproductive FACT Act, licensed healthcare facilities must display the following notice: “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].” *Id.* at §123472 (a)(1). Unlicensed facilities must display the following: “This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.” *Id.* at §123472 (b)(1).

<sup>129</sup> See, e.g., HOLLY FERNANDEZ LYNCH, CONFLICTS OF CONSCIENCE IN HEALTH CARE 79-97 (2008).



but also whether they have shared beliefs or points of view.”<sup>130</sup> However, in practice, there is a significant filtering problem that may lead to inadequate communication of knowledge from doctor to patient. Imagine a doctor informing a patient that, due to his faith, he will dispense only advice that is consistent with his faith. Even if the patient is of the same faith, it is at least questionable whether it will be obvious to her which advice is left out as inconsistent with the professional’s faith. Just as professional knowledge communities are not monolithic, faith communities are not monolithic. What is acceptable in light of religious doctrine for one member of a particular religion may be unacceptable for a coreligionist.<sup>131</sup> But even if disclosure puts the client on notice, the dissenting professional is still not communicating the full range of professional knowledge. And it would reintroduce an element of paternalism—physicians alone deciding on behalf of the patient what information the patient needed to know. On the tort side, this is exactly the situation to be remedied by the doctrine of informed consent.<sup>132</sup> The American Medical Association puts it this way: “The patient’s right to self-decision can be effectively exercised only if the patient possesses enough information to enable an informed choice.”<sup>133</sup> Thus, a disclosure regime only partially cures the problems outlined in the prior discussion.

#### 4. Exemptions

To what extent is the departure from expectations justified by exemptions? Writing more than a decade ago in the context of medical care, health law scholar Alta Charo posed the following set of questions:

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<sup>130</sup> Sonia M. Suter, *The First Amendment and Physician Speech in Reproductive Decision Making*, 43 J.L., MED. & ETHICS 22, 27 (2015).

<sup>131</sup> And even in hierarchically organized religions, individual members may depart from official doctrine in large numbers. See, e.g., Michael Lipks, *Majority of U.S. Catholics’ opinions run counter to church on contraception, homosexuality*, Sept 19, 2013, <http://www.pewresearch.org/fact-tank/2013/09/19/majority-of-u-s-catholics-opinions-run-counter-to-church-on-contraception-homosexuality/>

<sup>132</sup> Suter, *supra* note 130, at 27.

<sup>133</sup> Ahmed, *supra* note 124, at 52 (quoting American Medical Association, “Opinion 8.08 - Informed Consent”). But see Cameron O’Brien & Robin Fretwell Wilson, *When States Regulate Emergency Contraceptives Like Abortion, What Should Guide Disclosure?*, 43 J.L., MED. & ETHICS 72 (2015) O’Brien and Wilson argue that “following professional norms may not yield disclosures consistent with what women say they want to know.” O’Brien & Wilson, *supra* note 133, at 78. In the context of informed consent, they concede that “[g]enerally, the risks of a given health care procedure are scientifically resolvable, and therefore patients can benefit from the measured judgment of health care professionals as a group.” O’Brien & Wilson, *supra* note 133, at 78. However, they argue that abortion is different: “But unlike ordinary medical procedures, what constitutes life or when life begins are subjects that are not scientifically resolvable. A physician armed with medical knowledge cannot provide an answer to women that women themselves cannot supply to these questions. Moreover, despite the allure of professional norms, sometimes deciding what counts as the professional view is not so easy . . .” O’Brien & Wilson, *supra* note 133, at 79-80. The solution, however, is more information rather than less. And disagreements within the profession should be worked out within the knowledge community rather than be decided via state regulation.

What does it mean to be a professional in the United States? Does professionalism include the rather old-fashioned notion of putting others before oneself? Should professionals avoid exploiting their positions to pursue an agenda separate from that of their profession? And perhaps most crucial, to what extent do professionals have a collective duty to ensure that their profession provides nondiscriminatory access to all professional services?<sup>134</sup>

Today, these questions remain largely unanswered—and since then, leading up to the Supreme Court’s decision in *Obergefell v. Hodges*,<sup>135</sup> and certainly in its aftermath, new sites of contestation have emerged.<sup>136</sup> Contemporaneously, conscience exemptions have been at the forefront of legal and political debate for some time now, culminating most recently in the *Hobby Lobby* case.<sup>137</sup> One reaction to the expansion of marriage equality has been to call for exemptions from generally applicable anti-discrimination laws. These would include providers of professional services.<sup>138</sup> The CMDA Same-Sex “Marriage” [sic] Public Policy Statement for instance strongly supports such measures.<sup>139</sup> An expansive body of scholarship addresses the plethora of questions surrounding exemptions.

My point here is narrow and conceptual, and concerns only the site of negotiation for potential exemptions granted to professionals refusing to provide comprehensive professional advice. Exemptions for professionals should be negotiated within the knowledge community. Indeed, historically, this has been the case in the health context: “In medicine, until recently, legislative protection has focused on those objections grounded in professional ethical obligations.”<sup>140</sup> Objections to marriage equality, however, are unlikely to be rooted in professional norms: “Whereas doctors cite their obligation to preserve life to refuse assisted suicide, those who decline to perform IVF for lesbian couples cannot anchor their refusal in professional ethics. Indeed, medical ethics prohibit such acts as impermissible discrimination.” The same is true outside of the medical context. As Elizabeth Sepper notes, “if a tax or family law

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<sup>134</sup> R. Alta Charo, *The Celestial Fire of Conscience – Refusing to Deliver Medical Care*, 352 N. ENGL. J. MED. 2471, 2473 (2005).

<sup>135</sup> 135 S.Ct. 2584 (2015).

<sup>136</sup> See generally Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417 (2012).

<sup>137</sup> 134 S.Ct. 2751 (2014).

<sup>138</sup> Sepper, *supra* note 1, at 724 (“Religious organizations, small businesses, and professionals would be relieved of certain obligations of nondiscrimination and would avoid legal liability.”) and *id.* at 743 ([S]ome objectors could belong to professions characterized by moral complexity and shared ethics (including medicine.)”).

<sup>139</sup> <http://cmda.org/resources/publication/same-sex-marriage-public-policy-statement>

<sup>140</sup> Sepper, *supra* note 1, 726.

attorney objected to serving gay married couples, he or she would be hard pressed to identify the ethical norm supporting the objection.”<sup>141</sup>

A critic might object that the professions do not necessarily have a track record that makes them particularly trustworthy. Consider the following examples: the American Medical Association supported the criminalization of abortion;<sup>142</sup> homosexuality was considered a mental illness by professional groups until the 1970s; members of the American Psychological Association allegedly supported the C.I.A. torture program during the Bush administration;<sup>143</sup> OLC lawyers provided bad advice in the torture memos.<sup>144</sup> How, then, can we trust professionals to properly negotiate conscience exemptions? Perhaps the best answer is that among the finite number of potential decisionmakers, the professions are the least bad option. State legislatures, as the examples throughout this Article show, are increasingly emboldened to explicitly contradict professional knowledge. Courts may lack the expertise to evaluate the full effects of granting certain exemptions on the ability of professionals to provide services. In other words, deference to the professions on negotiating exemptions may be a second best, but still preferable option. And the professions are capable of correcting course.<sup>145</sup> Moreover, by giving the professions the authority to self-regulate, and by decisions made in other areas of the law—most prominently, in the tort law governing professional malpractice—the question has been resolved in favor of the professions despite such concerns beyond the narrow context of conscience exemptions. The idea of symmetry between tort liability and First Amendment protection, then, normatively supports this deference.

### B. *Internal Outliers*

Internal outliers share the knowledge community’s notions of validity, methodology, and intersubjective understanding. Their results deviate from the “mainstream;” yet, their outlier status is based on the application of the agreed-upon methods to the same data, only to reach divergent results. Ultimately, internal outlier status is thus grounded in the

<sup>141</sup> *Id.* at 743.

<sup>142</sup> See Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1000-02 (2007); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 280-318 (1992).

<sup>143</sup> See James Risen, *American Psychological Association Bolstered C.I.A. Torture Program, Report Says*, NEW YORK TIMES, April 30, 2015, <http://nyti.ms/1P9nqK1>; James Risen, *Outside Psychologists Shielded U.S. Torture Program, Report Finds*, NEW YORK TIMES, July 10, 2015, <http://nyti.ms/1fuWwC1>

<sup>144</sup> [http://www.nytimes.com/2010/02/20/us/politics/20justice.html?\\_r=0](http://www.nytimes.com/2010/02/20/us/politics/20justice.html?_r=0)

<sup>145</sup> See, e.g., James Risen, *Psychologists Approve Ban on Role in National Security Interrogations*, NEW YORK TIMES, August 7, 2015 <http://nyti.ms/1OVu4V1>

same set of professional insights. This is the key to understanding that knowledge communities are not monolithic. The same data may be interpreted in several ways. As a matter of tort liability, the resulting professional advice, consequently, is “good” professional advice falling within the range of defensible professional knowledge.<sup>146</sup> Different assessments of shared knowledge, if valid under the agreed upon methodology, will produce good professional advice, even if it departs from the mainstream.

But internal outliers can also produce bad professional advice. If the assessment of the shared knowledge is faulty or based on methodological errors, it will not result in defensible professional advice. One example, discussed in more detail in Part IV, is the study linking certain childhood vaccines to autism.<sup>147</sup>

The more difficult case is that in which outliers assert to be relying on the same knowledge basis without outright falsified or otherwise erroneous use of data. Again, NARTH provides a useful example. Under that group’s account, NARTH and the American Psychiatric Association operate based on different paradigms.<sup>148</sup> The claim that the American Psychiatric Association and other professional organizations in the mental health field have been hijacked by “gay activists” and research contrary to their goals has been silenced and scientists oppressed illustrates that NARTH rejects the same methods of reasoning while also asserting its competence in the same field. Indeed, they portray the debate as one “within mental health professional organizations.”<sup>149</sup> Thus, they do not purport to be part of a different knowledge community. The argument, rather, is that political pressure led to the delisting of homosexuality as a mental disorder from the DSM in 1973: “A review of the history reveals . . . that the decision was not based on science but was the response of an organization under siege by gay activists.”<sup>150</sup> In other words, NARTH accuses the mainstream of having attained outlier status. These competing claims can only be overcome by the knowledge community itself.

Thus, for internal outliers we must decide whose advice clears the bar of good professional advice and whose advice does not. The remainder of this Article is concerned only with internal outliers.

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<sup>146</sup> Haupt, *supra* note 6, at 1284-87.

<sup>147</sup> See *infra* Part IV.A.1.

<sup>148</sup> Kaufman, *supra* note 96, at 425 (“The paradigm of the gay activists holds that psychological theories and practice are social constructs and, therefore, are subject to political negotiation. The paradigm of NARTH holds that treatment provided by therapists should be guided by cumulative clinical experience and valid research carried out by responsible professionals”).

<sup>149</sup> *Id.* at 425.

<sup>150</sup> *Id.* at 433.

### III. DEFINING THE SCOPE OF DEFENSIBLE KNOWLEDGE: OUTLIERS IN TORT LAW AND EVIDENCE

In order to determine the range of acceptable advice within the knowledge community, it is helpful to interrogate two areas of the law that have dealt with similar issues: the tort law of professional malpractice and the law of evidence on expert testimony. What is the scope of good advice for First Amendment purposes? To answer this question, this Part brings these two areas of law into the conversation that have traditionally asked similar questions, and that therefore may provide guidance on how to draw the line between professional and unprofessional advice.

Tort law has long acknowledged that knowledge communities are not monolithic; so has the law of evidence governing the admissibility of expert testimony.<sup>151</sup> Both provide normative support to the position that the distinction between good and bad advice should be drawn by the knowledge community along the lines of a shared methodology and shared ways of knowing and reasoning. Whether advice based on a shared methodology and common ways of knowing and reasoning clears the bar of good advice on the substance, moreover, is also up to the knowledge community. Additionally, from an institutional competence and workability standpoint, both tort law and the law of evidence governing the admissibility of expert testimony illustrate that courts are able to accommodate the fact that a range of knowledge may constitute good advice.

This Part first turns to the treatment of outliers in tort law, which has traditionally accounted for the fact that a range of opinions may be valid for purposes of defending against claims of professional malpractice liability. In particular the “respectable minority” or “two schools of thought” doctrines, which are available as defenses against malpractice claims in many jurisdictions, serve this function. Ultimately, it is up to the knowledge community to determine what constitutes good advice—for malpractice liability and for First Amendment purposes alike. First Amendment protection of professional speech thus constitutes the flip side of imposing malpractice liability. Conceptually, they are two sides of the same coin.<sup>152</sup>

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<sup>151</sup> The two interact in a significant way. *See, e.g.*, Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 472-73 (2005) (“In federal courts, where the decision is legally binding, *Daubert* has become a potent weapon of tort reform by causing judges to scrutinize scientific evidence more closely. Tort reform efforts often focus on medical malpractice, products liability, and toxic torts—all cases in which scientific evidence is likely to play a decisive or at least highly influential role.”).

<sup>152</sup> Haupt, *supra* note 6, at 1285.

This Part then turns to the law of evidence. Robert Post pointed out the parallels between the formation of expert knowledge and the law of evidence: “We rely on expert ‘knowledge’ precisely because it has been vetted and reviewed by those whose judgment we have reason to trust. . . This is explicitly the perspective adopted by federal courts when they determine whether to admit expert testimony . . . under Federal Rule of Evidence 702.”<sup>153</sup> Professionals, importantly, are experts recognized under FRE 702, though the category of experts under that rule is much larger.<sup>154</sup> Whether expert testimony is admissible and subject only to cross-examination and counter-experts, or whether it is to be excluded provides a micro-scale study of the functioning of expert opinions outside the courtroom setting. In the modern litigation setting, “the twentieth-century trial judge turned into an active gatekeeper, charged with the responsibility of screening unreliable scientific evidence away from the jury.”<sup>155</sup> The underlying interests—ascertaining the reliability of opinions—are the same. Thus, both tort law and the law of evidence offer important insights that can guide theorizing the boundaries of First Amendment protection for professional speech.

#### A. Tort Law

Tort law sanctions unprofessional advice as professional malpractice or, in the medical context, as medical malpractice. Processes of professionalization are mirrored in the emergence of tort causes of action for professional malpractice. Take the mental health field as an example. Mental health providers find themselves increasingly exposed to malpractice claims as the field becomes increasingly science-based and standards of care become entrenched.<sup>156</sup> The irony is not lost on com-

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<sup>153</sup> POST, *supra* note 13, at 8. At the same time, Post juxtaposes this understanding of expert knowledge with underlying First Amendment interests: “The continuous discipline of peer judgment, which virtually defines expert knowledge, is quite incompatible with deep and fundamental First Amendment doctrines that impose a ‘requirement of viewpoint neutrality’ on regulations of speech and that apply ‘the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.’” *Id.* at 9. A First Amendment theory of professional speech focused on knowledge communities, however, is able to resolve this tension.

<sup>154</sup> Rule 702. Testimony by Expert Witnesses  
A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

<sup>155</sup> Tal Golan, *Revisiting the History of Scientific Expert Testimony*, 73 BROOK. L. REV. 879, 880 (2008).

<sup>156</sup> See Thomas L. Hafemeister, Leah G. McLaughlin & Jessica Smith, *Parity at a Price: The Emerging Professional Liability of Mental Health Providers*, 50 SAN DIEGO L. REV. 29, 31 (2013).

(continued next page)

mentators who point out that the very fact that treatments have improved creates the opportunity for recipients of such care “to pursue tort claims challenging the adequacy of the care they received.”<sup>157</sup> A variety of mental health care providers may be the target of such claims: physicians such as psychiatrists, as well as psychologists, social workers, and counselors.<sup>158</sup> Conceptually, it is important to remember that the profession sets the standard of care in these cases.<sup>159</sup> While there has been a shift from the customary practice standard, which provided “safety in numbers,” to the reasonably prudent physician standard, which relies more on an evidence-based approach than customary practices,<sup>160</sup> it is the profession itself that determines what constitutes reasonable care, and courts have long awarded deference to the professions in such cases.<sup>161</sup> Expert testimony typically establishes what qualifies as the applicable standard of care.<sup>162</sup>

The development of the standard of care results from contestation within the knowledge community. Scholars acknowledge that, given the “lack of consensus regarding the diagnosis of mental disorders and the appropriate course of treatment for a given diagnosis,” it is difficult to establish the standard of care.<sup>163</sup> In the mental health field, “the defining question in these cases is often whether the mental health provider, practicing in a field rife with uncertainty but in which substantial empirical progress is being made, made an error that should incur liability.”<sup>164</sup> The tort law of professional malpractice, in other words, takes into account the changing nature of the profession.

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*See also* Steven R. Smith, *Mental Health Malpractice in the 1990s*, 28 HOUS. L. REV. 209 (1991). The same was true in medical malpractice in the nineteenth century. *See, e.g.*, Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 FORDHAM L. REV. 943, 950 (2004) (noting that “progress in medical knowledge also led to malpractice suits.”).

<sup>157</sup> Hafemeister, McLaughlin & Smith, *supra* note 156, at 33. *See also* Struve, *supra* note 156, at 948 (“Improvements in medical knowledge and technology have heightened consumer expectations, and have led to lawsuits over imperfect results where previously—under less sophisticated treatment—no suit would have been possible.”).

<sup>158</sup> Hafemeister, McLaughlin & Smith, *supra* note 156, at 36 (“Suits targeting nonphysicians are typically referred to as professional liability claims, while suits aimed at physicians are categorized as medical malpractice claims. Their basic nature is similar, although the terminology may differ somewhat.”).

<sup>159</sup> *Id.* at 38.

<sup>160</sup> *See, e.g.*, Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 173 (2000);

<sup>161</sup> Hafemeister, McLaughlin & Smith, *supra* note 156, at 38-40 (citing *Pike v. Honsinger*, 49 N.E. 760 (N.Y. 1898)).

<sup>162</sup> *Id.* at 43; Struve, *supra* note 156, at 945 (“In many malpractice cases, each element of the claim—standard of care, breach, causation, and damages—requires medical expert testimony. Party-retained experts are the standard source of such expertise in the United States.”).

<sup>163</sup> Hafemeister, McLaughlin & Smith, *supra* note 156, at 43.

<sup>164</sup> *Id.* at 40.

Doctrinally, tort law manifests its acknowledgement that a range of opinions may exist in any given field in the “respectable minority” or “two schools of thought” doctrine, which is a defense against malpractice claims in many jurisdictions.<sup>165</sup> It states that “[w]here two or more schools of thought exist among competent members of the medical profession concerning proper medical treatment for a given ailment, each of which is supported by responsible medical authority, it is not malpractice to be among the minority . . . who follow one of the accepted schools.”<sup>166</sup> This doctrine explicitly accommodates the range of professional opinions. The benchmark for liability will be established by reference to that particular school of thought: “The ‘school of thought’ to which mental health providers belong can have considerable significance in a professional liability suit, as their actions will typically be judged against what a reasonable practitioner of that school of thought would have done under similar circumstances.”<sup>167</sup>

Ambiguity persists both in terms of quantity and quality as courts are hesitant give numerical guidance on how large the minority must be or what counts as recognized and respected knowledge.<sup>168</sup> Especially with respect to new developments, courts have noted that a publication requirement would be problematic.<sup>169</sup> Notwithstanding these ambiguities, the conceptually significant point is that the doctrine accommodates the fact that there may not be a single correct answer when it comes to professional knowledge. Institutionally, moreover, it does not force courts to function as the referee choosing among contested expert knowledge.

Critics suggest that the doctrine permits unproven or ineffective treatment, which is particularly relevant in a field such as mental health care, “where studies of the efficacy of various treatment alternatives are often lacking or highly contentious.”<sup>170</sup> Moreover, the doctrine is important “when traditional treatments are called into question by emerging approaches.”<sup>171</sup> Especially in a divided field such as mental health, where pharmacotherapy and psychoanalysis arguably embody divergent approaches, “if [one] orientation falls out of style or is deemed inappropriate to address a client’s condition, its practitioners may be subject to liability.”<sup>172</sup> If the law were to privilege pharmacotherapy, for instance, it

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<sup>165</sup> *Id.* at 40.

<sup>166</sup> *Id.* at 41 (quoting *Chumbler v. McClure*, 505 F.2d 489, 492 (6th Cir. 1974)).

<sup>167</sup> Hafemeister, McLaughlin & Smith, *supra* note 156, at 72.

<sup>168</sup> Tim Cramm, Arthur J. Hartz & Michael D. Green, *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 WAKE FOREST L. REV. 699, 705 (2002)(citing *Jones v. Chidester*, 610 A.2d 964 (Pa. 1992)).

<sup>169</sup> *See id.* (citing *Gala v. Hamilton*, 715 A.2d 1108 (Pa. 1998)).

<sup>170</sup> *Id.* at 41.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 42.



“would enhance the risk of liability for practitioners who primarily use traditional, psychoanalytic methods of treatment or other nonpharmaceutical approaches. However, it also suggests physicians may face liability for failing to refer to a nonmedical mental health practitioner a patient who might be better served by receiving a treatment modality that is not focused on pharmaceutical agents.”<sup>173</sup> As available treatment options multiply and treatment outcomes improve,<sup>174</sup> individual providers must therefore be aware of the alternatives.

How substantial the disagreement within the profession is, moreover, may itself be contested. In the mental health care context, some see psychotherapy and psychopharmacology not as antithetical but rather as complementary.<sup>175</sup> The courts cannot (and should not) be the arbiters of such disagreement. Rather, this state of internal contestation “suggests that mental health practitioners, regardless of their preferred treatment approach, need to remain aware of and be conversant regarding the potential benefits—and risks—of alternative treatment courses and refer their clients to other practitioners when these alternatives better meet their needs.”<sup>176</sup> Ultimately, this calls for greater engagement with the range of professional knowledge available. Thus, “to avoid liability when there are several courses of treatment available and the most appropriate choice is not clear, mental health providers should obtain a consultation from someone with expertise regarding these alternatives.”<sup>177</sup> And, on the liability side, “failure to obtain a needed referral or consult when treating a client can constitute a breach of the standard of care and result in liability for the provider.”<sup>178</sup>

Here, again, conversion therapy provides a useful example, as “different orientations have grown and faded in popularity over the years, with some discredited and associated professionals found liable when their clients experienced harm. For example, ‘conversion therapy,’ a school of thought that had a significant number of adherents at one time, subsequently fell out of favor, and its practitioners became the target of numerous professional liability claims.”<sup>179</sup>

These examples from contested areas of mental health illustrate how existing tort doctrines deal with the range of professional advice, and

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<sup>173</sup> *Id.* at 42.

<sup>174</sup> *See id.* at 48-52 (providing an overview of the developments in the mental health area since the mid-twentieth century, resulting in the rise of psychopharmacology and psychotherapy).

<sup>175</sup> *See, e.g.,* Richard A. Friedman, *Psychiatry’s Identity Crisis*, NEW YORK TIMES, Jul 17, 2015, SR 5, <http://nyti.ms/1Vc9kNW> (arguing for increased psychotherapy research alongside pharmacological research).

<sup>176</sup> Hafemeister, McLaughlin & Smith, *supra* note 156, at 53-54.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 52.

how emergent and refuted knowledge are treated with respect to professional malpractice claims. The First Amendment can learn from this area in its explicit acknowledgement of a range of good advice. By conceptualizing First Amendment protection as the flip side of malpractice liability, deference to the knowledge community on the substance of advice follows. The takeaway can be boiled down to two simple, but critical, insights: first, there may not be a single right answer but rather a range of valid opinions that constitute good professional advice; second, the knowledge community—rather than the courts or legislatures—determines what clears the bar of good advice.

### B. Evidence

Looking at the treatment of expert witnesses in the law of evidence is particularly instructive because the considerations underlying admissibility of expert testimony in the microcosm of the courtroom essentially mirror considerations underlying the role of the First Amendment. Can the adversary system provide tools, such as cross-examination or counter-evidence, to weed out “bad” expert opinions? These tools mirror the marketplace idea and the notion of speech and counter-speech. Or does proper administration of the system instead require the exclusion of “bad” experts?<sup>180</sup> Doing so would parallel the exclusion of outliers from First Amendment protection. What can First Amendment theory learn from the treatment of experts in the law of evidence?<sup>181</sup>

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<sup>180</sup> See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *Evidence* 664 (5th ed. 2012) (“*Daubert* came amidst increasing concern over ‘junk science’); Frederick Schauer & Barbara A. Spellman, *Is Expert Evidence Really Different?*, 89 NOTRE DAME L. REV. 1, 1-2 (2013)(describing *Daubert* as “setting out a list of factors designed principally to keep so-called junk science out of the courtroom”); Cheng & Yoon, *supra* note 151, at 474 (“Under this view, the real contribution of the *Daubert* decision was not in creating a new doctrinal test, but rather in raising the overall awareness of judges—in all jurisdictions—to the problem of unreliable or ‘junk’ science.”). On “junk science” see generally PETER W. HUBER, *GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991).

<sup>181</sup> This analogy is based on an oversimplification, of course. Even under *Daubert*, the judge as gatekeeper is not intended “to decide that the testimony is right or wrong or to displace the adversary system. That system depends on cross-examination and allowing the other side to offer its own counter-proof, and these mechanisms put before the trier of fact the necessary information to make a considered judgment, to decide which side should carry the day.” MUELLER & KIRKPATRICK, *supra* note 180, at 651. However, “*Daubert* expects judges to decide the question whether the theories, techniques, and data as applied can be trusted.” *Id.* Therefore, the analogy still stands. First Amendment protection of professional speech does not eliminate the mechanisms of speech and counter speech. Second opinions, in other words, remain permissible and relevant. First Amendment protection of professional speech, and corresponding lack of protection for “unprofessional” speech, only limits the range of acceptable advice to that based on the knowledge community’s range of acceptable insights.

The common law largely trusted procedural tools to ensure reliability of expert witnesses' testimony.<sup>182</sup> Since judges were deemed to have inadequate knowledge of the substantive areas of testimony, the common law did not provide the judge tools to substantively evaluate expert testimony. Instead, the adversary system's tools of cross-examination and counter-experts were entrusted to procure reliable testimony. With respect to scientific evidence, however, the standard articulated in *Frye v. United States* demanded "general acceptance in the particular field" governed.<sup>183</sup> In an attempt to reconcile heightened concerns about reliability with persisting skepticism about the judge's role to substantively evaluate scientific evidence, at the most basic level, the *Frye* test "deferred to prevailing thinking and practices in the scientific field."<sup>184</sup>

The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* addressed the standard set forth in the FRE, which superseded *Frye*.<sup>185</sup> *Frye* still governs in a number of states though not in the federal courts and a majority of states where instead the *Daubert* test is followed.<sup>186</sup> Moreover, *Kumho Tire Co., Ltd. v. Carmichael* extended *Daubert* beyond scientific testimony to all expert testimony.<sup>187</sup> Under *Daubert*, "general acceptance" is still one of the factors, though unlike in *Frye*, it is not the only one.<sup>188</sup> Other factors include testing, peer review,

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<sup>182</sup> See generally Golan, *supra* note 155; TAL GOLAN, LAWS OF MEN AND LAWS OF NATURE: THE HISTORY OF SCIENTIFIC EXPERT TESTIMONY IN ENGLAND AND AMERICA (2004). See also Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901) (providing a historical perspective).

<sup>183</sup> *Frye v. United States*, 293 Fed. 1013, 1014 (App.D.C. 1923) ("Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs.") (emphasis added).

<sup>184</sup> PAUL F. ROTHSTEIN, MYRNA S. RADER & DAVID CRUMP, EVIDENCE IN A NUTSHELL 326 (5th ed. 2007).

<sup>185</sup> 509 U.S. 579, 587 (1993) ("[T]he *Frye* test was superseded by the adoption of the Federal Rules of Evidence.").

<sup>186</sup> See generally Edward K. Cheng & Albert Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471 (2005) (finding in "a preliminary study of Connecticut and the EDNY as well as a national study of all available and relevant states . . . no evidence that *Frye* or *Daubert* makes a difference." *Id.* at 511).

<sup>187</sup> 526 U.S. 137, 141 (1999) ("We conclude that *Daubert*'s general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.").

<sup>188</sup> *Daubert* at 589 ("Frye made 'general acceptance' the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials."). See MUELLER & KIRKPATRICK, *supra* note 180, at 650; Mueller, *supra* note, at 989 (noting that "*Daubert* . . . asks directly the question that *Frye* put only indirectly"). See also *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (referencing "general acceptance" in expanding *Daubert*-style judicial gatekeeper function to non-scientific experts).

and error rates.<sup>189</sup> Both *Frye* and *Daubert* are designed to determine the reliability of the science offered.<sup>190</sup>

*Daubert* makes the judge the gatekeeper of scientific and other expert evidence.<sup>191</sup> Where “the law deferred to the scientific community on the question whether answers that scientists provide are sufficiently grounded in theory and practice to be trusted and acted upon by courts” before, *Daubert* asks judges “to independently appraise what science has to offer, in effect screening out evidence offered as science if it is invalid or unreliable.”<sup>192</sup> But the shift of decisionmaking power from the scientific community to the judiciary<sup>193</sup> may have little practical effect. In practice, it is likely that judges under both regimes essentially make the same inquiry, focusing on general acceptance. Indeed, scholars point out that while *Daubert* makes it “the job of courts to appraise science, and courts are not simply to defer to the scientific community on the question whether evidence presented as science is valid and reliable,” they still are charged “to judge science *by the standards that scientists deploy* in judging science.”<sup>194</sup> And in doing so, Rule 706 “allows the court at its discretion to procure the assistance of an expert of its own choosing.”<sup>195</sup>

Studies suggest that “while the *Daubert* decision itself may have raised judicial scrutiny of scientific evidence across the board, courts in practice engage in essentially the same analysis regardless of whether their jurisdiction is formally *Frye* or *Daubert*.”<sup>196</sup> Scholars thus note “that the power of the Supreme Court’s *Daubert* decision was not so much in its formal doctrinal test, but rather in its ability to create greater awareness of the problems of junk science. This suggests that courts apply some generalized level of scrutiny when considering the reliability of

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<sup>189</sup> *Daubert* at 593-94.

<sup>190</sup> Christopher B. Mueller, *Daubert Asks the Right Questions: Now Appellate Courts Should Help Find the Right Answers*, 33 SETON HALL L. REV. 987 (2003); MUELLER & KIRKPATRICK, *supra* note , at 654 (“*Daubert* said the trial judge is to decide whether the evidence is ‘reliable’ enough to be considered.”).

<sup>191</sup> *Daubert* at 589 (“[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”). See also MUELLER & KIRKPATRICK, *supra* note 180, at 649-50.

<sup>192</sup> MUELLER & KIRKPATRICK, *supra* note 180, at 654 (“*Daubert* said the trial judge is to decide whether the evidence is ‘reliable’ enough to be considered. In performing this function, *Daubert* did not want the judge to take either the word of the expert or the representations of the proponent as definitive.”).

<sup>193</sup> Cheng & Yoon, *supra* note 151, at 472.

<sup>194</sup> Mueller, *supra* note 190, at 1007 (emphasis added).

<sup>195</sup> *Daubert*, at 595.

<sup>196</sup> Cheng & Yoon, *supra* note 151, at 478 (citing studies by LLOYD DIXON & BRIAN GILL, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE DAUBERT DECISION (2001) and Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433 (2001)).

scientific evidence, regardless of the governing standard.”<sup>197</sup> Both ask the same fundamental questions regarding general acceptance in terms of quality and quantity: who (or how many) has to accept what?<sup>198</sup> Over time, however, “the range of reasonable difference” will be determined.<sup>199</sup> In *Kumho*, for instance, the expert’s testimony “fell outside the range where experts might reasonably differ.”<sup>200</sup>

The focus on methodology in *Daubert*<sup>201</sup> means that “sharply conflicting expert opinions can all pass muster” and “[a]ccepting the expertise of one witness does not entail rejecting the expertise of another witness who has come to the opposite conclusion.”<sup>202</sup> With respect to the range of acceptable knowledge, “*Daubert* means that proponents may sometimes present new conclusions based on old data that have led others to contrary conclusions.”<sup>203</sup> Yet, the underlying concept of the law of evidence does privilege existing knowledge and, at a very basic level, causes a problem for those ahead of the curve.<sup>204</sup> Indeed, the *Daubert* court itself was cognizant of this issue.<sup>205</sup>

*Daubert* places significant weight on “the scientific method.” This mirrors the knowledge community’s shared notions of validity and common ways of knowing and reasoning. The judge does not decide on the substantive accuracy of the expert’s testimony; likewise, the substantive content of good advice is up to the knowledge community. Both conceptually and from an institutional perspective, then, the law of evidence can inform the treatment of professional advice as a First Amendment matter.

#### IV. PROFESSIONAL AND UNPROFESSIONAL ADVICE IN PRACTICE

Only good advice should be protected as professional speech. Bad advice is subject to professional malpractice liability, and the First Amendment provides no defense. Applying the theory of First Amendment protection for professional speech based on an understanding of the professions as knowledge communities to a range of controversial cases, this Part illustrates how professional and unprofessional advice can be

<sup>197</sup> Cheng & Yoon, *supra* note 151, at 503.

<sup>198</sup> ROTHSTEIN, RADER & CRUMP, *supra* note 184, at 351-52.

<sup>199</sup> *Id.* at 368.

<sup>200</sup> *Kumho* at 153.

<sup>201</sup> *Daubert* at 595 (“The focus, of course, must be solely on principles and methodology, not on the conclusions they generate.”).

<sup>202</sup> MUELLER & KIRKPATRICK, *supra* note 180, at 651.

<sup>203</sup> *Id.* at 650.

<sup>204</sup> ROTHSTEIN, RADER & CRUMP, *supra* note 184, at 352.

<sup>205</sup> *Daubert* at 597 (“We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning authentic insights and innovations.”).

distinguished. All of the instances discussed in the Part concern *internal* outliers. Characteristically, these professionals' advice may depart from the "mainstream" of the knowledge community, but it is nonetheless based on the same data, using shared methods of knowing and reasoning and a shared methodology in evaluating the data.

### A. *Tested and Refuted Knowledge*

The discussion of tested and refuted knowledge provides examples of outright misuse of data, as in the MMR vaccine case, as well as the migration of once-accepted advice from the center to the periphery and eventually outside of the realm of shared knowing and reasoning or, in the language of *Kumho*, "outside the range where experts reasonably can differ."<sup>206</sup> Proponents of conversion therapy, as will be shown, are in the process of shifting from internal to external outliers. The treatment of expert witnesses in recent conversion therapy litigation reflects this shift.

One way in which formerly good professional advice can become unprofessional advice is through advances in the field. Hypotheses are subject to falsification, and when insights are tested and refuted, the result is that knowledge based on this data is rejected by the field. One court summed up this situation as follows: "[T]he theory that homosexuality is a disorder is not novel but – like the notion that the earth is flat and the sun revolves around it – instead is outdated and refuted."<sup>207</sup> Putting aside whether this characterization is exactly on point, the notion underlying this statement is what matters: something that once was believed to be axiomatic has been rejected by the knowledge community.<sup>208</sup>

#### 1. MMR Vaccine

In early 2015, reports of a measles outbreak originating at Disneyland in California brought renewed focus to communities refusing to vaccinate children.<sup>209</sup> Aside from medical reasons that make vaccination impossible,<sup>210</sup> parents cited either religious or "lifestyle" objections. In some instances, those parents relied on a discredited, and subsequently retracted, study that linked childhood mumps, measles and rubella

<sup>206</sup> *Kumho* at 153. See also *supra* note 200 and accompanying text.

<sup>207</sup> *Ferguson v. JONAH*, Opinion relating to Plaintiffs' motion to bar JONAH's experts ("Evidentiary Opinion") at \*25 (Sup.Ct. of N.J. – Hudson County, Feb 5, 2015).

<sup>208</sup> See also Marie-Amélie George, *Expressive Ends: The Substance and Strategy of Conversion Therapy Bans*, 68 ALA. L. REV. \_\_\_\_ (forthcoming 2017) (manuscript on file with author) (tracing the history of the move of conversion therapy out of the medical mainstream).

<sup>209</sup> See, e.g., Editorial, *Reckless Rejection of the Measles Vaccine*, NEW YORK TIMES, Feb 3, 2015, <http://nyti.ms/1zBS2jJ>

<sup>210</sup> Tamar Lewin, *Sick Child's Father Seeks Vaccination Requirement in California*, NEW YORK TIMES, Jan 29, 2015, <http://nyti.ms/1wBRwMc>

(MMR) vaccinations to autism.<sup>211</sup> As Erwin Chemerinsky and Michele Goodwin discuss, there was a noticeable increase in parents refusing to vaccinate their children that was based on a “medically unsupported theory that inoculation could lead to autism among children.”<sup>212</sup>

While the question of objections to vaccinations primarily concerns claims of parental rights and religious exemptions,<sup>213</sup> not professional advice, the discredited autism link illustrates an instance of “tested and refuted” knowledge. The autism link ostensibly was established by interpreting the knowledge community’s shared body of knowledge, using scientific methodology. But the study was flawed,<sup>214</sup> and the knowledge community refuted its assertions.<sup>215</sup> In short, the study failed to survive the knowledge community’s test of falsification. In addition, the author of the study was stripped of his medical license.<sup>216</sup> This, in a sense, represents the easy case of tested and refuted knowledge.

## 2. Conversion Therapy

One particularly rich and currently unfolding example of how previously accepted advice becomes bad advice involves the now-discredited practice of conversion therapy or “sexual orientation change efforts” (SOCE). Over the past two years, California,<sup>217</sup> New Jersey,<sup>218</sup> Oregon,<sup>219</sup> Illinois,<sup>220</sup> and the District of Columbia,<sup>221</sup> have passed legislation prohibiting licensed mental health providers from offering conversion therapy for minors. Similar legislation is pending in a number of other

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<sup>211</sup> Michael Specter, *A Death from Measles*, THE NEW YORKER, July 3, 2015, available at <http://www.newyorker.com/news/news-desk/a-death-from-measles>; Clyde Haberman, *A Discredited Vaccine Study’s Continuing Impact on Public Health*, NEW YORK TIMES, Feb 1, 2015, available at <http://nyti.ms/1z3vHen> (both discussing AJ Wakefield et al., RETRACTED: *Ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children*, 351 THE LANCET 637 (1998) available at <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2897%2911096-0/fulltext>). See also The Editors of the Lancet, *Retraction—Ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children*, 375 THE LANCET 445 (2010).

<sup>212</sup> Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 591-92 (2016) (discussing the effects of the discredited Wakefield study).

<sup>213</sup> See *id.* at 604-11 (explaining “why neither the claimed right of religious freedom nor the asserted right of parents to control the upbringing of their children justifies a constitutional exemption from compulsory vaccination requirements.” *Id.* at 604).

<sup>214</sup> *Id.* at 591.

<sup>215</sup> *Id.* at 592 (noting that “subsequent research disproved Wakefield’s findings”).

<sup>216</sup> <http://www.nytimes.com/2015/02/08/opinion/sunday/nicholas-kristof-the-dangers-of-vaccine-denial.html>

<sup>217</sup> Cal. Bus. & Prof. Code D. 2, Ch. 1, Art. 15 (2015).

<sup>218</sup> N.J. Rev. Stat. Title 45 § 45:1-54 (2014).

<sup>219</sup> Or. Rev. Stat. § 675.070 et seq. (2015).

<sup>220</sup> Youth Mental Health Protection Act, Public Act 099-0411 (2016).

<sup>221</sup> D.C. Official Code § 7-1231.01 et seq. (2015).

states,<sup>222</sup> and federal legislation was introduced in the House in May 2015.<sup>223</sup> The Governor of New York implemented measures aimed at ending conversion therapy by executive action.<sup>224</sup> The Obama administration<sup>225</sup>—including, most importantly for present purposes, the Surgeon General<sup>226</sup>—have come out against conversion therapy. Federal appellate courts upheld the California and New Jersey legislation, respectively, but took diametrically opposed approaches in doing so.<sup>227</sup> In addition to constitutional challenges under the free speech clause of the First Amendment, the legislation has been upheld against a free exercise and establishment clause challenge.<sup>228</sup>

From the perspective of mental health professionals, advising minors to subject themselves to conversion therapy has become unprofessional advice.<sup>229</sup> In response to an Oklahoma bill to protect conversion therapy,

<sup>222</sup> See National Center for Lesbian Rights, #BornPerfect: Laws & Legislation by State, <http://www.nclrights.org/bornperfect-laws-legislation-by-state/>

<sup>223</sup> H.R.2450 (introduced 5/19/2015). Moreover, pending resolutions H.Con.Res.36 “Expressing the sense of Congress that conversion therapy, including efforts by mental health practitioners to change an individual’s sexual orientation, gender identity, or gender expression, is dangerous and harmful and should be prohibited from being practiced on minors” (introduced 4/14/2015) and S.Res.184 “A resolution expressing the sense of the Senate that conversion therapy, including efforts by mental health practitioners to change the sexual orientation, gender identity or gender expression of an individual, is dangerous and harmful and should be prohibited from being practiced on minors” (introduced 5/21/2015) address the issue.

<sup>224</sup> Jesse McKinley, *Cuomo Moves Against Therapy That Claims to Make Gay Children Straight*, N.Y. TIMES Feb 6, 2016, <http://nyti.ms/20gA5jM>

<sup>225</sup> Valerie Jarrett, Official White House Response to Enact Leelah’s Law to Ban All LGBTQ+ Conversion Therapy Response to Your Petition on Conversion Therapy, <https://petitions.whitehouse.gov/response/response-your-petition-conversion-therapy>

<sup>226</sup> Sunnivie Brydum, *U.S. Surgeon General Opposes Conversion Therapy*, THE ADVOCATE, April 10, 2015, <http://www.advocate.com/ex-gay-therapy/2015/04/10/watch-us-surgeon-general-opposes-conversion-therapy>

<sup>227</sup> *Compare* Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013) (upholding California conversion therapy law as permissible regulation of *conduct*) with King v. Christie, 767 F.3d 216 (3d Cir. 2014) (upholding New Jersey conversion therapy law as permissible regulation of *speech*). Despite the circuit split on this issue, the Supreme Court denied certiorari in King v. Christie, 135 S.Ct. 2048 (2015).

<sup>228</sup> See Welch v. Brown, 58 F.Supp.3d 1079 (E.D. Cal. 2014) (upholding California conversion therapy law against Free Exercise and Establishment Clause challenge).

<sup>229</sup> See, e.g., King v. Christie, Brief of Amici Curiae American Association for Marriage and Family Therapy-New Jersey Division, New Jersey Psychological Association, National Association of Social Workers, National Association of Social Workers, New Jersey Chapter, and New Jersey Psychiatric Association Supporting Defendants-Appellees Urging Affirmance, 2014 WL 991477 (2014) at 4 (stating that the New Jersey conversion therapy law “reflects a broad consensus of responsible medical and mental health experts that efforts to change a child’s sexual orientation may cause harm to the child, and that the use of Sexual Orientation Change Efforts (‘SOCE’) provides no benefits that derive from SOCE itself and that could not be achieved through competent professional counseling that does not attempt to change sexual orientation. . . . [T]he statute is based on the current scientific understanding that homosexuality is not a mental disorder that can or should be ‘cured.’”). The amicus brief concludes:

As the medical and mental health communities have made clear for the last forty years, homosexuality is not a mental disorder in need of a “cure.” The medical and mental health communities have advised against practices that attempt to change an individual’s sexual orientation because such attempts can cause long-term harm, particularly in the case of minors.

(continued next page)



members of the profession articulated their opposition based on professional insights.<sup>230</sup>

In *Ferguson et al. v. JONAH (Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality)*, a New Jersey court after jury trial found conversion therapy providers to be engaged in consumer fraud.<sup>231</sup> This case is particularly instructive precisely for its treatment of expert testimony and the limits set to the scope of valid professional knowledge. In the course of that litigation, experts called to testify on the benefits of conversion therapy were excluded, illustrating how a once accepted practice has been eliminated from the canon of professional knowledge—from being offered by internal outliers to being offered by external outliers. While the pretrial ruling has no formal precedential effect, it did make the national news as a noteworthy development in conversion therapy litigation.<sup>232</sup>

Plaintiffs in the case argued that the expert testimony should be excluded because, first, “it is a scientific fact that homosexuality is not a disorder, but rather a normal variation of human sexuality, and thus any expert opinion concluding that homosexuality is a disorder is inadmissible.”<sup>233</sup> They based this assertion on the American Psychiatric Association’s 1973 removal of homosexuality as a mental disorder from the Diagnostic and Statistical Manual of Mental Disorders (DSM), which was followed by professional organizations domestically and worldwide.<sup>234</sup> Second, plaintiffs argued, “because the belief that homosexuality is a mental disorder is false and lacks any basis in science, any expert opinion that is derived from that false initial premise is unreliable and should be excluded.”<sup>235</sup> Moreover, they note that “because their belief that homosexuality is a disorder conflicts with the understanding held by every legitimate professional association, these experts have banded together under NARTH’s umbrella.”<sup>236</sup> JONAH, by contrast, claimed that “reli-

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*Id.* at 23.

<sup>230</sup> William S. Meyer, Duke psychiatry professor: *Sally Kern’s conversion therapy bill would do irreparable harm to Oklahoma children*, TULSA WORLD, March 8, 2015.

<sup>231</sup> Erik Eckholm, *In a First, New Jersey Jury Says Group Selling Gay Cure Committed Fraud*, NEW YORK TIMES, June 25, 2015, A18, available at <http://nyti.ms/1JmFMJv>.

<sup>232</sup> See, e.g., Jason Grant, *Selling Cure for Being Gay Found Illegal in New Jersey*, NEW YORK TIMES, Feb 13, 2015, <http://nyti.ms/1MkMaR0>; Olga Khazan, *Can Sexuality Be Changed?* THE ATLANTIC, Jun 3, 2015, <http://www.theatlantic.com/health/archive/2015/06/can-sexuality-be-changed/394490/>; Olga Khazan, *When the Therapist Is A Quack*, THE ATLANTIC, Jun 4, 2015, <http://www.theatlantic.com/health/archive/2015/06/when-your-therapist-is-a-quack/394886/>; Olga Khazan, *The End of Gay Conversion Therapy*, THE ATLANTIC, Jun 26, 2015, <http://www.theatlantic.com/health/archive/2015/06/the-end-of-gay-conversion-therapy/396953/>.

<sup>233</sup> *Ferguson v. JONAH*, Evidentiary Opinion at \*12 (Sup.Ct. of N.J. – Hudson County, Feb 5, 2015).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at \*12-13

<sup>236</sup> *Id.* at 13. See also *supra* notes 93-96 and accompanying text (discussing the formation of NARTH in opposition to the American Psychiatric Association’s stance on homosexuality).

ance on the DSM is misplaced because the removal of homosexuality was a political, rather than scientific, decision.”<sup>237</sup> Moreover, defendants insisted on “their experts’ clinical experience in SOCE” and the soundness of their methods.<sup>238</sup>

In excluding the expert witnesses, the judge stated: “The overwhelming weight of scientific authority concludes that homosexuality is not a disorder or abnormal. The universal acceptance of that scientific conclusion – save for outliers such as JONAH – requires that any expert opinions to the contrary must be barred.”<sup>239</sup> Turning to the question of reliability, since the litigation occurred in New Jersey state court, the *Frye* standard governed.<sup>240</sup> Applying the general acceptance standard, the court noted that “the DSM is unquestionably authoritative in the mental health field,” citing several instances in which other courts have found so.<sup>241</sup> With respect to the allegation that the decision to remove homosexuality from the DSM was political rather than scientific, the court stated that “a trial court should not substitute its judgment for that of the relevant scientific community.”<sup>242</sup> Nonetheless, the court did note in a footnote that “the APA does, in fact, provide a scientific reason for its decision to remove homosexuality as a disorder.”<sup>243</sup> Whether the APA’s decision to “generally accept that homosexuality is not a disorder” was correct, however, “is not a proper inquiry for a court.”<sup>244</sup>

Expanding on the meaning of “general acceptance,” the court noted that it “is not an end in itself. Nevertheless, general acceptance constitutes strong – some might say conclusive – indicia of whether a sufficient level of reliability has been achieved.”<sup>245</sup> Indeed, “[c]ountless organizations have followed the APA’s lead in removing homosexuality from its listings of mental disorders.”<sup>246</sup> Although JONAH argued that a more flexible standard governing “a new technique or theory” should apply,<sup>247</sup> the court noted that this case presented the exact opposite situation: while

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<sup>237</sup> *Ferguson v. JONAH*, Evidentiary Opinion at \*15 (Sup.Ct. of N.J. – Hudson County, Feb 5, 2015).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at \*19.

<sup>240</sup> *Id.* at \*21 (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) and *id.* at \*25 (“The correct legal standard here is *Frye*’s general acceptance standard”).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at \*22 (internal quotation marks omitted).

<sup>243</sup> *Id.* at \*22 n.3.

<sup>244</sup> *Id.* at \*22 (“It is not a proper inquiry for a court to determine the correctness of the APA’s decision to generally accept that homosexuality is not a disorder, and no proper basis has been advanced on which a court may reassess the scientific accuracy of the psychiatric categorization of homosexuality.”).

<sup>245</sup> *Id.* at \*23 (internal citations omitted).

<sup>246</sup> *Id.* (further noting that “JONAH hardly can argue that all of these organizations – including a federal appellate court – were the victims of manipulation by ‘gay lobbying’ groups. Regardless, it is not up to this court to decide that question.”).

<sup>247</sup> *Id.* at \*24.

homosexuality was listed in the DSM in the past, it has been removed.<sup>248</sup> And “JONAH has not identified any case that provides a standard for the admission of obsolete and discredited scientific theories. By definition, such theories are unreliable and can offer no assistance to the jury, but rather present only confusion and prejudice.”<sup>249</sup>

Moreover, the court addressed the question of unanimity with respect to the general acceptance standard, concluding that “JONAH also cannot point to the existence of NARTH to counter the general acceptance standard. This argument, which assumes that general acceptance requires unanimity, is incorrect.”<sup>250</sup> Thus, “general acceptance does not depend on unanimous or universal agreement within the scientific community.”<sup>251</sup> “The existence of a minority of conversion therapy proponents does not and cannot negate the fact that the DSM and its exclusion of homosexuality are generally accepted in the mental health field. Furthermore, a group of a few closely associated experts cannot incestuously validate one another as a means of establishing the reliability of their shared theories.”<sup>252</sup>

Finally, the court did take up the methodology question: “Although not necessary to this decision, one cannot fail but notice that several of the JONAH experts’ reports are riddled with methodological errors that also render their opinions inadmissible; these include the refusal to consider studies that do not support their views, and the plagiarism of another JONAH expert’s prior work without independent research or analysis.”<sup>253</sup> In the end, the court rightly deferred to the knowledge community’s insights. In excluding the expert witnesses, it mirrored the current state of the profession’s standard of good professional advice.

### B. *Emergent Knowledge*

The discussion of emergent knowledge that follows illustrates a shift in the opposite direction: using medical marijuana as an example, outliers’ advice can become more widely accepted in the field. The “guy ahead of the curve”-problem poses one of the most vexing puzzles. The medical marijuana cases illustrate the shift from the fringe of the knowledge community toward the center—when the mainstream of the profession subsequently catches up with the “guy ahead of the curve.” As already mentioned, as a matter of evidence law, the *Daubert* court recog-

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<sup>248</sup> *Id.* at \*25.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at \*26.

<sup>252</sup> *Id.* (internal citations omitted).

<sup>253</sup> JONAH at 26 n. 4.

nized that an approach that privileges existing knowledge harbors the risk of stifling innovation. Here, the perfect congruence of First Amendment protection and tort liability is challenged.

State regulation of off-label drug use provides an example of innovative or generally accepted advice within the knowledge community that conflicts with a state-imposed regulatory scheme restricting professional advice. The off-label drug use example illustrates how state regulation and professional insights collide when the state seeks to restrict professional advice. Here, the need for a dynamic system of deference to the knowledge community becomes clear.

### 1. Medical Marijuana

In contrast to tested and refuted knowledge, emergent knowledge by definition is generally untested. The medical marijuana cases provide an example of how emergent and untested knowledge can gain traction within the knowledge community and advance to an accepted position. One key question in this context is whether marijuana has medical use, and who determines whether it does or does not.<sup>254</sup> The federal government continues to adhere to the view “that marijuana has no currently accepted medical use in treatment in the United States.”<sup>255</sup> The D.C. Circuit affirmed the government’s determination.<sup>256</sup> But the medical community’s views on medical marijuana have shifted over time.<sup>257</sup> The First Amendment question, then, is whether doctors’ advice regarding the benefits of medical marijuana is protected professional speech, or whether the government’s determination makes it unprofessional advice.

A California initiative, the Compassionate Use Act, took effect in 1996, providing a “right to obtain and use marijuana for medical purposes.” The recommendation for use had to be made “by a physician who has determined that the person’s health would benefit from the use of

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<sup>254</sup> The Controlled Substances Act, 21 U.S.C. 801 et seq. classifies drugs in five Schedules. Schedule I controlled substances have “no currently accepted medical use in treatment in the United States.” See, e.g., *Conant v. McCaffrey*, 2000 WL 1281174 at \*1 (N.D. Cal. 2000) (discussing the classification of drugs in the medical marijuana context).

<sup>255</sup> Editorial, *A Sensible Bill on Medical Marijuana*, NEW YORK TIMES, March 11, 2015, A24 (<http://nyti.ms/19bdH8p>). See also *Conant v. McCaffrey*, 172 F.R.D. 681, 686 (N.D. Cal. 1997) (issuing preliminary injunction limiting government’s ability to prosecute physicians who recommend use of medical marijuana).

<sup>256</sup> See *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131 (D.C. Cir. 1994).

<sup>257</sup> Philip M. Boffey, *What Science Says About Marijuana*, NEW YORK TIMES, July 30, 2014, (<http://nyti.ms/1o5yvBE>); Aaron E. Carroll, *How ‘Medical’ Is Marijuana?* NEW YORK TIMES, July 20, 2015, (<http://nyti.ms/1KfYwby>) (discussing Penny F. Whiting, Robert F. Wolff, Sohan Deshpande, Marcello Di Nisio, Steven Duffy, et al., *Cannabinoids for Medical Use: A Systematic Review and Meta-Analysis*, 313 J. AM. MED. ASS’N 2456 (2015)). See also Deepak Cyril D’Souza, Mohini Ranganathan, Editorial, *Medical Marijuana: Is the Cart Before the Horse?* 313 J. AM. MED. ASS’N 2431 (2015).

marijuana.”<sup>258</sup> In the California cases, the district court and the Ninth Circuit alike noted that what is at stake is doctors’ ability “on an individualized basis, to give advice and recommendations.”<sup>259</sup> Pursuant to federal policy, “the government confirmed that it would prosecute physicians, revoke their prescription licenses, and deny them participation in Medicare and Medicaid for recommending medical marijuana.”<sup>260</sup> With respect to the doctors’ First Amendment claim, plaintiffs asserted that the policy prevents them from “offer[ing] patients their best medical judgment regarding the use of marijuana to treat disease.”<sup>261</sup> The government clarified its position, stating that it “does not prohibit physicians from discussing the risks and benefits of marijuana” and that it did not seek to “prevent physicians from communicating their professional judgments regarding the risks and benefits of any course of treatment.”<sup>262</sup> Nonetheless, physicians are not allowed to “provide their patients with oral or written statements in order to enable them to obtain controlled substances in violation of federal law.”<sup>263</sup>

Granting a preliminary injunction, the district court noted that “physicians contend they have censored their medical advice to patients,” and “patients allege that as a result of the government’s policy, they no longer trust in their physicians’ advice.”<sup>264</sup> Finding the speech to be protected by the First Amendment, the court concluded that the government may only prosecute California physicians if “it has probable cause to charge under the federal aiding and abetting and/or conspiracy statutes.”<sup>265</sup> The court thus protected the scope of professional advice consistent with the knowledge community’s emergent knowledge, despite ongoing scientific debate. The Ninth Circuit subsequently agreed with the district court’s assessment on the First Amendment issue, noting that “[t]he government policy does . . . strike at core First Amendment interests of doctors and patients.”<sup>266</sup>

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<sup>258</sup> Conant v. McCaffrey, at 685.

<sup>259</sup> *Id.* at 686. See also Conant v. Walters, 309 F.3d 629, 631 (9th Cir. 2002).

<sup>260</sup> Conant v. McCaffrey, at 686. The federal policy was upheld in Pearson v. McCaffrey, 139 F.Supp.2d 113 (D.C. Cir. 2001).

<sup>261</sup> Conant v. McCaffrey, at 686.

<sup>262</sup> *Id.* at 688.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 690 (further noting as one of the results that “physicians . . . are unable to advise patients about safe use of marijuana or guide proper use of marijuana for treatment” *id.* at 691).

<sup>265</sup> *Id.* at 701; Conant v. McCaffrey, 2000 WL 1281174 (N.D. Cal. 2000) (granting in part and denying in part cross-motions for summary judgment; dissolving preliminary injunction; entering permanent injunction). See also Haupt, *supra* note 6, at 1300-01 (discussing the question of First Amendment protection of doctors’ speech in these cases).

<sup>266</sup> Conant v. Walters, at 636 (“An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients.”).

In these cases, the characterization of medical knowledge on the benefits of marijuana reveals the changing nature of the profession's insights. In 1997, the district court stated that "a majority of Californians, and many physicians, apparently believe that medical marijuana may be a safe and effective treatment."<sup>267</sup> By the time the controversy reached the Ninth Circuit, Judge Alex Kozinski characteristically made the point very clear:

To those unfamiliar with the issue, it may seem faddish or foolish for a doctor to recommend a drug that the federal government finds has "no currently accepted medical use in treatment in the United States" . . . But the record in this case, as well as the public record, reflect *a legitimate and growing division of informed opinion* on this issue. A surprising number of health care professionals and organizations have concluded that the use of marijuana may be appropriate for a small class of patients who do not respond well to, or do not tolerate, available prescription drugs.<sup>268</sup>

Summarizing professional findings on the matter,<sup>269</sup> he concluded that "there is a genuine difference of expert opinion on the subject, with significant scientific and anecdotal evidence supporting both points of view."<sup>270</sup> For patients, "obtaining candid and reliable information about a possible avenue of relief is of vital importance."<sup>271</sup> On a matter of emergent knowledge, then, the First Amendment rightly protects differing opinions as good professional advice.

Beyond the First Amendment context, the shift from the periphery to the core of professional knowledge is also reflected to a certain extent in the treatment of expert testimony in *United States v. Oakland Cannabis Buyers' Cooperative*<sup>272</sup> and *Gonzales v. Raich*.<sup>273</sup> OCBC argued that "a drug may not yet have achieved general acceptance as a medical treatment but may nonetheless have medical benefits to a particular patient or class of patients."<sup>274</sup> Justice Thomas, writing for the Court, however, "decline[d] to parse the statute in this manner."<sup>275</sup> As Jessie Hill noted, "despite the fact that the patients in *OCBC* presented evidence, unrefuted by the Government, that marijuana may have legitimate medical uses and may be the only appropriate treatment for some patients, the Court re-

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<sup>267</sup> Conant v. McCaffrey, at 686.

<sup>268</sup> Conant v. Walters, 640-41 (Kozinski, J., concurring) (emphasis added).

<sup>269</sup> *Id.* at 641-42.

<sup>270</sup> *Id.* at 642.

<sup>271</sup> *Id.*

<sup>272</sup> 532 U.S. 483 (2001) (holding that no implied medical necessity exception exists for the Controlled Substances Act).

<sup>273</sup> 545 U.S. 1 (2005) (holding that application of the Controlled Substances Act to intrastate growers and users of medical marijuana does not violate the Commerce Clause).

<sup>274</sup> 523 U.S. 493.

<sup>275</sup> *Id.*

fused to consider that evidence, finding itself to be powerless to override a conclusory and controversial congressional finding.”<sup>276</sup>

Four years later, in *Gonzales v. Raich*, a commerce clause case, Justice Stevens noted that “[t]he case is made difficult by respondents’ strong arguments that they will suffer irreparable harm, because despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes.”<sup>277</sup> Justice Thomas in dissent further points out that “the Medical Board of California has issued guidelines for physicians’ cannabis recommendations, and it sanctions physicians who do not comply with the guidelines.”<sup>278</sup> These cases did not hinge on the knowledge community’s professional knowledge, but they demonstrate how courts do or do not deal with changing professional insights when emergent knowledge is at issue.

## 2. Off-Label Use

In order to gain approval by the Food and Drug Administration (FDA), prescription drugs must pass rigorous clinical trials. Upon approval of the medication, the FDA approves labeling that includes the chemical composition, the mechanism of action, and the regimen upon which approval is based. But once the FDA has approved the drug, physicians are free to prescribe it to treat illnesses and patients beyond those in the trials.<sup>279</sup> This is known as “off-label” or “evidence-based” use; as of 2008, over one-fifth of prescriptions in the United States fell into this category.<sup>280</sup>

Off-label use raises numerous First Amendment questions. In addition to free speech questions related to the marketing of drugs,<sup>281</sup> there is a First Amendment issue directly at the heart of professional advice. Scholars have noted that “if FDA were to proscribe off-label uses of

<sup>276</sup> B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 294 (2007).

<sup>277</sup> 545 U.S. 11.

<sup>278</sup> Id. At 62 (Thomas, J., dissenting).

<sup>279</sup> See 21 U.S.C. § 396 (“Nothing in this chapter shall be construed to limit or interfere with the authority of a health care practitioner to prescribe or administer any legally marketed device to a patient for any condition or disease within a legitimate health care practitioner-patient relationship.”).

<sup>280</sup> Jacob Rogers, *Freedom of Speech and the FDA’s Regulation of Off-Label Drug Uses*, 76 GEO. WASH. L. REV. 1429 (2008).

<sup>281</sup> Generally, off-label uses may not be used for promotion of prescription drugs which raises First Amendment questions. See, e.g., Christopher Robertson, *When Truth Cannot Be Presumed: The Regulation of Drug Promotion Under and Expanding First Amendment*, 94 B.U. L. REV. 545 (2014); Steven R. Salbu, *Off-Label Use, Prescription and Marketing of FDA-Approved Drugs: An Assessment of Legislative and Regulatory Policy*, 51 FLA. L. REV. 181 (1999); Dina McKenney, Note, *Off-Label Drug Promotion and the Use of Disclaimers*, 92 TEX. L. REV. 231 (2013); Gina Shaw, *Is Off-Label Marketing a First Amendment Right?*, 9 NEUROLOGY TODAY 20 (2009); Rodney A. Smolla, *Off-Label Drug Advertising and the First Amendment*, 50 WAKE FOREST L. REV. 81 (2015).

drugs, it would interfere with physicians' judgments about how to treat their patients, which is forbidden by the [Food, Drug, and Cosmetics Act]."<sup>282</sup> But doctors' freedom to prescribe drugs off-label came into direct conflict with state regulation to limit this ability in the abortion context. Several states, including Texas,<sup>283</sup> Ohio<sup>284</sup> and Oklahoma,<sup>285</sup> passed legislation requiring doctors to follow FDA protocol for medication abortions. Yet, the Oklahoma Supreme Court noted that off-label use is "common, permissible, and can be required by good medical practice."<sup>286</sup> This type of legislation represents an instance of the legislature determining against the insights of the profession what should be considered good professional advice. In effect, the legislature in these cases codifies previously good advice that has attained internal outlier status by subsequent innovation and advances in the field. Professional advice based on this emergent knowledge has become good advice.

The FDA approved mifepristone (RU-486) in 2000. In doing so, it "approved a specific regimen for administering mifepristone, but soon thereafter abortion providers began to change the protocol."<sup>287</sup> After the drug was approved, "additional clinical trials led to the development of new protocols for administering" it.<sup>288</sup> Under the new regimen, the dosage of mifepristone was reduced to one-third of the original dosage. Moreover, women could self-administer a second drug at home. The length of time during which the drugs could be administered was extended under the new regimen.<sup>289</sup> The second drug, "Misoprostol has not been approved by the FDA for use in abortions but has been approved by the FDA to treat ulcers."<sup>290</sup> An alternative evidence-based regimen "involve[s] the use of methotrexate," a drug whose "FDA-approved label . . . is silent on abortion-related uses."<sup>291</sup> The Oklahoma and Ohio legisla-

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<sup>282</sup> Robertson, *supra* note 281, at 548.

<sup>283</sup> See *Planned Parenthood of Greater Texas v. Abbott*, 748 F.3d 583, 600-605 (5th Cir. 2014) (upholding Texas law requiring physicians to follow FDA protocol).

<sup>284</sup> See *Planned Parenthood Southwestern Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012) (upholding Ohio law requiring adherence to the FDA protocol).

<sup>285</sup> See *Oklahoma Coalition for Reproductive Justice v. Cline*, 292 P.3d 27 (S.Ct. Okla. 2012) (holding Oklahoma statute facially unconstitutional) *cert. granted* 133 S.Ct. 2887 (2013) *certified* *Cline v. Oklahoma Coalition for Reproductive Justice*, 313 P.3d 253 (S.Ct. Okla. 2013) *cert. dismissed as improvidently granted* 134 S.Ct. 550 (2013).

<sup>286</sup> *Cline v. Oklahoma Coalition for Reproductive Justice*, 313 P.3d 253, 258 (S.Ct. Okla. 2013).

<sup>287</sup> Caitlin E. Borgman, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047, 1056 (2014).

<sup>288</sup> *Cline* at 257.

<sup>289</sup> *Id.* at 258.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*



tures passed legislation requiring that doctors follow the FDA protocol.<sup>292</sup>

In requiring doctors to prescribe drugs contrary to professional practice, the legislation seeks to bind doctors to the uses indicated on the label. In short, the legislature determines against the knowledge community's insights what constitutes good professional advice. Stated another way, the state requires doctors to dispense unprofessional advice. In these cases, the courts did not consider the First Amendment implications of limiting professional advice. Given the newly fractured landscape among federal appellate courts regarding the proper interpretation of the First Amendment implications of *Planned Parenthood v. Casey*,<sup>293</sup> however, this area of the law appears to be in flux.<sup>294</sup> The Fourth Circuit fundamentally challenged the Fifth and Eighth Circuits' positions on professional speech in the abortion context. Judge J. Harvie Wilkinson noted that "[t]he single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions."<sup>295</sup> With respect to the relationship between the undue burden standard and the First Amendment, he further pointed out: "The fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment."<sup>296</sup> In short, First Amendment protection of professional speech in the abortion context is unresolved by *Casey* and newly disputed among the circuits.

The theory of professional speech focused on the professions as knowledge communities resolves the issue in favor of First Amendment

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<sup>292</sup> The FDA changed the mifepristone guidelines in spring 2016. See <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm111323.htm>. See also Sabrina Traversi, *New F.D.A. Guidelines Ease Access to Abortion Pill*, NEW YORK TIMES, March 30, 2016, A1, <http://nyti.ms/22OWdIM>

<sup>293</sup> 505 U.S. 833 (1992). The somewhat cryptic passage in *Casey* dealing with the First Amendment states:

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard* . . . , but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe* . . . . We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

*Id.* at 884.

<sup>294</sup> See *Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014) (rejecting the Fifth and Eighth Circuits' interpretation of constitutionality of abortion regulations under the First Amendment) *cert. denied sub nom Walker-McGill v. Stuart*, 135 S.Ct. 2838 (2015). See also Scott W. Gaylord, Fourth Circuit Survey, Comment, *Casey and the First Amendment: Revisiting an Old Case to Resolve a New Compelled Speech Controversy*, 66 S.C. L. REV. 951 (2015).

<sup>295</sup> *Stuart v. Camnitz* at 249.

<sup>296</sup> *Id.*

protection of professionals' advice from state interference. The FDA as licensing body, moreover, should not determine the limits of professional advice.<sup>297</sup> In fact, this is what the Food, Drug and Cosmetics Act explicitly states: "Nothing in this chapter shall be construed to limit or interfere with the authority of a health care practitioner to prescribe or administer any legally marketed device to a patient for any condition or disease within a legitimate health care practitioner-patient relationship."<sup>298</sup>

Citing this provision, the Oklahoma Supreme Court noted the departure in the abortion context from the usual deference awarded to physicians' professional judgment.<sup>299</sup> Permitting off-label use acknowledges the fact that professional knowledge is not static: "Researchers continue to perform clinical trials, doctors continue to gain experience, and widespread use of a particular treatment allows the medical community to collect data about side effects, alternative doses, and potential new uses for treatments."<sup>300</sup> Leading professional organizations have endorsed the type of off-label used prohibited by the Oklahoma legislation.<sup>301</sup> The court cites the FDA's statement that "[g]ood medical practice and the best interests of the patient require that physicians use legally available drugs, biologics and devices according to their best knowledge and judgment."<sup>302</sup> This is true in all other areas of the law, and it is, in fact, "unprofessional conduct" to prescribe, dispense, or administer "drugs in excess of the amount considered good medical practice."<sup>303</sup> In conclusion, the Oklahoma Supreme Court emphasized the role of the physician's "knowledge and experience."<sup>304</sup> It agreed with the district court that the legislature's restrictions are "completely at odds with the standard that governs the practice of medicine."<sup>305</sup> The First Amendment, consequently, should provide a shield against the state's requirement that professionals dispense unprofessional advice. Ultimately, the theory of professional speech and advice-giving offered here supports the Okla-

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<sup>297</sup> The divergence was eliminated in the 2016 updated guidelines. Traversi, *supra* note 292 ("The American Congress of Obstetricians and Gynecologists said in a statement that it was 'pleased that the updated F.D.A.-approved regimen for mifepristone reflects the current available scientific evidence and best practices.'").

<sup>298</sup> 21 U.S.C. § 396.

<sup>299</sup> Cline, 260-61 (noting that this is "[i]n contrast to the deference physicians receive regarding treatment decisions in almost all other areas of medicine").

<sup>300</sup> *Id.* at 260.

<sup>301</sup> *Id.* at 261 ("Both the American College of Obstetricians and Gynecologists and the World Health Organization have endorsed these alternate regimens as safer and more effective than the now-outdated regimen provided for in mifepristone's FDA-approved label.").

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* ("The role of the physician is to heal the sick and the injured, and physicians are required to undergo rigorous training to develop the required knowledge and experience to perform that role well.").

<sup>305</sup> *Id.*

homa Supreme Court's position on off-label drug use and rejects the opposite outcome in the decisions of the Fifth and Sixth Circuit.

#### V. CONCLUSION

The First Amendment should provide robust protection for professional speech. The scope of protection has to take into account that a range of professional knowledge may count as good advice. Individual professionals may differ in their individual judgments, but being a professional still implies that they subscribe to a shared body of knowledge. And the shared notions of validity limit the range of professional opinions that may be found valid within the profession.

To the extent that the knowledge community decides that outlier status is encompassed by the range of defensible professional knowledge, state regulation should mirror this. Advice that is given in accordance with this range is good professional advice; what falls outside the scope is unprofessional advice. The client seeks good professional advice, that is, defensible professional knowledge. The First Amendment should provide robust protection for this type of advice, but it does not protect unprofessional advice.