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Professional Speech and the First Amendment

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PROFESSIONAL SPEECH AND THE FIRST AMENDMENT

Rodney A. Smolla

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I. INTRODUCTION

A growing number of courts are recognizing a new First Amendment doctrine governing regulation of a category of expression known as “professional speech.” Courts invoking this new doctrine generally define professional speech as expression by persons in a regulated profession, such as medicine or law, and usually (but not always) limit the application of the doctrine to contexts in which the professional is rendering counsel or advice, such as a doctor to a patient or a lawyer to a client. The professional speech doctrine is generally used by courts to reduce the level of First Amendment protection professionals receive for their expression.

It is not at all clear, however, that courts recognizing the professional speech doctrine intend it to encompass what are often thought of as the learned professions, such as law or medicine. Because the doctrine is often grounded in the basic supposition that the power of the government to license an activity carries with it an included power to regulate the speech of those exercising their licenses, the doctrine may well be expanded on to include virtually any licensed calling, from doctors and lawyers, to dentists, psychologists, architects, pharmacists, investment advisors, pilots, engineers, nurses, physical therapists, teachers, truck drivers, bartenders, hair stylists, or fortune tellers.

The professional speech doctrine is gaining momentum. Until the Supreme Court formally certifies it as an established First Amendment principle, however, it has only provisional stature on the First Amendment landscape. The purpose of this Article is to arrest the momentum of the professional speech doctrine, and urge its rejection. The thesis of this Article is that recognition of the professional speech doctrine will result in allowing government censorship of professional expression that ought to receive robust First Amendment protection, and that in those instances in which it is appropriate to permit regulation of professional speech, existing First Amendment doctrines are perfectly suited to the task. In considering how best to steer the evolution of First Amendment jurisprudence, it makes sense to borrow from the first rule of medicine: “do no harm.” Acceptance of a new professional speech doctrine will do more harm than good, and is not needed to provide government regulators with the space required to impose appropriate restrictions on the conduct and expression of professionals in relation to their clients, in those instances in which such regulation is justified.

This Article begins with an overview of the recent federal appellate decisions that have precipitated the new debate over whether the professional speech doctrine should be recognized, and if it is to be recognized, the shape it should take. The Article then proceeds to make a case against recognition of the professional speech doctrine. That exploration starts with a fresh look at the Supreme Court opinions that are typically cited as justification for recognition of the doctrine, arguing that those opinions do not, when examined closely, provide any persuasive justification for recognizing the doctrine. The Article then turns to the larger backdrop of First Amendment jurisprudence, beginning with an overview of the general case against the proliferation of new doctrinal categories created to reduce protection for freedom of speech. This is followed by a look at three existing First Amendment categories that have been invoked as supporting the recognition of a free-standing professional speech doctrine: the commercial speech doctrine, the government employment speech doctrine, and the doctrine governing conditions attached to speech subsidized by the government. The argument advanced is that these three doctrines do not provide convincing support, alone or in combination, for creating a new professional speech category with reduced free speech protection. The final substantive section of this Article loops back to one of the opening contentions made by proponents of a

professional speech doctrine, the fundamental premise that the power of government to license professionals necessarily contemplates a lesser-included power to significantly regulate the speech of professionals. Returning to the Supreme Court decisions that are usually credited as the progenitors of the professional speech doctrine, this final section argues that in fact those cases, and other long-standing First Amendment principles, instead stand for the proposition that there are certain aspects of expressive activity, whether engaged in by “professionals” or not, that the government may not presume to license at all. The Article concludes with a restatement of its driving thesis, which is that recognition of a new professional speech doctrine is unnecessary and inappropriate. Existing First Amendment doctrines are already available to properly separate constitutionally protected speech by professionals from speech by professionals that the government may constitutionally regulate. Recognizing a new professional speech category will do more harm than good.

II. RECENT CIRCUIT CASES RECOGNIZING THE PROFESSIONAL SPEECH DOCTRINE

The professional speech doctrine has been shaped principally by a handful of decisions from federal courts of appeal in the Third, Fourth, Ninth, and Eleventh Circuits. The decisions have focused on controversies as various as the regulation of fortune tellers, restrictions on sex-change therapy for minors, and limits on what physicians may say to patients regarding gun possession. As the cases proliferate, so do proposals for the appropriate constitutional standards governing their outcomes. Nominees range from highly deferential rational basis review, to intermediate scrutiny, to heightened intermediate scrutiny, to strict scrutiny.

A. *Wollschlaeger: Doctors and Gun Owners*

While a brief summary of all the recent federal courts of appeal cases involving professional speech is worthwhile, none more vividly illustrates the current state of doctrinal uncertainty as *Wollschlaeger v. Governor of Florida*.¹ In *Wollschlaeger*, the Eleventh Circuit addressed a facial challenge to a Florida law limiting what doctors may ask, record about, or say to a patient concerning the patient’s ownership of firearms. The law also prohibited certain forms of discrimination by doctors against gun owners.²

¹ 760 F.3d 1195 (11th Cir. 2014), *vacated and superseded on reh’g* by 797 F.3d 859 (11th Cir. 2015), *vacated and superseded on reh’g* by 814 F.3d 1159 (11th Cir. 2015), and *vacated and reh’g en banc granted*, No. 12-14009, 2016 WL 2959373 (11th Cir. Feb. 3, 2016).

² The court described the operation of the law in detail. *See Wollschlaeger*, 797 F.3d at 869–71 (“On June 2, 2011, Florida Governor Rick Scott signed the Act into law. The Act created Fla. Stat. § 790.338, entitled ‘Medical privacy concerning firearms; prohibitions; penalties; exceptions,’ and amended the Florida Patient’s Bill of Rights and Responsibilities, Fla. Stat. §

The original panel opinion in *Wollschlaeger* was announced on July 25, 2014.³ By a 2–1 vote, the majority reasoned that the professional speech doctrine prevents First Amendment scrutiny from applying to regulations of professional conduct that have only an incidental impact on a professional’s expression. Finding that the Florida law was indeed the regulation of professional conduct with only an incidental impact on expression, the court applied rational basis review to uphold the statute.

Just one year later the court took the unusual step of vacating its prior panel opinion, *sua sponte*, and issuing a substitute opinion that also upheld the law by a 2–1 vote. The panel engaged in an elaborate taxonomy of the various forms of speech by professionals, concluding that strict scrutiny should apply to expression by professionals to the general public but intermediate scrutiny should apply to expression by professionals engaged in providing personalized counsel to a patient or client.⁴ After positing that ordinary or heightened intermediate scrutiny might be the correct legal standard, the panel concluded that the law should be upheld whichever of the two might apply, holding that Florida’s interests in protecting the privacy of patients regarding gun ownership,

381.026, to include several of the same provisions. The Act also amended Fla. Stat. § 456.072, entitled ‘Grounds for discipline; penalties; enforcement,’ to provide for disciplinary measures for violation of the Act. The Florida legislature passed the Act in response to complaints from constituents that medical personnel were asking unwelcome questions regarding firearm ownership, and that constituents faced harassment or discrimination on account of their refusal to answer such questions or simply due to their status as firearm owners. The Act provides, in relevant part, that licensed health care practitioners and facilities (i) ‘may not intentionally enter’ information concerning a patient’s ownership of firearms into the patient’s medical record that the practitioner knows is ‘not relevant to the patient’s medical care or safety, or the safety of others,’ § 790.338(1); (ii) ‘shall respect a patient’s right to privacy and should refrain’ from inquiring as to whether a patient or his or her family owns firearms, unless the practitioner or facility believes in good faith that the ‘information is relevant to the patient’s medical care or safety, or the safety of others,’ § 790.338(2); (iii) ‘may not discriminate’ against a patient on the basis of firearm ownership, § 790.338(5); and (iv) ‘should refrain from unnecessarily harassing a patient about firearm ownership,’ § 790.338(6). Violation of any of the provisions of the Act constitutes grounds for disciplinary action under § 456.072(2). Fla. Stat. § 456.072(1)(nn). Furthermore, ‘[v]iolations of the provisions of subsections (1)-(4) constitute grounds for disciplinary action under [Fla. Stat. §§] 456.072(2) and 395.1055.’ Fla. Stat. § 790.338(8). Thus, if the Board of Medicine of the Florida Department of Health (the “Board”) finds that a physician has violated the Act, the physician faces disciplinary measures including fines, restriction of practice, return of fees, probation, and suspension or revocation of his or her medical license. Fla. Stat. § 456.072(2). An investigation culminating in disciplinary action may be initiated against a physician by the Department of Health or may be triggered by a citizen’s complaint. Fla. Stat. § 456.073. The minutes of a June 2, 2011, meeting of the Rules/Legislative Committee of the Board indicate that the Board is prepared to initiate disciplinary proceedings against a physician who violates the Act, stating that ‘the Committee [has] determined [that] violation of [the Act] falls under failure to comply with a legal obligation and the current disciplinary guidelines for this violation would apply.’ Fla. Bd. of Medicine Rules/Legislative Comm., Meeting Report, at 3 (Jun. 2, 2011).’

³ *Wollschlaeger*, 760 F.3d at 1195.

⁴ See *infra* notes 171–97 and accompanying text.

in situations in which gun ownership is not related to patient safety or medical treatment, justified the law.⁵

Six months later, the panel in *Wollschlaeger* once again vacated its prior opinion sua sponte. Analyzing the law now for the third time, the court applied strict scrutiny and upheld the law yet again, reasoning that Florida had a compelling interest in protecting the Second Amendment right to bear arms, a corresponding compelling interest in protecting the privacy rights of gun owners, and narrowly tailored the law to effectuate those interests. Judge Charles R. Wilson dissented for a third time, chiding his colleagues on their ever-evolving positions.⁶ One can hardly blame Judge Wilson for not being able to resist that critique, given the majority's invocation of essentially every standard of review known to modern First Amendment law in the course of the litigation.

On February 3, 2016, the Eleventh Circuit vacated the third panel decision and granted rehearing en banc, indicating that the Eleventh Circuit's jurisprudence on the professional speech doctrine and its application to the Florida law remains a work-in-progress.⁷

B. Pickup, King: *Sexual Orientation Change Efforts*

The Ninth Circuit and the Third Circuit have both recently invoked professional speech principles to uphold laws prohibiting state-licensed mental health providers from engaging in "sexual orientation change efforts" with clients who are minors under 18.⁸ The laws target what is also often called "conversion therapy" or "reparative therapy," which are aimed at trying to eliminate homosexual attractions and foster heterosexual attractions.⁹ In *Pickup v. Brown*,¹⁰ the Ninth Circuit upheld a California law forbidding such sexual orientation change efforts for minors,¹¹ applying simple rational basis review. The Ninth Circuit held that First Amendment standards applicable to

⁵ See *infra* notes 154–65 and accompanying text.

⁶ *Wollschlaeger*, 814 F.3d at 1202 (Wilson, J., dissenting).

⁷ *Wollschlaeger v. Governor of Fla.*, No. 12-14009, 2016 WL 2959373 (11th Cir. Feb. 3, 2016).

⁸ See Marc Jonathan Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. 681 (2016). Professor Blitz's article is a comprehensive and entirely persuasive analysis of First Amendment issues germane to psychotherapy, including the "talk therapy" that precipitated passage of the laws in California and New Jersey.

⁹ See Jacob M. Victor, Note, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 123 YALE L.J. 1532, 1534 (2014) ("This unprecedented statute aims to prevent any mental health professional from using techniques—commonly known as 'conversion therapy' or 'reparative therapy'—that attempt to eliminate homosexual attraction or foster heterosexual attraction when treating a minor patient.").

¹⁰ 740 F.3d 1208, 1232–33 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2871 (2014), and *cert. denied sub nom. Welch v. Brown*, 134 S. Ct. 2881 (2014).

¹¹ CAL. BUS. & PROF. CODE § 865.1 (Deering 2016).

professional speech ought to be judged on a continuum, reasoning that First Amendment protection is “at its greatest” when a professional is “engaged in a public dialogue,”¹² “somewhat diminished” when the professional is speaking “within the confines of a professional relationship,”¹³ and at its lowest when “the regulation [is] of professional conduct . . . even though such regulation may have an incidental effect on speech.”¹⁴ Holding that the California law regulated only professional conduct, the court found that no elevated First Amendment review of any kind was warranted, and sustained the law. Dissenting from a denial of rehearing en banc, Judge Diarmuid O’Scannlain, joined by Judges Carlos T. Bea and Sandra Segal Ikuta, chastised the majority for its characterization of the law as reaching only conduct and further argued that “[t]he Federal courts have never recognized a freestanding exception to the First Amendment for state professional regulations.”¹⁵

The Third Circuit reached a similar result, but on different reasoning, in *King v. Governor of New Jersey*.¹⁶ *King* upheld a New Jersey law similar to California’s, barring sexual orientation change efforts by licensed counselors treating minors.¹⁷ The Third Circuit concluded “that a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession.”¹⁸ Having thus accepted that “professional speech” is appropriately recognized as a distinct First Amendment category, the court stated the question before it as “whether this category receives some lesser degree of protection or no protection at all.”¹⁹ Parting with the Ninth Circuit’s rational basis review approach, the Third Circuit in *King* adopted a form of intermediate scrutiny that borrowed from the vocabulary of First Amendment commercial speech standards, holding “that prohibitions of professional speech are constitutional only if they directly advance the State’s interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest.”²⁰

It is worth noting at this juncture, as a preview of the arguments that will be more fully developed later in this Article,²¹ that I have less quarrel with the outcomes of *King* and *Pickup* than the doctrinal path that the courts followed to arrive at those outcomes. It might well be that California and New Jersey could

¹² *Pickup*, 740 F.3d at 1227.

¹³ *Id.* at 1228.

¹⁴ *Id.* at 1229.

¹⁵ *Id.* at 1218 (O’Scannlain, J., dissenting from the denial of rehearing en banc).

¹⁶ 767 F.3d 216 (3d Cir. 2014), *cert. denied sub nom. King v. Christie*, 135 S. Ct. 2048 (2015).

¹⁷ N.J. STAT. ANN. § 45:1–55 (West 2016).

¹⁸ *King*, 767 F.3d at 232.

¹⁹ *Id.* at 233.

²⁰ *Id.*

²¹ *See infra* Part III.C.

marshal impressive evidence regarding the damage to minors that are caused by “conversion therapy” or “reparative therapy,” evidence sufficient to satisfy a court that the laws satisfy strict scrutiny.²² Regulations driven by the laudable and entirely sympathetic legislative impulse to protect minors from psychological abuse ought not be given a free pass from the normal rigors of strict scrutiny review imposed on content-based regulation of speech under well-established First Amendment doctrine.²³ Better to put the government to its proof, than to warp First Amendment principles.

C. Moore-King: *Fortune Tellers*

In *Moore-King v. County of Chesterfield*,²⁴ the Fourth Circuit invoked the professional speech doctrine to reject a First Amendment challenge brought by a spiritualist, Patricia Moore-King, who practiced her calling as a fortune teller and spiritualist under the name “Psychic Sophie,” to a regime of licensure regulations imposed by Chesterfield County, Virginia, requiring her to obtain a special fortune teller’s license, to pay a special \$300 fortune teller’s license fee, and to undergo criminal backgrounds checks and other administrative processes, in order to practice her calling. The Fourth Circuit reasoned that “[u]nder the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment,”²⁵ and rejected her challenge. The Fourth Circuit in *Moore-King* treated the regulation of Psychic Sophie as the veritable poster child for permissive regulation of professional speech. “[T]he relevant inquiry to determine whether to apply the professional speech doctrine,” the court explained, “is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary.”²⁶ Under this test, it was easy to read the cards: “As Moore-King describes and as we have recounted, her psychic activities and spiritual counseling generally involve a personalized reading for a paying client.”²⁷ On this finding alone, Psychic Sophie’s First Amendment challenge was rejected.²⁸

²² See *supra* note 9 and accompanying text.

²³ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

²⁴ 708 F.3d 560, 569–70 (4th Cir. 2013).

²⁵ *Id.* at 569.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (“Within public discourse, the First Amendment requires law to respect the autonomy of speakers rather than to protect the targets of speech; outside public discourse, the First Amendment permits the state to control the autonomy of speakers in order to protect the dignity of the targets

III. THE CASE AGAINST THE PROFESSIONAL SPEECH DOCTRINE

The case against recognition of a new professional speech doctrine begins with a deconstruction of the principal Supreme Court cases that are routinely cited as the progenitors of the doctrine. The case against the doctrine then proceeds to explain why the creation of new categories of speech receiving diminished First Amendment protection is, appropriately, generally regarded by the Supreme Court with great skepticism. The case continues with the assertion that the existing doctrines often offered up as nominees supporting recognition of a professional speech doctrine, such as the principles governing commercial speech, government employee speech, or government subsidized speech, do not lend convincing support for recognition of the doctrine.

A. *The Ambivalent Pronouncements in Thomas, Lowe, and Casey*

1. Occam's Razor

Three discussions in Supreme Court opinions, the concurring opinion of Justice Robert Jackson in *Thomas v. Collins*,²⁹ the concurring opinion of Justice Byron White in *Lowe v. SEC*,³⁰ and the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³¹ all appear at first blush to provide support to the recognition of a professional speech doctrine, leading a number of courts and commentators to express the view that those opinions actually recognize and establish the doctrine.³² These three opinions, however, are not what they're cracked up to be.

"Occam's Razor" is a philosophical proposition positing that the simplest explanation is usually the best one.³³ There are emanations of Occam's Razor in the allure of the professional speech doctrine. A common-sense distinction exists between the speech of a professional in the context of advising or counseling a client and speech by a professional expressed to the public at large. This distinction is so instinctively obvious and self-evident that it pulls us to adopt the equally simple conclusion that client-centered speech should be walled off as a special category. Indeed, the three Supreme Court opinions in

of speech." (quoting ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM* 24 (2012)).

²⁹ 323 U.S. 516, 544 (1945) (Jackson, J., concurring).

³⁰ 472 U.S. 181, 211 (1985) (White, J., concurring).

³¹ 505 U.S. 833 (1992) (plurality opinion).

³² See *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014); *id.* at 1218 (O'Scannlain, J., dissenting from the denial of rehearing en banc); *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195 (11th Cir. 2014); *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569–70 (4th Cir. 2013).

³³ R.H. Helmholz, *Ockham's Razor in American Law*, 21 TUL. EUR. & CIV. L.F. 109, 110–11 (2006).

Thomas, *Lowe*, and *Casey*, especially the first two opinions in *Thomas* and *Casey*, strongly emphasized this client-centered context. Unlike some boundary disputes in First Amendment law, in which the edges of the boundary can be difficult to define (obscenity may be the most infamous example),³⁴ demarking the line between speech uttered “in the office” between a professional and a client and speech in the general marketplace, such as a lawyer writing an article or a doctor addressing a professional conference, is about as easy as First Amendment law gets. The very simplicity of the distinction is seductive. There is a temptation to treat professional speech, so efficiently and precisely defined as speech delivered by a professional to a client, as its own free-standing doctrine precisely because it is so easy to define its contours. We classify because we can.

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.”³⁵

It is helpful to look closely at the opinions *Thomas*, *Lowe*, and *Casey*, to determine exactly what those opinions mean.

2. *Thomas v. Collins*

The first inklings of a professional speech doctrine may be traced to statements in a concurring opinion by Justice Jackson in *Thomas v. Collins*.³⁶ Texas had a law requiring union organizers to register with the state and obtain an organizer’s card. R.J. Thomas was a national union leader, President of the United Automobile Workers (“U.A.W.”) and Vice-President of the Congress of Industrial Organizations (“C.I.O.”), who traveled from his home in Detroit to Houston to speak to a rally in Texas.³⁷ He did not obtain an organizing card. Thomas was held in contempt for violating an *ex parte* temporary restraining order preventing him from violating the Texas statute.³⁸ The Supreme Court, in an opinion by Justice Wiley Blount Rutledge, held that the actions taken by Texas against Thomas violated the First Amendment.

³⁴ See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting that defining obscenity is “the task of trying to define what may be indefinable”).

³⁵ Claudia E. Haupt, *Professional Speech*, 125 *YALE L.J.* 1238, 1241 (2016).

³⁶ 323 U.S. 516, 544 (1945) (Jackson, J., concurring).

³⁷ *Id.* at 520.

³⁸ *Id.* at 521.

This was a very early free speech case, decided before modern First Amendment doctrines had yet taken much form. Justice Rutledge invoked the “clear and present danger” test as the only readily available doctrine, stating for the Court that “any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.”³⁹ *Thomas v. Collins* was an important flexion point in the evolution of First Amendment doctrine, a case in which the majority openly embraced the dissenting opinions of Justice Oliver Wendell Holmes from an earlier epoch, a case that rightly deserves treatment as one of the launching points for the explosion of highly protective free speech decisions that would follow in coming decades. It is worth giving some emphasis to this historical point because it underscores why a case that is rightly regarded as among the critical early decisions marking the emergence of robust protection for freedom of speech ought not now be repurposed and put to the service of reducing free speech protection. For the purposes of the professional speech doctrine, the case is notable for the Court’s refusal to be persuaded by an argument advanced by Texas that it was merely regulating business and economic activity, governing the relationship between management and labor by requiring licensure of professional labor organizers. The Court rejected what it described as Texas’s “business practice theory” with the pragmatic observation that “Thomas went to Texas for one purpose and one only—to make the speech in question.”⁴⁰

Justice Jackson, in a concurring opinion, pushed the issue more deeply. Justice Jackson seemed to accept that Texas might legitimately choose to treat labor organizers as members of a profession and to exert regulation over that profession.⁴¹ If so, that then posed the question of where legitimate regulation of a profession ends and protection of free expression begins. As Justice Jackson saw it:

As frequently is the case, this controversy is determined as soon as it is decided which of two well-established, but at times overlapping, constitutional principles will be applied to it. The State of Texas stands on its well-settled right reasonably to regulate the pursuit of a vocation, including—we may assume—the occupation of labor organizer. Thomas, on the other hand, stands on the equally clear proposition that Texas may not

³⁹ *Id.* at 530.

⁴⁰ *Id.* at 533.

⁴¹ As I explain later in this Article, I am not sure that treating “labor organizers” as a “profession” requiring advance licensure is necessarily sound under the First Amendment, for the same reasons that I doubt the First Amendment should permit licensure of journalists or fortune tellers. But that critique of Justice Jackson’s assumption is not important to understanding the driving point of his concurring opinion, which is that Thomas could *not* be penalized for simply traveling to Texas to make a labor speech without a license. See *infra* text accompanying notes 229–44.

interfere with the right of any person peaceably and freely to address a lawful assemblage of workmen intent on considering labor grievances.⁴²

Justice Jackson reconciled these two propositions by distinguishing between the power of a state to require licensure of professionals, and the power of the state to regulate the speech of *anyone*—a member of the public or a licensed professional, to the general public—including a speech on issues that relate to the individual’s profession:

A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views. Likewise, the state may prohibit the pursuit of medicine as an occupation without its license but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought. So the state to an extent not necessary now to determine may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen, telling them their rights as he sees them and urging them to unite in general or to join a specific union.⁴³

Three important observations about *Thomas v. Collins* are in order. First, to the extent that either the majority opinion or Justice Jackson’s concurrence might be read as acknowledging that government has legitimate power to regulate professionals, that acknowledgement was for the purpose of insisting that the regulation at issue before it was *not* the regulation of a profession, but suppression of free speech. Second, the Court (including Justice Jackson) applied the highest level of First Amendment protections then known to it, the clear and present danger test.⁴⁴ Finally, the issue Justice Jackson was addressing was *not* the level of First Amendment protection that applies *inside* a licensed professional’s relationship with a client, but rather the antecedent question of when the state could *require* a license as a professional precondition to engaging in public speech. The offense for which Thomas was charged was in essence speaking without a license, and Justice Jackson’s opinion explained why Texas could not require a license of Thomas prior to his making a public speech at a labor rally.

⁴² *Thomas*, 323 U.S. at 544 (Jackson, J., concurring).

⁴³ *Id.* at 544–45.

⁴⁴ See *supra* text accompanying notes 39–41.

3. *Lowe v. SEC*

The professional speech question would surface again 40 years later in *Lowe v. SEC*.⁴⁵ Christopher Lowe was an investment advisor stripped of his license for numerous crimes, including misappropriating client funds, tampering with evidence, and stealing from a bank.⁴⁶ No longer licensed to provide investment advice to clients, he took to publishing an “investment newsletter” that “contained general commentary about the securities and bullion markets, reviews of market indicators and investment strategies, and specific recommendations for buying, selling, or holding stocks and bullion.”⁴⁷ The SEC prosecuted him for engaging in investment advising without a license. The majority of the Supreme Court, in an opinion by Justice John Paul Stevens, avoided confronting the First Amendment issues posed by the conviction, instead construing the Investment Advisors Act as not reaching Lowe’s newsletter, holding that Lowe’s letter fell within an exception in the statute for “the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation.”⁴⁸

Justice White, however, joined by Chief Justice Warren Burger and Justice William Rehnquist, thought this a tortured bit of statutory construction, and instead felt obligated to face the First Amendment issue.⁴⁹ Justice White, building on Justice Jackson’s opinion in *Thomas*, held in *Lowe* that the speech in the newsletter written by Lowe did not constitute “professional speech” but was rather speech published to the general public, and thus fully protected by the First Amendment.⁵⁰ The critical passage in Justice White’s opinion read:

These ideas help to locate the point where regulation of a profession leaves off and prohibitions on speech begin. One who 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 is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional’s speech is incidental to the conduct of the profession. If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the

⁴⁵ 472 U.S. 181 (1985).

⁴⁶ *Id.* at 183.

⁴⁷ *Id.* at 185.

⁴⁸ *Id.* at 187.

⁴⁹ *Id.* at 227 (White, J., concurring).

⁵⁰ *Id.* at 236.

press subject to First Amendment scrutiny. 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, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."⁵¹

The observations previously made regarding Justice Jackson's agenda in *Thomas* apply with the same force to Justice White's opinion in *Lowe*. The purpose of Justice White's discussion of professional speech was not to limit Lowe's expression, but expand it. Justice White, like Justice Jackson before him, held that the professional's speech was entitled to maximum First Amendment protection, noting that it was not individualized advice to a client. And as in *Thomas*, the legal question addressed by Justice White in *Lowe* was whether the SEC could punish Lowe for speaking without a license. Justice White, like Justice Jackson, concluded that under the First Amendment, Lowe did not need one.

The Jackson and White opinions in *Thomas* and *Lowe*, in short, do not stand for the proposition that the First Amendment does not apply to speech rendered by a professional in the context of a fiduciary relationship with a client. Rather, the opinions posit that there is no First Amendment impediment to government *requiring a license* for certain professional activity. They do not purport to exhaust the range of callings for which a license might be required—they do not tell us, for example, whether the First Amendment might be offended by a law requiring journalists to have a license.⁵² The opinions are utterly silent on the question of what restraints the government may impose on a professional's speech *within* the professional-client relationship or what standard of First Amendment review should apply to such restraints.

4. *Planned Parenthood v. Casey*

The plurality opinion in the Supreme Court's abortion regulation decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁵³ contained a cryptic and oblique reference to the regulation of professional speech, without using that terminology. In a brief passage, the plurality in *Casey* upheld Pennsylvania's requirement that doctors obtain informed consent at least

⁵¹ *Id.* at 232.

⁵² See *infra* text accompanying notes 227–43.

⁵³ 505 U.S. 833 (1992) (plurality opinion).

24 hours prior to an abortion procedure after explaining to the patient “the nature of the procedure, the health risks of the abortion and of childbirth, and the ‘probable gestational age of the unborn child.’”⁵⁴ Pennsylvania also required the physician or qualified assistant to inform the woman “of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.”⁵⁵ The plurality’s analysis of these provisions was not especially illuminating. Turning first to the constitutionality of the informed consent provisions under the Due Process Clause, the plurality treated the regulations as not different in kind from the sorts of informed consent routinely required of doctors for all medical procedures.⁵⁶ The plurality’s First Amendment analysis of the informed consent requirements was limited to three sentences:

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.⁵⁷

Dean Robert Post, in a thoughtful exploration of this passage, has been rightly critical of its import:

The passage is puzzling because *Wooley* is a precedent in which the Court applied strict First Amendment scrutiny to a state statute that compelled ideological speech, whereas *Whalen* upheld a New York statute requiring physicians to disclose prescriptions for certain drugs, holding in the page cited that “[i]t is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions.” Exactly how the strict First Amendment standards

⁵⁴ *Id.* at 881.

⁵⁵ *Id.*

⁵⁶ *Id.* at 884 (“Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.”).

⁵⁷ *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705 (1977); *Whalen v. Roe*, 429 U.S. 589, 603 (1977)).

of *Wooley* are meant to qualify the broad police power discretion of *Whalen* is left entirely obscure.⁵⁸

Robert Post argues more broadly that the First Amendment should be construed to prohibit the state from forcing physicians to engage in “ideological speech,” and from requiring physicians to communicate information “that the medical profession regards as false,” or prohibiting “physicians from communicating information that the medical profession regards as true.”⁵⁹ I agree with both of those propositions, though I would go farther and suggest that they do not exhaust the full range of First Amendment protections physicians (or other professionals) enjoy. For the purposes of the passage in *Casey*, what matters is that the plurality’s on-the-fly approval of the informed consent requirements provides virtually no guidance as to the general constitutional status of professional speech. At most, the plurality’s holding reveals that it deemed informed consent requirements to fall generally within a range of “easy cases” that, as explained later in this Article, would survive even strict scrutiny review.⁶⁰ Even when reviewed under strict scrutiny, informed consent requirements ought normally be sustained by courts as narrowly tailored to effectuate compelling governmental interests in the preservation of patient autonomy.⁶¹ The Pennsylvania regulations upheld in *Casey* may well have approached the edge of permissible regulation under the First Amendment, coming dangerously close to forcing doctors to espouse the ideology of the state. Even so, however, the plurality in *Casey* could plausibly have concluded that the regulations did not cross the edge. The regulations did not require doctors to profess agreement with the state’s position, or even themselves articulate the state’s position, but only to inform patients of the existence of written materials composed by the state.

In sum, the opinions by individual Justices in *Thomas*, *Lowe*, and *Casey* are of limited precedential or persuasive force. They do not establish a proposition so sweeping as the notion that the First Amendment does not apply *at all* to the regulation of speech by professionals within the bounds of a professional-client relationship. The opinions in *Thomas* and *Lowe* only describe when a professional may speak without a license, and do not purport to examine the limits of regulation in cases where a licensed professional is advising a client. The plurality in *Casey* does potentially establish that informed consent laws may survive First Amendment scrutiny, but that is an unremarkable conclusion even under strict scrutiny review⁶² and *Casey*’s three obscure sentences are hardly enough to build a coherent body of First Amendment law.

⁵⁸ Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 946 (2007) (internal citations omitted).

⁵⁹ *Id.* at 939.

⁶⁰ *See infra* Part III.D.

⁶¹ *See infra* Part III.E.

⁶² *See supra* text accompanying notes 56–57.

B. *Stevens and the Hazards of Creating New First Amendment Doctrines*

Modern First Amendment law is largely populated by discrete doctrines tailored to address particular recurring speech problems. A legal treatise or casebook canvassing freedom of speech might thus include coverage on topics as various as incitement to violence,⁶³ true threats,⁶⁴ fighting words,⁶⁵ obscenity,⁶⁶ nude dancing,⁶⁷ dial-a-porn,⁶⁸ libel,⁶⁹ invasion of privacy,⁷⁰ infliction of emotional distress,⁷¹ prior restraints,⁷² speech of government employees,⁷³ student speech in public schools,⁷⁴ public forum law,⁷⁵ governmentally funded speech,⁷⁶ commercial speech,⁷⁷ political campaign finance,⁷⁸ corporate political speech,⁷⁹ regulation of judicial speech,⁸⁰ restrictions on extrajudicial statements of lawyers involved in litigation matters,⁸¹ trafficking in national security secrets,⁸² academic freedom and the speech of university professors,⁸³ publishing private intercepted phone conversations,⁸⁴ parody and satire,⁸⁵ speech in relation

⁶³ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁶⁴ See *Virginia v. Black*, 538 U.S. 343 (2003).

⁶⁵ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁶⁶ See *Miller v. California*, 413 U.S. 15 (1973).

⁶⁷ See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

⁶⁸ See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

⁶⁹ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁷⁰ See *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

⁷¹ See *Snyder v. Phelps*, 562 U.S. 443 (2011).

⁷² See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

⁷³ See *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

⁷⁴ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

⁷⁵ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

⁷⁶ See *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁷⁷ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

⁷⁸ See *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁷⁹ See *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁸⁰ See *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

⁸¹ See *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

⁸² See *Snepp v. United States*, 444 U.S. 507 (1980).

⁸³ See *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

⁸⁴ See *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

⁸⁵ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

to intellectual property,⁸⁶ confidential sources of journalists,⁸⁷ media access,⁸⁸ regulation of broadcasters,⁸⁹ anonymous speech,⁹⁰ regulation of Internet media,⁹¹ speech of labor unions,⁹² municipal codes governing signs,⁹³ captive audiences,⁹⁴ heckler's vetoes,⁹⁵ or government speech,⁹⁶ just for starters. Swirling through these topics will be tests and concepts such as content discrimination⁹⁷ and viewpoint discrimination,⁹⁸ strict scrutiny,⁹⁹ heightened scrutiny,¹⁰⁰ intermediate scrutiny,¹⁰¹ time, place, or manner regulations,¹⁰² or the *O'Brien* standard.¹⁰³ And then there is the suggestion emanating from Justice Jackson's observation in

⁸⁶ See *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁸⁷ See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

⁸⁸ See *Press-Enter. Co. v. Superior Court of Cal.*, 478 U.S. 1 (1986).

⁸⁹ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

⁹⁰ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

⁹¹ See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

⁹² See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

⁹³ See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991).

⁹⁴ See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

⁹⁵ See *Feiner v. New York*, 340 U.S. 315 (1951).

⁹⁶ See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015).

⁹⁷ See *Reed*, 135 S. Ct. at 2226.

⁹⁸ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (“[T]he ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination.”).

⁹⁹ See *Reed*, 135 S. Ct. at 2227.

¹⁰⁰ See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (“Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted.”).

¹⁰¹ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

¹⁰² See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

¹⁰³ See *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (“[E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” (internal citations omitted)).

*Kovacs v. Cooper*¹⁰⁴ that every method of communicating ideas is “a law unto itself” and that law must reflect the “differing natures, values, abuses and dangers” of each method.¹⁰⁵ In *Metromedia, Inc. v. City of San Diego*,¹⁰⁶ Justice White captured this fractionated tradition with the simple statement: “We deal here with the law of billboards.”¹⁰⁷ Against that backdrop, the creation of a new free-standing legal doctrine for professional speech seems entirely commonplace—it is what we do.

Yet there are perils to the recognition of new categories of speech that enjoy diminished First Amendment protection. The better view, suggested by Paul Sherman, is that professional speech (or what he calls “occupational speech”) should be subjected to strict scrutiny, the norm for content-based regulation of speech.¹⁰⁸

The most comprehensive explanation of why the creation of such new categories of disfavored speech generally runs against the grain of First Amendment tradition and values was written by Chief Justice John Roberts for the Court in *United States v. Stevens*.¹⁰⁹ In *Stevens*, the Court struck down a federal statute prohibiting the creation, sale, or possession of certain depictions of animal cruelty. Congress passed the law out of understandable aversion to gruesome videos, sometimes called “crush videos,” of horrific treatment of animals.¹¹⁰ This was speech that had no plausible value to commend it, and the

¹⁰⁴ 336 U.S. 77 (1949).

¹⁰⁵ *Id.* at 97 (Jackson, J., concurring).

¹⁰⁶ 453 U.S. 490 (1981).

¹⁰⁷ *Id.* at 501.

¹⁰⁸ See Paul Sherman, Commentary, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 192–93 (2015) (“Taken together, these cases suggest that occupational speech should be treated just like any other content-defined category of speech. Laws that require an occupational license in order to provide advice to a client about a specific subject impose a direct, not incidental, burden on speech based on the content of that speech. Such content-based burdens on speech are subject to strict scrutiny. It is at least theoretically possible that some subcategories of occupational speech may fall outside the scope of the First Amendment. But the Supreme Court has made clear that categorical exceptions to the First Amendment may only be recognized on the basis of evidence that the category of speech has been considered historically unprotected ‘[f]rom 1791 to the present.’ Moreover, the government bears the burden of producing this evidence. Thus, where an occupational-licensing law burdens speech and the government can neither satisfy strict scrutiny nor provide evidence that the narrowly defined category of regulated speech has been considered historically unprotected, the law violates the First Amendment.” (alteration in original) (internal citations omitted)). While Professor Sherman and I reach the same conclusion, we reach that conclusion through differently framed arguments, essentially providing differing but complementary proofs for the same ultimate theorem.

¹⁰⁹ 559 U.S. 460 (2010).

¹¹⁰ *Id.* at 464–65 (“Congress enacted 18 U.S.C. § 48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty . . . Section 48 establishes a criminal penalty of up to five years in prison for anyone who knowingly ‘creates, sells, or possesses a depiction of animal cruelty,’ if done ‘for commercial gain’ in interstate or foreign commerce. §

United States understandably sought to defend the law on the theory that depictions of animal cruelty should be added to the list of categories of expression that receive little or no First Amendment protection.¹¹¹ As the Court aptly put it, the Government's claim was "not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether—that they fall into a 'First Amendment Free Zone.'"¹¹²

The Government's theory was that "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."¹¹³ The Court's rejection of this proposition was at once passionate and reproachful, admonishing the Government that "[a]s a free-floating test for First Amendment coverage, that sentence is startling and dangerous."¹¹⁴ Such balancing of costs and benefits, the Court lectured, is precisely what the First Amendment forbids, foreclosing deference to legislative judgments that some speech is just "not worth it."¹¹⁵

But this balancing test, which was most eloquently described in *Chaplinsky v. New Hampshire*,¹¹⁶ has long been obsolete, as both a description of free speech doctrine and a theoretical explanation of when speech is protected and when it is not.¹¹⁷ The opinion of Chief Justice Roberts in *Stevens* captured

48(a). A depiction of 'animal cruelty' is defined as one 'in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,' if that conduct violates federal or state law where 'the creation, sale, or possession takes place.'").

¹¹¹ *Id.* at 469 ("The Government argues that 'depictions of animal cruelty' should be added to the list.").

¹¹² *Id.* (quoting *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)).

¹¹³ *Id.* at 470 (quoting Brief for United States, *United States v. Stevens*, 559 U.S. 460 (2010) (No. 08-769), 2009 WL 1615365, at *8).

¹¹⁴ *Id.*

¹¹⁵ *Id.* ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803))).

¹¹⁶ 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

¹¹⁷ See generally Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 318–19 (2009).

the flaw in the reasoning suggested by *Chaplinsky*, in an unequivocal rejection of its balancing test as an ongoing approach to the evolution of First Amendment doctrine: The Chief Justice admonished that “such descriptions are just that—descriptive.”¹¹⁸ Even as a *description*, the Chief Justice’s characterization may be too generous, for substantial First Amendment protection is now extended to much expression that is lewd,¹¹⁹ obscene,¹²⁰ profane,¹²¹ libelous,¹²² insulting,¹²³

¹¹⁸ *Stevens*, 559 U.S. at 471.

¹¹⁹ See *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (employing strict scrutiny to protect dial-a-porn under the First Amendment).

¹²⁰ See *Miller v. California*, 413 U.S. 15 (1973) (holding that obscenity is not protected under the First Amendment, but announcing a three-part test for defining obscenity that effectively drew a First Amendment line distinguishing hard-core from soft-core pornography, stating: “The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” (internal citations omitted)).

¹²¹ See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504–05 (1952) (“In seeking to apply the broad and all-inclusive definition of ‘sacrilegious’ given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies, New York cannot vest such unlimited restraining control over motion pictures in a censor. Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the ‘sacrilegious’ test, in these or other respects, might raise substantial questions under the First Amendment’s guaranty of separate church and state with freedom of worship for all. However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.”).

¹²² See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (protecting publishers from liability for libel in defamation cases brought by public official plaintiffs in the absence of proof of actual malice, defined as knowledge of falsity or reckless disregard for truth or falsity); see also LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* 525 (1st ed. 1993) (“The Supreme Court has never decided a blasphemy case. It did, however, decide the case of *The Miracle*, involving ‘sacrilege,’ which a state court defined as if it meant substantially the same as blasphemy. This case, *Burstyn v. Wilson*, involved the censorship of a film.”).

¹²³ See *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 268 (1974) (holding as protected name-calling in the context of a labor dispute: “After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab. A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles. When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out. No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with

and fighting words.¹²⁴ We are certainly long past the notion that regulation of such offensive speech is not “thought to raise any Constitutional problem.”¹²⁵

Summarizing current doctrine in *Reed v. Town of Gilbert*,¹²⁶ the Supreme Court declared that “[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”¹²⁷ In a powerful reminder, the Court in *Gilbert* emphasized that the strict scrutiny standard is triggered by laws that either facially discriminate on the basis of content or are motivated by a governmental purpose to penalize disfavored views.¹²⁸ Considered as theory, *Chaplinsky* has been rendered obsolete by a host of major First Amendment decisions establishing robust protection for offensive, low-value expression of the sort the *Chaplinsky* Court derided.¹²⁹ As the Court in *Stevens* adamantly explained, the

a scab. For betraying his Master, he had character enough to hang himself. A scab has not. Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer. Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.”); *see also* RODNEY A. SMOLLA, 1 LAW OF DEFAMATION § 4:7 (2d ed. 2016) (“The common law has always differentiated sharply between genuinely defamatory communications as opposed to obscenities, vulgarities, insults, epithets, name-calling, and other verbal abuse.”).

¹²⁴ *See* *Cohen v. California*, 403 U.S. 15, 20 (1971) (striking down a conviction for wearing the words “Fuck the Draft,” and narrowing the scope of the “fight words” doctrine to speech directed to the person of the hearer, noting: “While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not ‘directed to the person of the hearer.’”).

¹²⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

¹²⁶ 135 S. Ct. 2218 (2015).

¹²⁷ *Id.* at 2226; *see also id.* at 2230 (“Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.”).

¹²⁸ *Id.* at 2229 (“Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—*i.e.*, the ‘abridg[ement] of speech’—rather than merely the motives of those who enacted them.”(alteration in original)).

¹²⁹ *See* *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (plurality opinion) (striking down federal law prohibiting false claims of military honors, observing that “[s]tatutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment”); *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011) (“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle

Chaplinsky balancing approach does “not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.”¹³⁰ The Court in *Stevens* thus roundly rejected the notion that its prior decisions could “be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”¹³¹ Prudent judicial craftsmanship cautions to never say never, and the Court in *Stevens* did not absolutely shut the door on any future recognition of new categories of unprotected speech.¹³² Yet, the Court expressed extreme skepticism that such recognition could ever stand on a mere calculation of costs and benefits.¹³³

C. Professional Speech is Not Analogous to Commercial Speech

The regulation of professional speech might be analogized to the regulation of commercial speech, which is governed by the intermediate standard of review commonly described as the *Central Hudson* test.¹³⁴ The Third Circuit

underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

¹³⁰ *United States v. Stevens*, 559 U.S. 460, 471 (2010); *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (“We have sometimes said that these categories of expression are ‘not within the area of constitutionally protected speech’ . . . or that the ‘protection of the First Amendment does not extend’ to them Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity ‘as not being speech at all’ What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.” (internal case citations omitted) (citing Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 615 n.146 (1986))).

¹³¹ *Stevens*, 559 U.S. at 472.

¹³² *Id.* (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that ‘depictions of animal cruelty’ is among them. We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.”).

¹³³ *Id.* at 471 (“When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.”).

¹³⁴ Commercial speech jurisprudence is anchored in the *Central Hudson* test:

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.

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

in *King*, for example, found the analogy persuasive.¹³⁵ It is easy enough to make the mechanical argument that professional speech is plainly not commercial speech. The core test for identifying commercial speech is speech which does “no more than propose a commercial transaction.”¹³⁶ Occasionally commercial speech is defined more broadly, as “expression related solely to the economic interests of the speaker and its audience.”¹³⁷ Under either the core “no more” or the broader “economic interest” tests for commercial speech, professional speech is clearly much more than commercial. While a professional’s advertising to solicit clients is commercial speech, the professional’s advice to the client is not.

The weakness in the analogy is that even within the confines of commercial speech regulation, certain justifications for regulation have been ruled out of bounds, yet these are the justifications that must be invoked to make the case that professional speech and commercial speech deserve equivalent constitutional protection. In the realm of commercial speech doctrine, the Supreme Court has been unsympathetic to arguments that invoke paternalism or disagreement with the substance of a commercial message when such arguments

¹³⁵ *King v. Governor of N.J.*, 767 F.3d 216, 233 (3d Cir. 2014), *cert. denied sub nom. King v. Christie*, 135 S. Ct. 2048 (2015) (“In explaining why this level of protection is appropriate, we find it helpful to compare professional speech to commercial speech. For over 35 years, the Supreme Court has recognized that commercial speech—truthful, non-misleading speech that proposes a legal economic transaction—enjoys diminished protection under the First Amendment.”).

¹³⁶ Since 1973, no less than 12 Supreme Court opinions have invoked the “no more” test as the core definition of commercial speech. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (“no more than propose a commercial transaction”); *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (same); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (same); *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (same); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993) (same); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 340 (1986) (same); *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 66 (1983) (same); *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979) (same); *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 98 (1977) (same); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (same); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973) (same). Many opinions describe the “no more” formulation as the “core” or “usual” test. *United Foods, Inc.*, 533 U.S. at 409 (explaining that commercial speech is “usually defined” under the “no more” test); *Discovery Network, Inc.*, 507 U.S. at 422 (describing the “no more” test at the “core notion of commercial speech”); *Bolger*, 463 U.S. at 66 (same). The Court has on one occasion described it as the test. *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (finding that the speakers “propose[d] a commercial transaction, . . . which is the test for identifying commercial speech” (citations omitted)); see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J., concurring) (invoking the “no more” test as defining characteristic of commercial speech while arguing that commercial speech should receive same levels of protection as political speech); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 790 (1985) (Brennan, J., dissenting) (“‘Commercial speech’—defined as advertisements that ‘[do] no more than propose a commercial transaction,’ . . . —may be more closely regulated than other types of speech.” (alteration in original) (internal citation omitted)).

¹³⁷ *Cent. Hudson*, 447 U.S. at 561; *In re R.M.J.*, 455 U.S. 191, 204 n.17 (1982).

are proffered as the justification for regulation.¹³⁸ The Court has treated such justifications as outside the range of government interests that may be invoked to defend commercial regulation.¹³⁹ One of the most powerful themes of modern commercial speech law is that the government may not invoke, as its “substantial interest” justifying regulation, paternalistic manipulation of the marketplace of ideas.¹⁴⁰ “Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the ‘fear that people would make bad decisions if given truthful information’ cannot justify content-based burdens on speech.”¹⁴¹

Similarly, the government is disqualified from invoking the false cover of commercial speech regulation to do no more than penalize expression it finds offensive, for such a purpose is per se disqualified as the type of interest that may be invoked to justify regulation: In *Carey v. Population Services International*,¹⁴² the Court rejected the position that commercial speech regulation could be justified by the government’s interest in suppressing offensive expression, noting that it had “consistently held that the fact that protected speech may be offensive to some does not justify its suppression.”¹⁴³ Elaborating, the Court drove home that point that such “offensiveness” arguments carry no more weight in the context of commercial speech regulation than in the context of noncommercial speech:

Appellants suggest no distinction between commercial and noncommercial speech that would render these discredited

¹³⁸ See cases cited *infra* note 140.

¹³⁹ See cases cited *infra* note 140.

¹⁴⁰ See *Liquormart*, 517 U.S. at 521 (Thomas, J., concurring) (“In case after case . . . the Court, and individual Members of the Court, have continued to stress . . . the antipaternalistic premises of the First Amendment . . .”); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) (“Any ‘interest’ in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment . . . the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good.”); *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 105 (1990) (“We reject the paternalistic assumption that the recipients of petitioner’s letterhead are no more discriminating than the audience for children’s television.”); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 790–91 (1988) (“The State’s remaining justification—the paternalistic premise that charities’ speech must be regulated for their own benefit—is equally unsound. The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791 n.31 (1978) (criticizing the State’s paternalistic interest in protecting the political process by restricting speech by corporations); *Linmark*, 431 U.S. at 97 (criticizing the State’s paternalistic interest in maintaining the quality of neighborhoods by restricting speech to residents).

¹⁴¹ *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 577 (2011) (quoting *Thompson*, 535 U.S. at 374).

¹⁴² 431 U.S. 678 (1977).

¹⁴³ *Id.* at 701.

arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression the core of First Amendment values.¹⁴⁴

Similarly, in *Bolger v. Youngs Drug Products Corp.*,¹⁴⁵ the Court stated that “we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression,” adding that the Court had “specifically declined to recognize a distinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech.”¹⁴⁶

The claimed parallel between commercial speech and professional speech attempts to draw support from the differential in knowledge and experience between professionals and their clients.¹⁴⁷ As the Third Circuit argued in *King*:

As previously discussed, professionals have access to a body of specialized knowledge to which laypersons have little or no exposure. Although this information may reach non-professionals through other means, such as journal articles or public speeches, it will often be communicated to them directly by a licensed professional during the course of a professional relationship. Thus, professional speech, like commercial speech, serves as an important channel for the communication of information that might otherwise never reach the public.¹⁴⁸

This argument, however, proves too much, for a vast part of the public discourse that reaches non-expert readers, listeners, and viewers originates from speakers with specialized knowledge or expertise. Indeed, a major function of the marketplace of ideas is to enable those with superior knowledge (or claims thereof), including members of countless professions, to spread what they know to persons who are not experts in their fields. The professional speech doctrine appears to accept that professionals are often engaged in speech that has as its *subject matter* issues of public concern, but then assumes that because that speech occurs in a *setting* involving direct communication between a

¹⁴⁴ *Id.* at 701 n.28.

¹⁴⁵ 463 U.S. 60 (1983).

¹⁴⁶ *Id.* at 71–72.

¹⁴⁷ See *King v. Governor of N.J.*, 767 F.3d 216, 234 (3d Cir. 2014), *cert. denied sub nom. King v. Christie*, 135 S. Ct. 2048 (2015).

¹⁴⁸ *Id.*

professional and a client, the speech is disqualified from the protection it would otherwise deserve. Yet even commercial speech doctrine does not go this far.

Commercial speech doctrine is grounded quintessentially in protection of consumers from expression that is *false* or *misleading*. When attempts are made to push regulation outside of those core consumer protection moorings, the regulation is typically *struck down*. That is the point of the hostility to paternalism as the justification for commercial regulation.¹⁴⁹ No special “professional speech” doctrine is needed, however, to protect the consumers of professional services from expression by professionals that is false, misleading, criminal, tortious, or palpably unethical in some traditional sense (such as speech covering up a conflict of interest). Application of the strict scrutiny test will already allow for such regulation. What is then left over is the very thin, conclusory, and paternalistic argument that consumers who receive advice from professionals, including advice that often implicates important matters of public discourse, need the heavy hand of the state to protect them from over-reaching and abuse. The First Amendment, however, is grounded in exactly the reverse set of assumptions. The First Amendment presumes that people are their own best judge of what to say or not say, or listen to or not listen to. Clients do not have to listen to the advice they are receiving, or even continue the relationship.

The First Amendment similarly presumes that when commercial and non-commercial elements of expression are intertwined, the better view is to ratchet up, not dumb down, the level of First Amendment protection. As the Supreme Court explained in *Riley v. National Federation of the Blind of North Carolina, Inc.*¹⁵⁰:

It is not clear that a professional’s speech is necessarily commercial whenever it relates to that person’s financial motivation for speaking But even assuming, without deciding, that such speech in the abstract is indeed merely “commercial,” we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.¹⁵¹

¹⁴⁹ See *supra* note 140 and accompanying text.

¹⁵⁰ 487 U.S. 781 (1988).

¹⁵¹ *Id.* at 796–97 (internal citation omitted); see *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 456 (D.C. Cir. 2012) (“Thus, when the government seeks to restrict inextricably intertwined commercial and noncommercial speech, courts must subject the restriction to the test ‘for fully protected expression.’”); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 793 (3d Cir. 1999) (“Where the commercial and noncommercial elements of speech are ‘inextricably intertwined,’ the court must apply the ‘test for fully protected expression.’”).

Just as commercial and non-commercial elements of speech may be combined in a corporation's expression, the speech of professionals, as shown in the next section of this Article,¹⁵² will often involve a blend of pure "professional advice" (such as a lawyer's explanation of the elements of a case, or a doctor's explanation of the risks of a medical procedure), and discussion that implicates broader topics of public discourse.¹⁵³ The doctrinal response to such combinations that is most respectful of First Amendment free speech values is to err on the side of applying strict scrutiny.¹⁵⁴

D. Professional Speech is Not Analogous to Government Employee Speech

Fledgling legal doctrines may take hold because they are perceived as close "near-miss" cousins to other doctrines already recognized, partaking of similar factual attributes and policy justifications, and thereby deserving similar doctrinal treatment. A "near-miss," however, is still a miss. I have already dealt with one near-miss, the weak parallel between professional speech and commercial speech. I deal next with a basketful of related near-misses, all of which may seek to draw parallels between the regulation of commercial speech and the regulation of speech involving governmental enterprises.

¹⁵² See *infra* Part III.D.

¹⁵³ See *infra* Part III.E.

¹⁵⁴ Of note on this point is the dissenting opinion of Justice Breyer, joined by Justice O'Connor, in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (per curiam), which involved the question of whether Nike's public statements on labor and employment conditions in third-world factories could be regulated as "commercial speech." See *id.* at 656–57. The Supreme Court initially granted certiorari on whether a corporation could be held liable under "commercial speech" doctrine for its political communications, expressed by the company to defend its reputation and advance its commercial interests. See *id.* at 657. Because Justice Breyer's opinion is a dissent from the dismissal of a writ of certiorari, it has no binding precedential force on this Court, and is offered here only for its persuasive value. Yet, that persuasive value is compelling. Justice Breyer in *Nike* observed that the First Amendment "favors application of the . . . public-speech principle, rather than the . . . commercial-speech principle." *Id.* at 676 (Breyer, J., dissenting). Justice Breyer noted that "the communications at issue are not purely commercial in nature. They are better characterized as involving a mixture of commercial and noncommercial (public-issue-oriented) elements." *Id.* He then noted that even the least political of the statements at issue in the case involved commercial and noncommercial elements that were "inextricably intertwined." *Id.* at 677. After examining the form, content, and regulatory regime, Justice Breyer concluded that heightened scrutiny, not commercial speech intermediate scrutiny, should apply:

These three sets of circumstances taken together—circumstances of format, content, and regulatory context—warrant treating the regulations of speech at issue differently from regulations of purer forms of commercial speech, such as simple product advertisements, that we have reviewed in the past. And, where all three are present, I believe the First Amendment demands heightened scrutiny.

Id. at 678–79.

Professional speech is not the speech of the government, not the speech of government employees, and not speech funded by government grants. There are many professionals who do speak for the government, or work for the government, or are funded by the government, and when they fall into those categories, they may be subject to a number of well-established First Amendment doctrines that eliminate or significantly reduce First Amendment speech in contexts in which that speech is strongly connected to governmental enterprises. Professionals who are not government employees (not government lawyers or doctors, for example), however, are not working for the government or speaking for the government when they interact with clients. Professionals may ply their trades in highly regulated industries, but there is a world of constitutional difference between a heavily regulated enterprise and a government enterprise, and that difference should make all the difference in First Amendment analysis.

The government speech doctrine is the most recently recognized category of unprotected speech. The government speech doctrine graduated from passing reference in dicta in a number of Supreme Court opinions,¹⁵⁵ to recognition by lower courts,¹⁵⁶ to formal acceptance by the Supreme Court in two opinions, *Pleasant Grove City v. Summum*,¹⁵⁷ and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*¹⁵⁸ The government speech doctrine exists to enable the government to express its own viewpoints as an incident to governance: “Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas.”¹⁵⁹ Political process theory provides strong theoretical justification for the government

¹⁵⁵ See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (“[T]he Government’s own speech . . . is exempt from First Amendment scrutiny.”); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (“The University having disclaimed that the speech is its own, we do not reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself.”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (A government entity has the right to speak for itself: “[I]t is entitled to say what it wishes”); *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression.”).

¹⁵⁶ See *Knights of Ku Klux Klan v. Curators of Univ. of Mo.*, 203 F.3d 1085, 1093 (8th Cir. 2000) (“First and foremost, KWMU’s underwriting acknowledgments constitute governmental speech on the part of UMSL.”); *Muir v. Ala. Educ. Television Comm’n*, 688 F.2d 1033, 1044 (5th Cir. 1982) (en banc) (“[T]he First Amendment does not prohibit the government, itself, from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial discretion over its own medium of expression.”).

¹⁵⁷ 555 U.S. 460 (2009).

¹⁵⁸ 135 S. Ct. 2239 (2015).

¹⁵⁹ *Id.* at 2245–46.

speech doctrine, which “reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech.”¹⁶⁰

Other First Amendment doctrines allow for greater latitude by the government in regulating speech by individuals when the speech occurs within the context of a government program: Prominent examples include the diminished protection for expression public school students possess in relation to school officials regulating speech within the confines of schools,¹⁶¹ the diminished protection for expression citizens may receive when that expression occurs within the context of a governmentally funded subsidy program,¹⁶² or the regulation of speech by government employees.¹⁶³ In all these situations, First Amendment protection is reduced out of deference to the governmental functions being carried out within the programs in which the expression occurs.

The quintessential example is the body of law governing the speech rights of government employees. That *Connick / Pickering / Ceballos* test, named for the three Supreme Court cases that have shaped it,¹⁶⁴ has two parts.¹⁶⁵ A court determines whether the employee spoke as a citizen on a matter of public concern.¹⁶⁶ If the court determines that answer is no, the case is over, and no First Amendment claim may be brought.¹⁶⁷ If the answer is yes, the court proceeds to part two of the test, a balancing exercise that focuses on the strength of the government employer’s justification, taking into account the extent to which the speech may disrupt the functioning and efficiency of the government agency.¹⁶⁸ In *Garcetti v. Ceballos*,¹⁶⁹ the third case in this trilogy, the Supreme Court engrafted on the test a bright-line rule regarding application of the first prong: If an employee’s expression arises from his or her official responsibilities, the Court held, it will automatically be deemed to be speech as an employee, and not speech as a citizen speaking on a matter of public concern.¹⁷⁰

Just as it is plain that professional speech is not “commercial,” it is plain that professional speech is not “governmental,” under any of the various

¹⁶⁰ *Id.* at 2245 (citing *Southworth*, 529 U.S. at 235).

¹⁶¹ See *Morse v. Frederick*, 551 U.S. 393 (2007).

¹⁶² See *Rust v. Sullivan*, 500 U.S. 173 (1991).

¹⁶³ See *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹⁶⁴ *Id.*; *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.* 205, 391 U.S. 563 (1968).

¹⁶⁵ *Garcetti*, 547 U.S. at 418.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 410.

¹⁷⁰ See *id.* at 421 (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).

doctrines described above. Yet, as in the case of commercial speech, to give the proponents of the professional speech doctrine their fair due, they are arguing that professional speech *shares attributes* of these other settings, and should thus also receive reduced constitutional protection. As in the case of the commercial speech argument, however, the parallels are weak and not persuasive.

Those who favor adoption of the professional speech doctrine might be tempted to apply a variation of the *Connick / Pickering / Ceballos* test to professional speech. The “middle opinion” in the trilogy of opinions by the Eleventh Circuit panel in *Wollschlaeger v. Governor of Florida*¹⁷¹ appeared to have something like this in mind: The court began by noting that “[s]ociety has traditionally accorded physicians a high degree of deference due to factors such as their superior knowledge, education, and ‘symbolic role as conquerors of disease and death.’”¹⁷² “This deference reaches its apex,” the court observed, “in the examination room.”¹⁷³ Elaborating, the court explained the nature of the physician-patient relationship, and the impact of the Florida law on that relationship: “When a patient enters a physician’s examination room,” the court noted, “the patient is in a position of relative powerlessness.”¹⁷⁴ This means that the “patient must place his or her trust in the physician’s guidance and submit to the physician’s authority.”¹⁷⁵ With this authority, the court reasoned, comes responsibility: “To protect patients, society has long imposed upon physicians certain duties and restrictions that operate to define the boundaries of good medical care.”¹⁷⁶ It was against the backdrop of this tradition, the court observed, that Florida passed the law regarding inquiries into gun ownership.¹⁷⁷ The purpose of the law, the court held, was to “protect patient privacy by restricting irrelevant inquiry and record-keeping by physicians on the sensitive issue of firearm-ownership.”¹⁷⁸ In the court’s view, the Florida law did not prevent physicians from speaking with patients about firearms generally.¹⁷⁹ “Nor does it prohibit specific inquiry or record-keeping about a patient’s firearm-ownership status when the physician determines in good faith, based on the circumstances of that patient’s case, that such information is relevant to the patient’s medical

¹⁷¹ 760 F.3d 1195 (11th Cir. 2014), *vacated and superseded on reh’g* by 797 F.3d 859 (11th Cir. 2015), *vacated and superseded on reh’g* by 814 F.3d 1159 (11th Cir. 2015), *vacated and reh’g en banc granted* by No. 12-14009, 2016 WL 2959373 (11th Cir. Feb. 3, 2016).

¹⁷² *Wollschlaeger*, 797 F.3d at 868–69 (quoting 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, 226 (1994)).

¹⁷³ *Id.* at 869.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

care or safety, or the safety of others.”¹⁸⁰ Rather, the court held, “the Act codifies the commonsense conclusion that good medical care does not require inquiry or record-keeping regarding firearms when unnecessary to a patient’s care—especially not when that inquiry or record-keeping constitutes such a substantial intrusion upon patient privacy.”¹⁸¹ With this understanding of the Act, “and in light of the longstanding authority of States to define the boundaries of good medical practice,” the court held that the Act was “on its face, a permissible restriction of physician speech.”¹⁸² While doctors would remain free in any future specific case involving any action brought against them under the Act “to assert their First Amendment rights as an affirmative defense,” the court refused to hold the Act facially invalid.¹⁸³

To its credit, the court rejected the sweeping argument advanced by Florida that *all* speech between a doctor and a patient falls outside the ambit of the First Amendment; Florida argued that in regulating what a doctor says or asks a patient, it was regulating the practice of medicine, not expression, and thus the First Amendment is not implicated at all.¹⁸⁴ Thus, statements that would be protected by the First Amendment if uttered by strangers on a street corner would be placed outside the First Amendment when made by a doctor to a patient.¹⁸⁵ The Eleventh Circuit had previously stated, in *Locke v. Shore*,¹⁸⁶ that “[a] statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation.”¹⁸⁷ But this statement did not answer the critical question of whether a particular regulation of a professional’s speech was merely the incidental effect of an otherwise legitimate regulation.¹⁸⁸

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 884 (“It would seem under this definition—indeed, under almost any measure—that asking questions and writing down answers constitute protected expression under the First Amendment. However, the State argues that the Act escapes First Amendment scrutiny because it is directed toward conduct—the practice of medicine.”).

¹⁸⁵ *Id.* (“While seemingly conceding (as it must) that asking questions and writing down answers would receive First Amendment protection if it occurred between strangers on a street corner, the State asserts that because the activity is conducted by a physician as part of the practice of the medical profession, and because the medical profession has long been subject to close regulation by the State, the fact that the law restricts oral and written communication is of no consequence whatever.”).

¹⁸⁶ 634 F.3d 1185 (11th Cir. 2011).

¹⁸⁷ *Id.* at 1191.

¹⁸⁸ *See id.*

The court argued that there is a salient difference, for First Amendment purposes, between the speech of a professional to the public at large and the speech of a professional that is direct and personalized speech to a client,¹⁸⁹ a distinction that somewhat parallels the divide between the speech of a government employee “on the job” and the speech of an employee speaking “as a citizen” on an issue of public concern.¹⁹⁰ The court posited two extremes:

Consider two hypothetical scenarios. In the first, a physician meets with a patient in an examination room and explains the risks of a particular surgical procedure. This conversation is easily classified as professional speech. In the second scenario, the same physician speaks to a crowd at a rally, extolling the merits of a particular political candidate. It seems equally clear that while this speech is also uttered by a professional, it is not “professional speech.”

Phrased in terms of principles, we think it is safe to say that speech uttered by a professional in furtherance of his or her profession and within the confines of a professional-client relationship falls within any reasonable definition of professional speech.

At the other end of the spectrum, speech uttered by a professional that is irrelative to the practice of his or her profession and outside a particular professional-client relationship likely falls beyond the purview of professional speech.¹⁹¹

The court reasoned that “[t]he difference between the first and second scenarios” turned on two factors: “the professional effectivity of the speech—whether the physician is speaking in furtherance of the practice of medicine or not, and the relational context of the speech—whether the physician is speaking within a fiduciary relationship or not.”¹⁹² The court advanced this analysis by positing that the universe of speech uttered by a professional could be divided into four categories:

First, a physician may speak to the public, in furtherance of the practice of medicine. Second, a physician may speak to a client, in furtherance of the practice of medicine. Third, a physician

¹⁸⁹ *Id.*

¹⁹⁰ *See* *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

¹⁹¹ *Wollschlaeger v. Governor of Fla.*, 797 F.3d 859, 887 (internal citations omitted).

¹⁹² *Id.* at 888.

may speak to a client, on a matter irrelative to the practice of medicine. Finally, a physician may speak to the public, on a matter irrelative to the practice of medicine.¹⁹³

While the court's analysis on this point is not entirely free of ambiguity, the court appeared to be suggesting a matrix that might be described graphically along the following lines.

	<i>Speech in Furtherance of the Practice of Medicine</i>	<i>Speech on Matters Unrelated to the Practice of Medicine</i>
<i>Speech Directed to a Client</i>	Lowest Level of First Amendment Protection	Intermediate Level of First Amendment Protection
<i>Speech Directed to the General Public</i>	Intermediate Level of First Amendment Protection	Highest Level of First Amendment Protection

The court reasoned that the government's case for regulating professional speech is at its apex when the professional speaks in furtherance of the profession, and at its nadir when the speech is not germane to the profession.¹⁹⁴ Conversely, the court reasoned, the free speech interests of the professional are at their highest when the speech does not relate to the profession, and weakest when the speech does relate to the profession. The court then posited that the government's constitutional authority to regulate the speech of professionals is greatest when the speech is directed to a client, but diminished when the speech is directed to the general public.¹⁹⁵

The court treated the Florida law as falling into the intersection of speech directed to a specific client, but on matters not directly germane to medical practice: gun ownership.¹⁹⁶ It applied intermediate scrutiny to the regulation, and proceeded to uphold it.¹⁹⁷

This was an impressive analytic effort. The weakness in the court's argument was not the internal logic of the matrix itself—the various classifications the court imposed are logical—but the judgment that the matrix justifiably applied to professional speech. To accept that point one must accept

¹⁹³ *Id.*

¹⁹⁴ *See id.*

¹⁹⁵ *Id.* at 889–90.

¹⁹⁶ *Id.* at 895–96.

¹⁹⁷ *Id.* at 896.

that abridgements of the speech of professionals *who are not government employees* but private citizens exercising professional judgement to serve private clients may be treated by government *as if they were employees* merely because government has the power to license admission to the profession and regulate the profession.

To be fair, of all the allures arguing for acceptance of a professional speech doctrine, the most powerful focus on an interrelated cluster of concerns regarding the unique nature of the relationship between a professional and client. These concerns exert particular power in the arenas of law and medicine, in which fidelity to the client or patient deservedly occupies a primacy that is virtually mythical in its reverence and respect. These values may be distilled into a number of related propositions, all of which are variants of the same essential theme. First, as between the interests of the professional and the client, the client's interests have primacy. Second, the professional and the client are not equals in the relationship. Rather, the professional has superior knowledge, expertise, experience, and stature in relation to the client that inherently places the professional in a position of superior leverage and influence, thereby justifying the intervention of the government to ensure that this influence is not used for overbearing or abusive purposes. Third, the very notion of a "profession" presupposes the existence of a tradition of professional norms governing ethical behavior within the confines of a fiduciary relationship that require acquiescence by the professional regulations that license entry into the professions and enforce their professional ethical norms, all of which are ultimately grounded in society's interest in safeguarding the interests of the public who partake in those professional services.¹⁹⁸

These arguments suffer from what might aptly be labeled the "false leads" of certain easy cases—common situations in which we know intuitively that regulation of the professional's speech cannot possibly raise serious First Amendment objections, even though we may not have quite yet puzzled out the doctrinal and theoretical explanation why. It simply cannot be that the First Amendment stands in the way of Bar authorities restricting the speech of attorneys to enforce the attorney-client privilege or conflict-of-interest disclosures. Nor can it be that the First Amendment interdicts rules of tort law requiring physicians to obtain informed consent from patients.¹⁹⁹ Yet these "easy

¹⁹⁸ Note that these arguments, addressed here in the context of the public / private divide, are largely parallel to the same arguments advanced when attempting to compare professional speech to commercial speech. To that extent, the refutation of them here has some qualities of reprise.

¹⁹⁹ See Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 844–45 (1999) ("Although the Court has said even less about the extent of permissible regulation of professional speech than about identifying the category of such communications, it would seem that the scope of permissible regulation of the physician-patient dialogue must be determined with a view to the nature of the underlying relationship. Apart from the recognition of a predefined communicative project, the physician-patient relationship is marked by an imbalance of authority. Patients seeking the help of a physician

cases” do *not* mean that regulations of the expression of professionals within their client relationships are invisible to the First Amendment. They simply point to the truism that, on the merits, properly applied First Amendment principles would sustain the power of regulators to regulate professional speech in these instances. These are the very regulations that would typically be upheld even under application of the “strict scrutiny” test.

To say that certain time-honored forms of regulation of the speech of professionals would and should be upheld under application of the strict scrutiny doctrine, however, does not mean that all such forms of regulation, properly analyzed, would or should survive strict scrutiny. While rigorous enforcement of the core confidentiality requirements of Rule 1.6 of the Rules of Professional Responsibility for lawyers may withstand First Amendment challenge, for example, there may be other limits imposed by Rule 1.6 that would *fail* a First Amendment challenge: The Virginia Supreme Court struck down an attempt by the Virginia Bar to discipline a lawyer under Rule 1.6 for certain entries in a blog he maintained describing the outcomes of certain concluded matters he had handled for clients, descriptions recounting events of public record in open court proceedings.²⁰⁰ While the confidentiality obligation of lawyers under Rule 1.6 will certainly survive First Amendment strict scrutiny review in most of its applications, there may be pockets in which Rule 1.6, for all its laudatory purposes, is properly trumped by superior First Amendment principles. The

tend to lack the knowledge to evaluate their own medical condition or to understand fully the various treatment options apart from their careful presentation by the physician. They are not privy to the discourse of medical science and are not usually in a position to rely on their own evaluation of the best course of action independent from their encounters and discussions with physicians. To varying degrees, patients will ‘suspend their critical faculties and defer to physicians’ opinions.’ Although patients may get a second opinion, the social practice of seeking treatment from a physician, or even a second opinion, is not a general unbounded scholarly investigation, but the placing of trust in, and the recognition of the authority of, one or more physicians. Undoubtedly as a result of this imbalance, the social practice surrounding medical care and advice includes the recognition that physicians assume certain fiduciary responsibilities in the context of this relationship.”).

²⁰⁰ *Hunter v. Va. State Bar ex rel. Third Dist. Comm.*, 744 S.E.2d 611, 620 (Va. 2013), *cert. denied*, 133 S. Ct. 2871 (2013) (“The VSB argues that it can prohibit an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession. Such concerns, however, are unsupported by the evidence. To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB’s interpretation of Rule 1.6 violated the First Amendment.”) (Author’s disclosure: the author of this Article, Rodney Smolla, served as lead counsel for Mr. Hunter in the matter. While Mr. Hunter prevailed in striking down the application of Rule 1.6 to his blog, he lost in his claim that the blog did not constitute commercial speech, subjecting it to the requirements of the lawyer advertising rules in Virginia).

notion that lawyers should be free to talk about the public aspects of concluded public judicial proceedings is one of them.

E. Professional Speech is Not Analogous to Government Funding Doctrine

It is also useful to consider as a foil to the fledgling professional speech doctrine the line of decisions dealing with the conditions government may attach to government funding programs. These decisions fall into two opposing lines of precedent, which exist in significant tension. On the one side are cases such as *Rust v. Sullivan*,²⁰¹ the close and controversial decision in which the Court held that restrictions on abortion counseling placed on medical providers in programs funded under Title X of the Public Health Service Act were constitutional.²⁰² *Rust* is among a cluster of cases that have sustained federal programs refusing to subsidize certain expressive activity.²⁰³ These decisions are incongruous with another line of decisions enforcing the “doctrine of unconstitutional conditions,”²⁰⁴ in which the Court has held that attaching strings restricting First Amendment rights to the receipt of government funds violates the Constitution.²⁰⁵ The Court’s most ambitious effort to reconcile these two lines of precedent occurred in *Agency for International Development v. Alliance for*

²⁰¹ 500 U.S. 173 (1991).

²⁰² *Id.* at 173; see 42 U.S.C. §§ 300–300a-5 (2012).

²⁰³ See *Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661 (2010) (upholding a requirement imposed by the Hastings Law School that registered student groups open their membership to all comers, notwithstanding the objections of a religious student group opposed to homosexuality that claimed its First Amendment rights were violated by being forced to accept openly gay members); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding an IRS ruling stripping Bob Jones University of tax-exempt status because of its racist policies); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (upholding a requirement that nonprofit organizations seeking tax-exempt status under 26 U.S.C. § 501(c)(3) not engage in substantial efforts to influence legislation).

²⁰⁴ See generally Richard A. Epstein, *The Supreme Court 1987 Term: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5 (1988); Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

²⁰⁵ *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (striking down a provision of a federal law requiring recipients of funds to adopt a policy stating that they oppose sex trafficking and prostitution); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (striking down restrictions placed on the Legal Services Corporation by Congress prohibiting legal representation funded by recipients of LSC moneys if the representation involved an effort to amend or otherwise challenge existing welfare law); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (striking down restrictions on funding of the University of Virginia’s student organizations for religiously proselytizing publications); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (striking down restrictions on editorializing by public broadcasters).

*Open Society International, Inc.*²⁰⁶ The key distinction, the Court maintained, was between those conditions that “define the limits of the government spending program” and those that seek to use funding as leverage “to regulate speech outside the contours of the program itself.”²⁰⁷ The line drawn by this distinction is often elusive, as the Court itself acknowledged, because a law that in fact seeks to use leverage to regulate outside the law’s programmatic purpose may be crafted in such a manner that it is effectively recast as if it is defining the limits of a spending program.²⁰⁸

Regulation of professional speech cannot be justified as an exercise by government in “defining the limits of a spending program,” because the regulation of professional speech is not tied to any government spending program but to the issuance of a professional license. If, for the purposes of analogy, we treat the grant of the license as somewhat akin to a government subsidy, then regulation of professional speech is exposed as the very kind of content-based leverage over discourse that the First Amendment forbids.

Florida’s imposition of restrictions on the First Amendment rights of doctors surrounding gun ownership is a vivid example. Florida is attempting to use the leverage of licensure to manipulate discussion among private citizens—doctors and patients—on an issue of major public importance. Florida is certainly entitled to enter this debate through its own expression—engaging in its own government speech on the question. Florida can presumably exert some control over its own employees on matters relating to this issue, to the extent that the speech in question would fall within the confines of an employee’s job duties under the *Pickering / Connick / Ceballos* test. But when Florida attempts to limit the speech of licensed professionals in the private sector on such topics, it is restricting expression on the basis of content and viewpoint in a manner that ought to trigger strict scrutiny review. To grant the government the benefit of a lower level of review, such as rational basis or intermediate scrutiny, merely because the speech occurs within the context of a professional’s advice to a client is to ride roughshod over the fundamental constitutional divide separating the power of government to control speech within the confines of government programs, and the power of government to control speech in the general marketplace of ideas. Indeed, the very fact that professions typically have strong cultural norms and sociological structures that exert peer pressure on professions

²⁰⁶ 133 S. Ct. 2321, 2328 (2013).

²⁰⁷ *Id.* at 2328 (“In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”).

²⁰⁸ *See id.* (“The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that ‘Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.’” (quoting *Velazquez*, 531 U.S. at 547)).

to comport themselves ethically and professionally, actually diminishes the strength of the government's claim that it somehow needs to step into the professional arena to augment those forces. As Justice Breyer has noted, where "speech is subject to independent regulation by canons of the profession . . . the government's own interest in forbidding that speech is diminished."²⁰⁹

Indeed, to treat the expressive activity of a private professional in relation to a client as somehow beneath the dignity of full First Amendment protection is to fail to appreciate that major topics of public discourse that may often play out in the context of the questions, answers, counsel, and advice exchanged within a professional-client setting. A professional's speech in the public arena—such as expression in a book or a speech to a conference—is plainly part of public discourse and should receive the highest levels of constitutional protection. It does not follow, however, that a professional's speech within the confines of a fiduciary relationship with a client may not *also* be part of public discourse. It is a false dichotomy to assume that expression in a manifestly public sphere (a lawyer's speech to a convention) is public and protected by the First Amendment, while expression in the office with a client is private and not.

The Supreme Court's decision in *Legal Services Corp. v. Velazquez*²¹⁰ is a powerful exemplar. Congress thought it could draw a sensible line between legal services lawyers providing routine legal services to the indigent, and legal services lawyers engaging in frontal assaults on the welfare system by bringing broad ideological suits against the system.²¹¹ In holding the attempt by Congress unconstitutional, the Court first distinguished *Rust v. Sullivan*, describing *Rust* as a case largely grounded in a rationale akin to the government speech doctrine, in which Congress was forcing private doctors to engage in counseling outside the scope of the government's spending program, in a manner that effectively transmitted the government's own message.²¹² For purposes of the argument I am making here regarding the status of professional speech, the Court in *Velazquez* emphasized that the speech of lawyers advising clients is "private" in the sense of *not being governmental*, not "private" in the sense of not being on matters of important public concern.²¹³ The Court in *Velazquez* thus explained that "[t]he Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding."²¹⁴ *Velazquez* pointedly contrasted *Rust* with

²⁰⁹ *Garcetti v. Ceballos*, 547 U.S. 410, 446 (2006) (Breyer, J., dissenting).

²¹⁰ 531 U.S. 533 (2001).

²¹¹ *Id.* at 536–37.

²¹² *Id.* at 533–34.

²¹³ *Id.* at 542.

²¹⁴ *Id.* at 541.

Rosenberger v. Rector & Visitors of University of Virginia,²¹⁵ in which the Court struck down the University of Virginia's attempt to limit the funding of student organizations for religious messages.²¹⁶ The Court in *Velazquez* then made the case for the high First Amendment value of the speech of lawyers advising their legal services clients: "Although the LSC program differs from the program at issue in *Rosenberger* in that its purpose is not to 'encourage a diversity of views,' the salient point is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message."²¹⁷

Most significantly, the Court in *Velazquez* eloquently described the value of the professional speech of lawyers in the constitutional scheme. Reminding us that "[i]t is fundamental that the First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,'"²¹⁸ the Court concluded that "[t]here can be little doubt that the LSC Act funds constitutionally protected expression."²¹⁹ Restricting the speech of lawyers was deemed damaging to the interests of clients,²²⁰ and damaging to the larger legal system as a whole.²²¹ "By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts," the Court noted, "the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."²²²

Indeed, *Velazquez* strongly endorsed the traditional autonomy and independence of lawyers as they relate to their clients and to the courts, *elevating* the constitutional status of professional speech, not diminishing it. The Court thus strongly emphasized that "[r]estricting 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,"²²³ adding that this distortion could occur "whether the validity issue becomes apparent during initial attorney-client consultations or in the midst of litigation proceedings."²²⁴ *Velazquez* is a powerful ruling, and may in itself clinch the argument against

²¹⁵ 515 U.S. 819 (1995).

²¹⁶ *Id.*

²¹⁷ *Velazquez*, 531 U.S. at 542.

²¹⁸ *Id.* at 548 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))).

²¹⁹ *Id.*

²²⁰ *Id.* at 546 ("There often will be no alternative source for the client to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits.").

²²¹ *Id.* at 544.

²²² *Id.* at 545.

²²³ *Id.* at 544.

²²⁴ *Id.* at 545.

applying anything less than full strict scrutiny review to regulation of professional speech.

My argument that strict scrutiny is the appropriate standard to apply to speech restricting what a professional may say to a client, it bears repeating, does not mean that the government is powerless to regulate communication between a professional and a client.²²⁵ Even under strict scrutiny, the government sometimes wins. What application of strict scrutiny does mean is that the government's range of permissible regulation is limited to prevention of behavior that is criminal, tortious, or unethical, provided that the crime, tort, or ethical norm is independently justified by compelling government interests. Doctors, for example, are required by tort law to obtain a patient's informed consent before performing a medical procedure, out of solicitude for preserving the dignity and autonomy of patients. Lawyers are required by ethical rules to retain client confidences and disclose conflicts of interests in the service of core fiduciary duties of confidentiality and loyalty that preserve the core integrity of the attorney-client relationship.²²⁶ First Amendment challenges to these basic rules governing doctors and lawyers would in most cases appropriately be deemed frivolous. That frivolous quality, however, does not exist because the communications are not "speech," or because the First Amendment does not "apply" to these settings, or because the regulation is not content-based, or because the setting of speech within a regulated industry justifies lower scrutiny, but rather because even applying strict scrutiny, the government's compelling justifications in such classic instances are already established, obvious, and incontrovertible.

F. The Threshold Authority to License at All

Before ending the discussion of the appropriate level of review of professional speech, there is one more important matter to consider, which is whether there may be instances in which *even the act of requiring a professional license* alone may in some settings violate the First Amendment.

Even the threshold decision to require a license is not immune from high levels of First Amendment scrutiny. The opinion of Justice Jackson in *Thomas*

²²⁵ *Pickup v. Brown*, 740 F.3d 1208, 1220–21 (9th Cir. 2014) (O'Scannlain, J., dissenting) ("Subjecting regulations of professionals' speech to some degree of scrutiny under the First Amendment indeed does not necessarily call their legitimacy into question. But perhaps the panel's common sense would afford more deferential treatment to such traditional regulations as, for example, the ethical rules forbidding attorneys from divulging client confidences. Accordingly, the panel intimates a potentially broad exception to the First Amendment for certain categories of speech. The Supreme Court, however, has clearly warned us inferior courts against arrogating to ourselves 'any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."'" (quoting *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010))).

²²⁶ See MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016).

and Justice White in *Lowe* are persuasive in their holding that the First Amendment bars *requiring a license at all* for certain forms of expression.²²⁷ The decision of the Fourth Circuit in the fortune teller's case, *Moore-King v. County of Chesterfield, Virginia*,²²⁸ ignored this threshold problem of when a license may even be required.²²⁹ The Fourth Circuit appeared to lump all "professions" together indiscriminately, treating the decision on when to license as routine economic legislation that never triggers elevated First Amendment review, and treating distinctions that the state may choose to draw among the licensing schemes applied to various professions (imposing more onerous licensure burdens on some than others) as merely a subsidiary form of economic regulation not triggering First Amendment concerns.²³⁰

Perhaps fortune tellers were just easy pickings. Perhaps fortune tellers were perceived by legislators as having only marginal social status on the spectrum of professions.²³¹ Imagine instead that a state were to license *journalists*, requiring a professional journalist's license entailing special fees, background checks, or competency determinations in order to practice professional journalism. When a South Carolina legislator recently introduced a bill requiring such licensure of journalists, the bill drew instant national attention and wide condemnation as an affront to First Amendment principles.²³² The legislator would quickly walk back the bill, claiming he was just pulling

²²⁷ See *Lowe v. SEC*, 472 U.S. 181, 211 (1985) (White, J., concurring); *Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J., concurring).

²²⁸ 708 F.3d 560 (4th Cir. 2013).

²²⁹ See *id.*

²³⁰ See *id.* at 569; see also *id.* at 570 ("To recognize the variability inherent in occupational regulations is not to afford the government carte blanche in crafting or implementing those regulations. We need not delineate the precise boundaries of permissible occupational regulation under the professional speech doctrine in this case because we hold that the County's regulation of Moore-King's activities falls squarely within the scope of that doctrine. The County's regulations therefore do not abridge Moore-King's First Amendment freedom of speech.").

²³¹ See Nicole Brown Jones, Comment, *Did Fortune Tellers See This Coming? Spiritual Counseling, Professional Speech, and the First Amendment*, 83 Miss. L.J. 639, 669 (2014) ("While regulators may disagree with its themes and be highly skeptical of its validity, spiritual counseling cannot be deemed inherently false, no more than any other spiritual practice that makes unverifiable, supernatural claims. Concerns about consumer protection can be sufficiently addressed by existing state laws that apply to all businesses, making the additional restrictions on spiritual counselors' speech unnecessary and overly burdensome. The First Amendment requires that spiritual counselors be given freedom to communicate with those who seek their guidance without excessive government intervention. Regulatory schemes that target the speech of spiritual counselors violate the First Amendment and should be invalidated by courts.").

²³² See, e.g., Michael Calderone, *GOP Rep. Wants Government to Register Journalists*, HUFFINGTON POST (Jan. 19, 2016, 4:29 PM), http://www.huffingtonpost.com/entry/gop-press-freedom_us_569e8faae4b04c813761b0fd.

everyone's leg.²³³ If so, it was a formidable pull, as the proposed "Responsible Journalism Registry Law" was quite elaborate in its structure and design.²³⁴

²³³ See Callum Borchers, *That South Carolina Bill to Register Journalists? It Was a Ruse.*, WASH. POST (Jan. 20, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/01/20/south-carolina-journalist-registry-update-it-was-a-ruse/>.

²³⁴ See H.R. 4702, 121st Gen. Assemb., Reg. Sess. (S.C. 2016):

A BILL

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 85 TO TITLE 40 TO ENACT THE "SOUTH CAROLINA RESPONSIBLE JOURNALISM REGISTRY LAW" SO AS TO ESTABLISH REQUIREMENTS FOR PERSONS BEFORE WORKING AS A JOURNALIST FOR A MEDIA OUTLET AND FOR MEDIA OUTLETS BEFORE HIRING A JOURNALIST; TO REQUIRE THE ESTABLISHMENT AND OPERATION OF A RESPONSIBLE JOURNALISM REGISTRY BY THE SOUTH CAROLINA SECRETARY OF STATE'S OFFICE; TO AUTHORIZE REGISTRY FEES; TO ESTABLISH FINES AND CRIMINAL PENALTIES FOR VIOLATION OF THE CHAPTER; AND FOR OTHER PURPOSES.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. This chapter may be cited as the "South Carolina Responsible Journalism Registry Law".

SECTION 2. Title 40 of the 1976 Code is amended by adding:
"CHAPTER 85

South Carolina Responsible Journalism Registry

Section 40-85-10. For purposes of this chapter:

(1) 'Journalist' means a person who in his professional capacity collects, writes, or distributes news or other current information for a media outlet, including an employee or an independent contractor.

(2) 'Media outlet' means a for-profit or not-for-profit publication or broadcast program that provides news and feature stories to the public through various distribution channels including, but not limited to, newspapers, magazines, radio, television, and the Internet.

(3) 'Office' means the South Carolina Secretary of State's Office.

(4) 'Registry' means the South Carolina Responsible Journalism Registry.

Section 40-85-20. (A) The Secretary of State's Office shall create a registry for the registration of persons who qualify as a journalist pursuant to this chapter.

(B) A person seeking to register shall provide all information required by the office including, but not limited to, a criminal record background check, an affidavit from the media outlet attesting to the applicant's journalistic competence, and an application fee in an amount determined by the office.

(C) A registration is valid for two years and must be renewed within thirty days of expiration.

(D)(1) The Secretary of State's Office may deny, revoke, or refuse to issue or renew a registration if the office finds that the person:

(a) has filed an application for registration that contains a statement that is false or misleading with respect to a material fact;

(b) has failed to pay the proper application fee or any other fee or penalty imposed pursuant to this chapter; or

(c) has failed to comply with any provision of this chapter.

(2) The Secretary of State's Office shall deny, revoke, or refuse to issue or renew a registration if a media outlet has determined pursuant to Section 40-85-40 that the person is not competent to be a journalist.

(E) Upon receipt of the required information and documents, the office within thirty days shall provide a registration to the person for submission to a media outlet or a letter notifying the person of the basis for denying, revoking, or refusing to issue or renew a registration.

(F) If the office denies, revokes, or refuses to issue or renew a registration, the office shall inform the person of the right to appeal the decision to the South Carolina Administrative Law Court.

Section 40-85-30. (A) Before hiring or contracting with a person as a journalist, a media outlet shall require the person to present a copy of a criminal record background check and shall make a determination pursuant to Section 40-85-40 whether the person is competent to be a journalist.

(B) Before working as a journalist for a media outlet in this State, a person shall provide a criminal record background check to the media outlet to determine journalistic competence and register with the South Carolina Responsible Journalism Registry. After registering, the person shall provide a copy of the registration to the media outlet. A person may not work as a journalist until the person provides a copy of a registration to the media outlet.

Section 40-85-40. (A) A person is not competent to be a journalist if:

(1) within the three years before submitting an application for registration, the person has been determined by a court of law to have committed:

(a) libel, slander, or invasion of privacy; or

(b) a felony if the underlying offense was committed to collect, write, or distribute news or other current information for a media outlet; or

(2) as a journalist, the person has demonstrated a reckless disregard of the basic codes and canons of professional journalism associations, including a disregard of truth, accuracy, objectivity, impartiality, fairness, and public accountability, as applicable to the acquisition of newsworthy information and its subsequent dissemination to the public.

(B) Upon making a determination that a person is competent to be a journalist, the media outlet shall provide the person an affidavit attesting to the person's journalistic competence for submission to the registry.

Section 40-85-50. (A) A person who works as a journalist without registering pursuant to Section 40-85-30(B):

(1) for a first offense, must be fined not more than twenty-five dollars;

(2) for a second offense, is guilty of a misdemeanor and must be fined not more than one hundred dollars or imprisoned not more than fifteen days, or both; and

(3) for a third or subsequent offense, is guilty of a misdemeanor and must be fined not more than five hundred dollars or imprisoned not more than thirty days, or both.

(B) An officer, director, or principal of a media outlet that employs or contracts with a person as a journalist whom the media outlet knows has not registered pursuant to Section 40-85-30(B), or whose registration the media outlet knows has expired or been revoked, is subject to the penalties provided in subsection (A).

(C) Upon finding that conduct of a journalist or media outlet is in violation of this chapter, the Secretary of State's Office may order the person to cease and desist from engaging in the prohibited conduct. A journalist or media outlet that continues to engage in prohibited conduct in violation of an order is

Reasonable pundits might differ on whether the practice of journalism or fortune telling holds higher esteem in the eyes of the general public, or whether it is even always possible to distinguish between the two, but in the eyes of the Constitution, both callings are presumptively outside the licensure power of government. A review of several of the foundational First Amendment decisions of the last century demonstrates why licensing of expressive activity is generally anathema to First Amendment principles.

In *Grosjean v. American Press Co.*,²³⁵ the Supreme Court struck down a license tax aimed at expression, which it described as a “license tax for the privilege of engaging in such business,” that is to say, the business of selling, or making any charge for, advertising.”²³⁶ The Court engaged in a long discussion of the history of the British Government’s use of license fees and taxes to punish freedom of press.²³⁷ “It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government,”²³⁸ the Court explained. The key for the Court in *Grosjean* was the distinction between an “ordinary” tax and a tax that targeted freedom of the press. “But this is not an ordinary form of tax,” the Court thus

subject to an administrative penalty that may not exceed five hundred dollars for each violation of the order.

(D) A journalist or media outlet against whom a cease and desist order has been issued may appeal to the South Carolina Administrative Law Court.

(E) A copy of an order issued by the Secretary of State’s Office or the Administrative Law Court must be maintained as part of the registry.

Section 40-85-60. The Secretary of State’s Office shall retain all fees and fines to establish and operate the South Carolina Responsible Journalism Registry.”

SECTION 3. This act takes effect upon approval by the Governor.

Id.

²³⁵ 297 U.S. 233 (1936).

²³⁶ *Id.* at 244.

²³⁷ *Id.* at 245–46 (“For more than a century prior to the adoption of the amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing. As early as 1644, John Milton, in an ‘Appeal for the Liberty of Unlicensed Printing,’ assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views ‘without previous censure’; and declared the impossibility of finding any man base enough to accept the office of censor and at the same time good enough to be allowed to perform its duties. Collett, *History of the Taxes on Knowledge*, vol. I, pp. 4–6. The act expired by its own terms in 1695. It was never renewed; and the liberty of the press thus became, as pointed out by Wickwar (*The Struggle for the Freedom of the Press*, p. 15), merely ‘a right or liberty to publish without a license what formerly could be published only with one.’ But mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press.”).

²³⁸ *Id.* at 250.

warned, “but one single in kind, with a long history of hostile misuse against the freedom of the press.”²³⁹

Government may certainly require a *general business license* for a newspaper or a fortune teller. This would indeed be routine economic legislation not triggering any heightened First Amendment review.²⁴⁰ Neutral regulations applicable to all enterprises, such as laws of general applicability requiring a business license to open a business, or zoning laws regulating land use without regard to the content of expression carried on by the land use, or general laws imposing property, sales, or income taxes, do not typically trigger First Amendment scrutiny. It has long been recognized that the First Amendment does not stand against subjecting expressive enterprises to neutral laws of general applicability, from fortune telling to legal practice to operating a newspaper. The Court stated that such “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”²⁴¹

But to go beyond generally applicable laws and require a license *specifically* to report news or predict fortunes is a prior restraint on purely expressive activity.²⁴² Licensure of journalists or fortune tellers is palpably different in kind from licensure of doctors, lawyers, dentists, psychologists, architects, pharmacists, investment advisors, pilots, engineers, nurses, physical therapists, teachers, truck drivers, bartenders, or hair stylists.²⁴³ There are hundreds, perhaps thousands, of professions that require special expertise and competence, and governments may impose licensure requirements to protect the

²³⁹ *Id.*

²⁴⁰ *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 138–40 (1969) (sustaining application of antitrust laws to the press); *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 192–94 (1946) (sustaining application of the Fair Labor Standards Act to the press); *Associated Press v. United States*, 326 U.S. 1, 19–23 (1945) (sustaining application of antitrust laws to the press); *Associated Press v. NLRB*, 301 U.S. 103, 130–31 (1937) (sustaining application of the National Labor Relations Act to the press).

²⁴¹ *Cohen v. Cowles Media, Inc.*, 501 U.S. 663, 669 (1991).

²⁴² *See Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 227–28 (1987) (“Our cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment This is because selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State.”).

²⁴³ *See Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (“A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.”); *see also Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (striking down a law making it unlawful to “print, publish, or broadcast . . . in any instrument of mass communication” the name of the victim of a sexual offense); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down Florida newspaper “right of reply” statute).

public by ensuring that such competence exists. The threshold decision to regulate an arena ought not get a free pass under the First Amendment, however. Fortune telling is expressive and involves a leap of faith for those who indulge in it. Legislatures may not like fortune tellers, just as they may not like journalists, but legislative distaste for their expression, or skepticism regarding their utility, cannot be enough, standing alone, to justify singling them out for licensure and fees.

IV. CONCLUSION

There are allures to the recognition of a special First Amendment doctrine covering professional speech. The most powerful of them speak to our concerns that consumers of professional services be protected against overreaching by those with superior knowledge and experience. The principal concern of the First Amendment, however, is not overreaching by professionals, but overreaching by government. The First Amendment is grounded in the premise that the marketplace is the better regulator of expressive activity than government. There are powerful cultural forces at work within professions that encourage professionals to act ethically and within professional norms. When professionals violate hardline rules of professional conduct, disciplinary bodies and courts may intervene, and such interventions will typically withstand any First Amendment challenge, even when subjected to strict scrutiny review. The application of strict scrutiny serves the valuable purpose, however, of filtering out government regulation that is not, in the classic sense, targeted at preventing criminal, tortious, or palpably unethical professional conduct, but instead an attempt to skew the marketplace of ideas or invade the buffer of confidentiality and autonomy that protects the integrity of the professional-client relationship. Most professionals advising clients are not government employees, and are not carrying on the government's work or carrying the government's message. The First Amendment stands against treating them as if they are. The discourse between a professional and client is often public discourse, and that discourse should receive the highest levels of constitutional protection from government interference.