

# ARTICLES

## The “Watchman for Truth”: Professional Licensing and the First Amendment

Robert Kry\*

*The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. . . . But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. . . . In this field every person must be his own watchman for truth. . . .*<sup>1</sup>

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\* The author is a graduate of Queen’s University, Canada, and currently works in the financial industry in New York. He is a Research Associate with the Institute for Justice, a Washington, D.C.-based public interest law firm. He assisted the Institute in its successful litigation of *Taucher v. Born* in the District Court for the District of Columbia. The author is grateful for having had the advice and support of the following people in writing this Article: Scott Bullock of the Institute for Justice (who argued *Taucher v. Born*), Michael Schoeman of Schoeman, Marsh & Kaufman (who argued *Lowe v. Securities and Exchange Commission*), and Clint Bolick, also of the Institute for Justice.

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## INTRODUCTION

States have exercised broad authority over the practice of professionals for most of this century.<sup>2</sup> This regulation currently extends not only to the traditional professions such as medicine and law,<sup>3</sup> but to a wide array of modern occupations.<sup>4</sup> In addition, the federal government extensively regulates many forms of professional practice.<sup>5</sup>

A typical method of professional regulation is licensure. Under this system, a professional must obtain a license from a government agency before engaging in certain acts defined to comprise the practice of that profession.<sup>6</sup> Today, state or federal governments license some 500 different occupations, and licensing laws directly affect as much as one-third of the workforce.<sup>7</sup>

2. See *infra* Part III.A.

3. See, e.g., N.Y. JUD. LAW § 460 (McKinney 1999) (practice of law); N.Y. EDUC. LAW § 6524 (McKinney 1999) (practice of medicine).

4. See, e.g., N.Y. EDUC. LAW § 7704 (McKinney 1999) (licensing of social workers); N.Y. EDUC. LAW § 8355 (McKinney 1999) (licensing of athletic trainers).

5. See, e.g., Investment Advisers Act, 15 U.S.C. §§ 80b-21 (1994) (regulating investment advisers); Commodity Exchange Act, 7 U.S.C. §§ 1-26 (1994) (regulating commodity trading advisers).

6. See, e.g., N.Y. JUD. LAW § 476-a (McKinney 1999) (authorizing actions against unlicensed practitioners of law); N.Y. EDUC. LAW § 6512 (McKinney 1999) (criminalizing professional practice without appropriate licensure); Investment Advisers Act, 15 U.S.C. § 80b-3 (1994) (requiring licensure); Commodity Exchange Act, 7 U.S.C. § 6m(1) (1994) (same).

7. See S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN

Although licensing laws vary widely, certain characteristics are common. First, the licensure scheme typically sets out certain requirements that the professional must fulfill before practicing. These may include completing a prescribed course of study, passing prescribed examinations, and agreeing to practice according to defined standards.<sup>8</sup> Second, licensure schemes often grant the administering agency some degree of authority to deny licensure to those deemed unfit to practice the profession.<sup>9</sup>

Practice by an unlicensed person is punishable whether or not there is any actual harm to the public. *State Bar v. Cramer*<sup>10</sup> is representative. Virginia Cramer operated a low-cost form-preparation and advice service for parties seeking no-fault divorces in the state of Michigan. The state bar alleged that her business was in violation of the state's unauthorized practice of law statute. Despite the lack of any evidence that her work was deficient and the fact that all of her customers knew that she was not an attorney, the court enjoined her business. When she continued to operate it, she was jailed.<sup>11</sup>

Licensure can be compared with certification, another means of professional regulation. Certification is similar to licensure in that the government (or a private certification authority) prescribes requirements and reviews the qualifications of those who seek to obtain a designation. However, certification differs from licensure in that "lack of certification does not bar someone from practicing the certified trade; it only prohibits him from presenting himself to the public as a 'certified' practitioner."<sup>12</sup>

The most common interest asserted to justify professional practice regulation is the protection of the public.<sup>13</sup> Proponents of profes-

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AMERICA 5, 14 (1987).

8. See, e.g., N.Y. EDUC. LAW § 6524 (McKinney 1999) (requirements for obtaining a medical license, including education, training, and examination); Investment Advisers Act, 15 U.S.C. § 80b-4 (1994) (recordkeeping requirements); Commodity Exchange Act, 7 U.S.C. § 6n (1994) (requirements for registration as a Commodity Trading Advisor, including fees, ethics training, maintenance of books and records, and submission to commission audits).

9. See, e.g., N.Y. EDUC. LAW § 6524(7) (McKinney 1999) (allowing the board to deny licensure to candidates not demonstrating "good character"); Investment Advisers Act, 15 U.S.C. § 80b-3(e) (1994) (listing grounds for denial or revocation); Commodity Exchange Act, 7 U.S.C. §§ 12a(2), 12a(3)(M) (1994) (setting out grounds for which regulators can deny registration, including "for other good cause").

10. 249 N.W.2d 1 (Mich. 1976).

11. See *id.* at 1-3, 5.

12. YOUNG, *supra* note 7, at 5. See also YOUNG, *supra* note 7, at 19 (describing the system of certification for Certified Financial Analysts); 15 U.S.C. § 80b-8(c) (1994) (restricting the use of the term Investment Counsel to those meeting certain criteria); George Leef, *The Case for a Free Market in Legal Services*, CATO POLICY ANALYSIS No. 322, at 35-37 (Oct. 9, 1998) (proposing certification as an alternative to licensing in the legal profession).

13. See, e.g., YOUNG, *supra* note 7, at 15 ("[The] principal justification [for occupational

sional licensing argue that regulation is necessary to prevent harm from unscrupulous or incompetent practice.<sup>14</sup> They note that professional-client relationships are frequently marked by a disparity in knowledge that may hamper the ability of clients to make informed decisions.<sup>15</sup>

On the other hand, there is a large body of historical, economic, and sociological literature that suggests that the primary motivation for professional licensing laws is economic self-interest.<sup>16</sup> By restricting entry into the practice of a profession, professional groups can insulate themselves from competition and derive monopoly profits at the expense of consumers, who are denied lower-cost alternatives to the professional's services.<sup>17</sup> This view is consistent with the fact that the principal proponents of licensing laws are typically the occupational groups themselves.<sup>18</sup> Adherents to this position also note that most of the justifications for licensure could be equally well addressed by systems of certification.<sup>19</sup>

Like most statutes, professional licensure systems that neither concern a suspect classification nor burden a fundamental right are subject to only rational basis review in the courts: they are constitutional so long as they have a reasonable relationship to a legitimate government interest.<sup>20</sup> Protection of the public is certainly a legitimate

licensing] is the public interest."); See also *Oregon State Bar v. Security Escrows, Inc.*, 377 P.2d 334, 338 (Or. 1962) ("Laymen are excluded from law practice . . . solely to protect the public."); Donald E. Lively, *Securities Regulation and Freedom of the Press: Toward a Marketplace of Ideas in the Marketplace of Investment*, 60 WASH. L. REV. 843, 846 (1985) ("[Regulation of] expression in the investment marketplace rests largely upon the regulatory predicate of investor protection.").

14. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-1 (1981) ("The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services.").

15. See Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328 (Dec. 1979).

16. See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 137-60 (1962); SIMON ROTTENBERG, *OCCUPATIONAL LICENSING AND REGULATION* (1980); YOUNG, *supra* note 7.

17. See Walter Gelhorn, *Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 1, 11 (1976) ("Licensing has been eagerly sought—always on the purported ground that licensure protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members of the licensed group become protected against competition from newcomers."); ROTTENBERG, *supra* note 16; Leef, *supra* note 12, at 21; THOMAS SOWELL, *KNOWLEDGE AND DECISIONS* 200 (1980).

18. See Gelhorn, *supra* note 17, at 11 ("Licensing has only infrequently been imposed upon an occupation against its wishes."); JETHRO LIEBERMAN, *THE TYRANNY OF THE EXPERTS: HOW PROFESSIONALS ARE CLOSING THE OPEN SOCIETY* 15 (1970) ("The bulk of existing professional licensing laws was passed at the behest of the professional group.").

19. See YOUNG, *supra* note 7, at 18-19; FRIEDMAN, *supra* note 16, at 149.

20. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative

government interest, and in most cases courts have held that licensing regimes are a reasonably related means of pursuing that interest, even if the profession enjoys a consequential economic benefit. While courts have invalidated some licensing laws under the rational basis test,<sup>21</sup> in most cases, they have found them constitutional.<sup>22</sup>

This Article addresses a particular aspect of many kinds of professional practice: the rendering of advice to clients. Drawing on their knowledge and experience, professionals may recommend a certain course of action to their clients in the course of their practice. The client may then assess the recommendation and decide whether or not to act on it. This aspect of professional practice involves a speech-related activity, so government regulation might raise at least a colorable First Amendment issue.<sup>23</sup>

This Article also focuses on a particular aspect of the regulation of professional advice, namely, licensure. When professional advice-rendering activities are covered by a system of licensure, particularly acute First Amendment questions arise because the license requirement arguably acts as a prior restraint on speech. A prior restraint is a legal requirement that an individual obtain permission from the government before speaking.<sup>24</sup> Protection of speakers from regimes of prior restraint lies at the heart of the First Amendment's guarantee of free speech. As the Supreme Court explains, "[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights."<sup>25</sup> This view reflects the First Amendment's historical motivation: British laws that had sought to impose licensing requirements on the press.<sup>26</sup>

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measure was a rational way to correct it."); *Conn v. Gabbert*, 119 S. Ct. 1292, 1295-96 (1999) ("[T]he liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment," subject to "reasonable government regulation.").

21. See, e.g., *Brown v. Barry*, 710 F. Supp. 352, 355 (D.D.C. 1989) (finding a restriction on the operation of bootblack stands unconstitutional under rational basis review); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (finding cosmetology licensing restrictions unconstitutional as applied to practitioners of African hair-braiding). See also *Leef*, *supra* note 12 (critiquing unauthorized practice laws as an abridgement of economic due process rights).

22. See, e.g., *Graves v. Minnesota*, 272 U.S. 425 (1926) (licensing of dentists); *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889) (licensing of doctors).

23. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").

24. See *Thomas Emerson, The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 655 (1955).

25. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). See also *STONE ET AL., CONSTITUTIONAL LAW* 1183 (1996) ("[T]he Court has steadfastly held that there is a special presumption under the First Amendment against the use of prior restraints."); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (striking down a licensing ordinance for handbill distributors).

26. See *LAURENCE TRIBE, CONSTITUTIONAL LAW* § 12-34 (2d ed. 1988); *Emerson*,

Prior restraints are particularly severe when the licensing requirements impose significant burdens on the speaker,<sup>27</sup> or when they grant administrative officials broad discretion in evaluating applications.<sup>28</sup> Many professional licensing schemes fall into both categories.

Professional licensing laws applied to individuals who render advice present a conflict between the states' traditional authority to regulate professions and the First Amendment prohibition on prior restraints of speech. The Supreme Court has developed a unique jurisprudence which I believe can be reduced to two rules, the operation of which depend on both the content and the context of the advice given. Though these rules rest on venerable First Amendment theories, the theories themselves do not justify the broad licensing power claimed by the states today. I call for a reevaluation of the professional speech doctrine driven by the values that the First Amendment represents.

Part I of this Article examines the evolution of the judicial doctrine of professional speech. Many courts uphold restrictions on professional speech by asserting that the speech is merely incidental to the conduct of the profession.<sup>29</sup> However, this reasoning cannot be squared with the Court's normal approach to expressive conduct cases. In addition to examining whether the speech is merely incidental to conduct, the Court applies rules to distinguish "professional speech," which the government may license, from "protected speech," which it may not. These rules can be distilled into two "tests" that determine when government licensure is constitutional. The first test is a "value-neutral test" that allows the government to license advice when the advice is both tailored to the characteristics of the recipient and delivered in the context of a person-to-person relationship between the speaker and listener. The second test is a "value-based test." This test prohibits the government from licensing speech on matters of public concern when the speaker's motivation is not solely self-enrichment (even if the requirement would otherwise be constitutional under the value-neutral test).

Part II of the Article demonstrates how the rules formulated in Part I can be applied to current issues that span professional boundaries. As an example, I look at the question of software that renders advice on such topics as law, securities trading, and personal health, and I argue that advice-rendering software does not generally consti-

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*supra* note 24.

27. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-33 (1992).

28. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988) (discussing the particular dangers of allowing licensing authorities standardless discretion).

29. See *infra* note 30.

tute professional speech under the value-neutral test unless the author wrote it with the needs of a specific user in mind. I discuss two recent cases that deal with this issue, *Taucher v. Born* and *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*, and I examine related academic commentary. Finally, I comment on the doctrinal significance of the software issue and argue that it has broad ramifications for the evolution of the professional speech doctrine.

In Part III, I provide a critical analysis of the Court's tests. I first examine the historical context surrounding the adoption of the First and Fourteenth Amendments and argue that it does not support the broad licensing authority currently claimed by state and federal regulators. Next, I attempt to understand the two professional speech tests in terms of academics' views of the purposes underlying the First Amendment. I argue that the value-neutral test is an extension of Holmes' "marketplace of ideas" theory, while the value-based test is more akin to Meiklejohn's "self-governance" theory. I argue, however, that both theories have serious limitations in explaining the breadth of the professional speech doctrine as it currently exists. In particular, I argue that while these rationales may justify certification systems, they fall short of justifying licensure. Finally, I examine the issue from a legal realist's perspective, drawing on sociological research about the motives and methods of professional groups and suggesting that it may offer some insight into the Court's treatment of professional speech. I conclude by calling for a reevaluation of the professional speech doctrine and the adoption of a framework that places greater emphasis on client empowerment.

## I. THE PROFESSIONAL SPEECH DOCTRINE

### A. *Professional Speech and Professional Conduct*

A theory often invoked to justify the constitutionality of licensing laws applied to advice-rendering professionals is the doctrine of "speech incidental to conduct." Courts have reasoned that professional practice is a course of conduct that merely involves speech elements.<sup>30</sup> Thus, the argument goes, licensure is a permissible regulation of conduct with a merely incidental impact on speech.

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30. See, e.g., *Oregon State Bar v. Smith*, 942 P.2d 793, 801 (Or. Ct. App. 1997) ("[The statute] does not proscribe the mere generalized exchange of legal information or discussion of legal issues. Rather, the statute is expressly directed to limiting the conduct of a profession—the practice of law—to those who possess certain qualifications. It cannot be gainsaid that some part of the practice of law involves expression—and, indeed, that expression is an indispensable component of some aspects of legal practice. However, as described above, the practice of law involves conduct, processes, and relationships that transcend mere expression. In that

To consider the validity of this argument, it is helpful to review the Court's normal approach to "expressive conduct" cases. In *United States v. O'Brien*,<sup>31</sup> the Court upheld the federal government's authority to prohibit the burning of selective service registration certificates, despite the obvious expressive component. The Court reasoned 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."<sup>32</sup> Importantly, the Court held that such restrictions are valid only when "the governmental interest is unrelated to the suppression of free expression."<sup>33</sup> That standard was met because the government had an administrative interest in the continued availability of draft cards that was unrelated to the expressive component of the activity.<sup>34</sup>

Compare *O'Brien* with *Texas v. Johnson*,<sup>35</sup> where the Court invalidated a law prohibiting flag desecration. The Court reiterated that when regulating expressive conduct, "the governmental interest in question [must] be unconnected to expression."<sup>36</sup> The Court held that in the case of laws prohibiting flag desecration, no such interest existed.<sup>37</sup>

From these cases, we can extract the Court's normal rule concerning "speech incidental to conduct." Regulations of expressive activity are valid only when the government's regulatory interest aims at the nonexpressive component of the activity.<sup>38</sup>

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respect, . . . the corollary legal licensing statutes are no different from other professional licensing and regulatory schemes."); *State v. Niska*, 380 N.W.2d 646, 648-49 (N.D. 1986) ("Apparently Niska asserts that in practicing law he was exercising his freedom of speech. . . . it is evident that [the licensing requirement] was not enforced against Niska in order to quash the political views he was expressing by means of his legal advice . . . . Instead, [it] was enforced to prohibit Niska from the unauthorized practice of law. Any resulting limitation of his speech was merely indirect and incidental."); *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in the result) ("The power of government to regulate the professions is not lost whenever the practice of a profession entails speech.").

31. 391 U.S. 367 (1968).

32. *Id.* at 377.

33. *Id.* at 377. The Court also held that the challenged law must be "within the constitutional power of the Government; [must further] an important or substantial governmental interest; . . . [and that the] incidental restriction on alleged First Amendment freedom [must be] no greater than is essential to the furtherance of that interest." *Id.* at 367-68.

34. *See id.* at 377-78.

35. 491 U.S. 397 (1989).

36. *Id.* at 407.

37. *See id.* at 407-20.

38. Courts often phrase this inquiry by asking whether the regulation is "content-based" or "content-neutral." *See, e.g., Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 643 (1994). This is simply an application of the same test under different labels. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 308 n.6 (1984) (Marshall, J., dissenting) ("[N]o substan-



We can analyze the regulation of professional advice-rendering activities under this framework. Many professions involve some activities that are plainly expressive, and others that are nonexpressive, "pure" conduct. A doctor might one day advise her patient to get more rest, and the next, perform a complex surgical operation. A financial advisor might advise his client to reduce her exposure to emerging markets, and later, invest client funds from an account over which he has discretionary authority.

When a professional does no more than render advice to a client, the government's interest in protecting the public from fraudulent or incompetent practice is quite obviously directed at the expressive component of the professional's practice rather than the nonexpressive component (if such a component even exists).<sup>39</sup> The government's regulatory goal is to prevent the expression of opinions or recommendations that are not consistent with the accepted standard in the profession.<sup>40</sup> Whether the speech is fraudulent or incompetent turns solely on its content. In such circumstances, the government's avowed policy is simply to suppress the speech of all but licensed persons on certain topics in the interest of protecting the public. Under *O'Brien*, regulations of advice-rendering professionals would be subject to strict scrutiny, and prophylactic measures such as licensing requirements would undoubtedly be unconstitutional.<sup>41</sup>

This is not to suggest that under *O'Brien*, the mere fact that a profession involves speech would remove it from the state's regulatory purview. When a professional performs distinct expressive and non-

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tial difference distinguishes the test applicable to [content-neutral] restrictions and the test articulated in *United States v. O'Brien*." (citation omitted).

39. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 64 (1981) (noting that restrictions on the personal counseling activities of professionals are directed at expression and implying that restrictions on form preparation activities should be viewed as regulating the expressive component of a mixed speech/conduct activity); *id.* at 64-65 (arguing that the traditional speech-conduct framework is not useful from a policy standpoint in the context of professional speech).

40. *But see Niska*, 380 N.W.2d at 649 (applying *O'Brien* and concluding that "The State's interest in regulating the practice of law is unrelated to the expression of ideas. [The unauthorized practice statute] is not targeted at ideas which the state seeks to suppress."); *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ. A. 3:97CV-2859-H, 1999 WL 47235, at \*8 (N.D. Tex. Jan. 22, 1999), *vacated following legislation*, 173 F.3d 956 (5th Cir. 1999) ("The Statute is aimed at eradicating the unauthorized practice of law. The Statute's purpose has nothing to do with suppressing speech.") (discussed *infra*, Part II.B.2).

41. Under *O'Brien*, even a restriction on expressive conduct directed at its nonexpressive elements must satisfy certain criteria. It must advance a legitimate government interest, and must do so in a way that does not overly burden the expressive elements of the conduct. I will argue in Part III.B that licensure is hardly a narrowly tailored means of regulating professional speech.

expressive activities, the presence of the expressive activities does not preclude licensure of the nonexpressive ones.<sup>42</sup> If an unlicensed medical practitioner not only delivers speeches on public health matters but also administers medication, takes blood samples, and performs surgery, the practitioner cannot claim that the latter activities are immune from regulation simply because of the presence of the former. Those nonspeech activities pose an independent risk to the public health and safety, and the government's interest in addressing that risk is independent of the professional's other, expressive activities. In such cases, the speech elements are genuinely "incidental" to the professional's conduct.<sup>43</sup>

Furthermore, I do not mean to suggest that any regulation of a speaking or writing activity is necessarily aimed at expression. As many commentators have noted, the spoken word may sometimes do more than merely confer information or advice.<sup>44</sup> For example, words may create or affect legal rights or obligations. When a doctor writes a prescription for a patient, she is doing more than simply recommending a remedy. The prescription has legal significance because it authorizes a pharmacist to deliver a prescription medication to the patient; it gives the patient the right to make a purchase that would otherwise be illegal.<sup>45</sup> A government restriction on who may write prescriptions is a valid regulation of conduct under *O'Brien*. The state's interest in accrediting this class of persons is not directed at the expressive content of the prescription, but at the nonexpressive legal right created by it. Even though the prescription physically consists of

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42. Cf. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was *in part* initiated, evidenced, or carried out by means of language, either spoken, written, or printed.") (emphasis added).

43. See, e.g., *Thomas v. Collins*, 323 U.S. 516, 540 (1945) (stating that a union organizer who not only urges workers to organize but also "collect[s] [union membership] funds" or "secur[es] subscriptions" may be subjected to regulation); *Lowe v. SEC*, 472 U.S. 181, 210 n.57 (1985) (implying that publishers who "have . . . authority over the funds of subscribers [or that] have been delegated decisionmaking authority to handle subscribers' portfolios or accounts" may be subjected to a registration requirement).

44. See, e.g., Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 823-28 (1999); Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081, 1091 (1983); Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 247 (1990).

45. See J. Wells Dixon, *Conant v. McCaffrey: Physicians, Marijuana, and the First Amendment*, 70 U. COLO. L. REV. 975, 982 (1999).

[I]t is also important to note that prescribing marijuana is not the same as recommending it for medical use. Prescribing marijuana generally involves procurement of the drug through legal means, while recommending the medical use of marijuana arguably only involves a discussion between a physician and the patient concerning the benefits and risks associated with the drug, and, possibly, acknowledgment that possession and use of the drug is illegal. *Id.*

nothing more than written words, it has a nonexpressive aspect that the government may regulate.<sup>46</sup> The same analysis applies to a lawyer who notarizes a document or settles a case on behalf of a client. This distinction is also highly relevant to professionals who enter into contracts on behalf of their clients. The government may impose a licensing requirement on a financial advisor who invests funds on behalf of a client, even though the manner in which this investment occurs involves nothing more than the advisor telephoning a broker and verbally transmitting an order. The order placed, without more, affects the legal rights of the client (in this case, the client's entitlement to property). Government regulation could plausibly relate to this nonexpressive aspect of the communication.

Finally, even when a restriction does target the expressive component of a professional's speech, other First Amendment doctrines may come into play. For example, regulations of expressive activity occurring on government property that is not a "public forum" are often constitutional under well-settled First Amendment principles.<sup>47</sup> This doctrine supplies a convincing basis for the traditional licensure requirements for attorneys who represent clients in court.<sup>48</sup> Similarly, a professional's advertising of his services is a form of commercial speech, an area where state and federal governments enjoy broader regulatory discretion.<sup>49</sup>

This array of legal justifications for restricting speech is broad, but it still fails to explain a number of cases in which courts have approved the application of licensing laws to those who render advice. Under the current state of the law, restrictions directed at the expressive component of various forms of professional advice (notably, individually-tailored consultative services) are permitted, even when the advice does not affect any legal rights and does not occur in a governmental forum.

For example, concurring in *Lowe v. SEC*,<sup>50</sup> Justice White stated his belief that the government could impose a licensing requirement on a professional who renders personalized advice to particular clients. He argued that "[j]ust as offer and acceptance are communications incidental to the regulable transaction called a contract, the profession-

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46. A doctor who writes a prescription can be compared with a nutritionist who recommends a customer purchase certain freely-available foods. The nutritionist's recommendation does not create or alter any legal rights, so a government restriction of such advice would fail *O'Brien*.

47. See, e.g., *Greer v. Spock*, 424 U.S. 828 (1976); *Adderly v. Florida*, 385 U.S. 39 (1966).

48. See also *Rhode*, *supra* note 39, at 75 (noting the additional state interests present when a state regulates in-court appearances); see also *infra* note 358 (examining history).

49. See, e.g., *Ohralik v. State Bar Ass'n*, 436 U.S. 447 (1978).

50. 472 U.S. 181, 228 (1985) (White, J., concurring in the result); see also *infra* Part I.B.2.

al's speech is incidental to the conduct of the profession."<sup>51</sup> Viewed under traditional *O'Brien* principles, this argument is unsound. The government may regulate speech incidental to a contract because the contract is more than just an expression of ideas; it has a legal significance that places certain responsibilities on the contracting parties. If the government requires a contracting party to be of the age of majority, the government's regulation addresses not the expressive content of the communications that effected the contract, but the legal consequences thereby created. Regulations of contracts themselves are constitutional under *O'Brien*. But where mere advice is at issue, this rationale does not apply.<sup>52</sup>

Although inconsistent with *O'Brien*, Justice White's expansive view of state authority follows the Court's normal approach. States do not have unfettered authority to regulate speech merely by labeling the speakers "professionals," however, regulations of professional speech are routinely upheld as regulations of "speech incidental to conduct" when they would be invalid under *O'Brien*.

This treatment creates three categories of activity by professionals. The first I will call "actual conduct." Activities in this category fall outside the protection of the First Amendment because they have material nonexpressive elements that the government may legitimately regulate. An example would be a doctor's administration of medicine to a patient. The second category consists of what I will call "professional speech" (although courts often refer to this as merely a subset of professional conduct). These activities, although they would normally be protected under *O'Brien*, are subject to state licensure because of the First Amendment doctrines specific to professional activity. An example would be a doctor's recommendation that a particular patient refrain from eating fatty foods. The final category,

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51. 472 U.S. at 232.

52. Justice White claims that "the professional's speech is incidental to the conduct of the profession," but fails to identify exactly what the "conduct of the profession" is. *Id.* See also *id.* at 231 (noting that in *Thomas*, Justice Jackson held that "the distinguishing factor was whether the speech in any particular case was 'associat[ed] . . . with some other factor which the state may regulate so as to bring the whole within official control'"). Does Justice White believe that "taking the affairs of a client personally in hand" is a course of conduct somehow distinct from the actual rendering of the advice itself? This seems untenable when the only way a professional takes an individual's affairs in hand is by giving personalized advice. Does a writer for a food magazine "take the affairs of her readers in hand" whenever she recommends a restaurant to attend? Both involve the same process of analysis and subsequent recommendation. Although the targets of the analysis are different (in one case, a client's circumstances; in the other, a restaurant's quality), neither seems more "expressive" than the other. In any case, professional licensing requirements are directed at ensuring the quality of the ultimate advice, not at any theoretical "taking the affairs of a client in hand" that may be a part of the process. Under traditional *O'Brien* principles, Justice White's analysis is insufficient.

“protected speech,” consists of those activities that a state may not license, even under its traditional authority over professionals, for reasons I discuss in the next two sections. An example would be a doctor’s publication of an article urging people to exercise more often. An appropriate first inquiry in analyzing any professional speech case is whether the restriction is one on “actual conduct.” If so, the First Amendment inquiry normally ends. If the restriction is not one imposed on “actual conduct,” it must be analyzed under the doctrines peculiar to professional speech.

### B. *The Value-Neutral Test for Restraints on Professional Speech*

The Supreme Court’s professional speech doctrines can be roughly classified into two categories. The first of these determines which kinds of advice are licensable based on how closely they resemble forms of communication associated with fiduciary relationships. This test does not explicitly consider the “value” of any particular speech in the discourse of ideas; I will therefore refer to it as the “value-neutral” test.

Two Supreme Court cases, *Thomas v. Collins*<sup>53</sup> and *Lowe v. SEC*,<sup>54</sup> apply the “value-neutral” test. Additionally, a line of state court decisions beginning with *New York County Lawyers’ Association v. Dacey*<sup>55</sup> is relevant in interpreting its proper scope.

#### 1. *Thomas v. Collins*

In the 1945 case of *Thomas v. Collins*,<sup>56</sup> the Supreme Court considered whether a state may enforce a professional registration requirement against an individual who addresses a group of workers and urges them to join a specific union. The defendant in this case was R.J. Thomas, a prominent union leader. In connection with efforts to organize a union at a refinery near Houston, Thomas agreed to address the workers at a well-publicized mass meeting. Shortly before his scheduled address, however, he was served with a restraining order, enjoining him from proceeding with his engagement without first obtaining an “organizer’s card.”<sup>57</sup> The authority for the injunction was a Texas statute imposing a requirement that “[a]ll

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53. 323 U.S. 516 (1945).

54. 472 U.S. 181 (1985).

55. 283 N.Y.S.2d 984 (N.Y. App. 1967), *reversed and dissenting opinion adopted by* 234 N.E.2d 459 (N.Y. 1967).

56. 323 U.S. 516 (1945).

57. *Id.* at 520-21.

labor union organizers . . . before soliciting any members for his [sic] organization . . . shall apply . . . for an organizer's card."<sup>58</sup>

Having consulted with his attorneys, Thomas elected to go ahead with the meeting as planned. Approximately three hundred people attended.<sup>59</sup> His speech closed with "a general invitation to persons present not members of a labor union to join Local No. 1002 and thereby support the labor movement throughout the country."<sup>60</sup> In addition, at the conclusion of the speech, he added "an oral solicitation of one Pat O'Sullivan, a nonunion man in the audience whom he previously had never seen."<sup>61</sup> After the meeting, Thomas was (predictably) arrested.

The Supreme Court of Texas, ruling against Thomas, held that the statute was a valid exercise of the state's police power taken "for the protection of the general welfare of the public, and particularly the laboring class."<sup>62</sup> It further posited that the statute "affects only the right of one to engage in the business as a paid organizer, and not the mere right of an individual to express his views on the merits of the union."<sup>63</sup>

On appeal to the United States Supreme Court, Thomas argued that the state had penalized him "for the simple act of delivering an address to a group of workers."<sup>64</sup> The state countered that "no issue of free speech or free assembly is presented[;] . . . the statute is directed at business practices. . . ."<sup>65</sup> The Court rejected the state's position, holding that "the First Amendment's safeguards are [not] wholly inapplicable to business or economic activity."<sup>66</sup> It went on to declare that while "the State has power to regulate labor unions with a view to protecting the public interest, . . . [such] regulation . . . , whether aimed at fraud or other abuses, must not trespass upon the domain set apart for free speech and free assembly."<sup>67</sup>

*Thomas v. Collins* is significant for the Court's rejection of the state's argument that it was merely regulating the business practices

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58. *Id.* at 519 n.1.

59. *Id.* at 522.

60. *Id.*

61. *Id.* at 522-23. The exact interchange, in Thomas' recollection, was: "Pat O'Sullivan, I want you to join the Oil Workers Union. I have some application cards here, and I would like to have you sign one." *Id.* at 523 n.5.

62. *Id.* at 524.

63. *Id.*

64. *Id.* at 525.

65. *Id.* at 526.

66. *Id.* at 531.

67. *Id.* at 531-32.

(in other words, the "professional conduct") of union organizers.<sup>68</sup> The opinion is also significant for its treatment of what might appear at first glance to be a peripheral issue in the case: Thomas's solicitation of Pat O'Sullivan.

The Court went to great pains to avoid deciding whether this one act of individual solicitation could constitutionally subject Thomas to the state's registration requirement. The State of Texas had argued that even if Thomas's general invitation to join the union was protected by the First Amendment, his specific solicitation of O'Sullivan was a proper subject for the state's registration requirement and that that act alone was a sufficient basis to find a statutory violation.<sup>69</sup> Rather than confront the degree of constitutional protection afforded to that specific interchange, the Court engaged in judicial legerdemain: It decided that because Thomas's contempt citation was "in general terms" and did not explicitly indicate whether it was premised on Thomas's general invitation to join the union or on his specific one, it was obligated to affirm "as to both or as to neither."<sup>70</sup> The Court concluded that "[i]f what Thomas did, in soliciting Pat O'Sullivan, was subject to . . . restriction, as to which we express no opinion, that act was intertwined with the speech and the general invitation in the penalty which was imposed for violating the restraining order."<sup>71</sup>

The Court never offered a compelling explanation as to why an invitation to enlist in a union is a form of protected speech when delivered to many, but a form of professional conduct when delivered to one. While it ultimately declined to rule on the constitutional dimensions of the latter, it clearly felt that there was a significant difference between the two. Was this because the Court felt that the meaning of the speech itself depends on whether it is delivered to a group of people or to a single person? Or was it because the nature of the speaker-listener relationship is different in a fashion that somehow affects the analysis? The Court did not attempt to answer these questions.<sup>72</sup>

Writing in a concurring opinion, Justice Jackson made the distinction in the following terms:

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68. See also Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 376-78 (1995) (discussing the significance of Thomas in the broader context of employer and union speech).

69. See *Thomas*, 323 U.S. at 527.

70. *Id.* at 528-29.

71. *Id.* at 541.

72. Another possibility is that the Court viewed individual solicitation as a form of commercial speech (which at that time was wholly unprotected by the First Amendment, see, e.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942)), since it arguably proposes a form of commercial transaction. However, if this is so, the Court does not explain why group solicitation should be treated any differently.

Though the one may shade into the other, a rough distinction always exists, I think, which is more shortly illustrated than explained. 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.<sup>73</sup>

The first two examples are not particularly helpful to our discussion, because the practice of law or medicine could involve both expressive and nonexpressive elements.<sup>74</sup> On the other hand, the last example is instructive. Assuming that "making a livelihood" is equivalent to being "salaried," we can parse Justice Jackson's reasoning:

[T]he state . . . may regulate one who solicit[s] . . . memberships for unions. But I do not think it can prohibit one . . . from . . . urging [a public meeting of workmen] to . . . join a specific union.

Again, the focus appears to be on urging a "public meeting" to join a union as opposed to urging (presumably individual) persons to do so. Like the majority, Justice Jackson offers no insights into why he believes this distinction to be relevant.<sup>75</sup>

The Supreme Court did not squarely return to this issue for forty years. However, in 1985, it considered *Lowe v. SEC*,<sup>76</sup> which again pitted an individual's First Amendment freedoms against the authority of the state to regulate professional practice.

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73. *Thomas*, 323 U.S. at 544-45 (Jackson, J., concurring).

74. *See supra* Part I.A.

75. Justice Jackson went on to argue that Texas had attempted to prevent speech by "associating" it with solicitation, and that this condemnation-by-association was invalid. However, he did not explain why the association might have been valid had the solicitation been personal rather than general. *See Thomas*, 323 U.S. at 547 (Jackson, J., concurring).

76. 472 U.S. 181 (1985).



2. *Lowe v. SEC*

*Lowe v. SEC*<sup>77</sup> involved the Investment Advisers Act of 1940 (IAA), which imposed a registration requirement on "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities . . . ."<sup>78</sup>

Christopher Lowe was the owner of a corporation that published three financial newsletters. The *Lowe Investment and Financial Letter* "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."<sup>79</sup> Prior to 1981, the corporation was registered as an "investment adviser" under the Act. However, in that year, the SEC revoked Lowe's registration as a result of his conviction for various securities-related offenses.<sup>80</sup> Although Lowe ceased his client fund management activities, he continued to operate his publishing business. As a result, the Commission commenced an action alleging that Lowe was acting as an unregistered investment adviser and sought a permanent injunction barring Lowe from distributing his publications.<sup>81</sup>

The district court did not grant the Commission the relief that it sought. It agreed to enjoin Lowe from giving person-to-person advice (that is, "giving information to [his] subscribers by telephone, individual letter, or in person"<sup>82</sup>), but it refused to prohibit him from publishing purely impersonal investment letters. Although the district court acknowledged that the face of the statute did not differentiate between the two activities, it concluded that constitutional considerations suggested the need for such a distinction.<sup>83</sup> Accordingly, it dismissed the Commission's complaint as to Lowe's impersonal publishing activities.

The court of appeals, over one dissent, reversed. It held that the registration requirement was a type of "regulation of commercial activity permissible under the First Amendment."<sup>84</sup> The court rea-

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77. *Id.*

78. 15 U.S.C. § 80b-2(a)(11) (1994).

79. *Lowe v. SEC*, 472 U.S. 181, 185 (1985).

80. *See id.* at 183-84.

81. *See SEC v. Lowe*, 556 F. Supp. 1359, 1360 (E.D.N.Y. 1983). Notably, the subscribers called by the Commission as witnesses had no complaints about the contents of any of the publications. *See id.* at 1361. At the district court the Commission did, however, argue that Lowe was under a duty to disclose his prior convictions. *See id.* at 1370.

82. *Id.* at 1371.

83. *See id.* at 1365.

84. *Lowe v. SEC*, 725 F.2d 892, 900 (2d Cir. 1984).

soned that saying that petitioners "may not sell their views as to the purchase, sale, or holding of certain securities is no different from saying that a disbarred lawyer may not sell legal advice."<sup>85</sup>

The Supreme Court unanimously reversed. Justice Stevens delivered the opinion of the Court for five justices, and Justice White delivered an opinion concurring in the judgment that was joined by Justices Burger and Rehnquist. Although both opinions held that impersonal publishers did not have to register under the Act, they differed markedly in their approaches.

Justice Stevens rested his decision on a statutory interpretation of the Act that excluded Lowe's publications. One clause of the Investment Advisers Act exempted "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation."<sup>86</sup> Although the SEC interpreted this clause as not applying to Lowe,<sup>87</sup> Justice Stevens concluded otherwise. He held that "Congress, plainly sensitive to First Amendment concerns, . . . did not seek to regulate the press through the licensing of nonpersonalized publishing activities. . . ."<sup>88</sup>

Justice Stevens' disposition of the case was based largely on his review of the legislative history of the Act. He first examined a report that the SEC prepared prior to the enactment of the IAA. The report stated that it did not intend to address "any person or organization which was engaged in the business of furnishing investment analysis, opinion, or advice solely through publications distributed to a list of subscribers and did not furnish specific advice to any client with respect to securities."<sup>89</sup> Rather, the report concerned only "a distinct class of persons [that] held themselves out as giving only personalized investment advisory service."<sup>90</sup> This notion of "personalized" advice was clarified in a section of the report containing the following colloquy with an industry representative:

Q. Now, you say the true function as you conceive it, of an investment counselor, is to give advice in connection with the specific condition of a particular individual?

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85. *Id.* at 902.

86. 15 U.S.C. § 80b-2(a)(11)(D) (1994).

87. *See* *Lowe v. SEC*, 472 U.S. 181, 207 (1985) (noting that the Commission had interpreted the exclusion to apply "only where, based on the content, advertising material, readership and other relevant factors, a publication is not primarily a vehicle for distributing investment advice").

88. *Id.* at 204.

89. *Id.* at 191.

90. *Id.*

A. Yes.

Q. While the investment trust does not have that personal element in it, that it manages the funds more on an impersonal basis?

A. That is right.

Q. 'Impersonal' being used in the sense that they may try to get a common denominator, or what they envision their stockholders' condition may be, or what would be best for a cross-section of the American public, but does not give the advice with the peculiar, particular, specific financial condition of the individual and what he hopes to accomplish, or what purpose.<sup>91</sup>

Next, Justice Stevens turned to the Senate subcommittee hearings on the bill. He pointed to a section of a witness's testimony that described the business of an investment adviser in the following terms:

It is a personal-service profession and depends for its success upon a close personal and confidential relationship between the investment-counsel firm and its client. It requires frequent and personal contact of a professional nature between us and our clients [and] . . . [j]udgment of the client's circumstances and of the soundness of his financial objectives and of the risks he may assume. Judgment is the root and branch of the decisions to recommend changes in a client's security holdings. If the investment counsel profession, as we have described it, could not offer this kind of judgment with its supporting experience and information, it would not have anything to sell that could not be bought in almost any bookstore. . . . We regard it as a major defeat if we are unable to have frequent personal contact with a client and with his associates and dependents."<sup>92</sup>

Another witness added,

The relationship of investment counsel to his client is essentially a personal one involving trust and confidence. The investment counselor's sole function is to render to his client professional advice concerning the investment of his funds in a manner appropriate to that client's needs.<sup>93</sup>

Based on these sources of legislative history and the observation that Congress was "undoubtedly familiar" with the Court's earlier

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91. *Id.* at 193 n.34.

92. *Id.* at 195-96.

93. *Id.* at 196 n.39.

precedents on prior restraints,<sup>94</sup> Justice Stevens concluded that the exclusion for publishers should be given a "broad reading."<sup>95</sup> He interpreted the scope of the exclusion as follows:

The Act was designed to apply to those persons engaged in the investment-advisory profession—those who provide personalized advice attuned to a client's concerns, whether by written or verbal communication. . . . Thus, petitioners' publications do not fit within the central purpose of the Act because they do not offer individualized advice attuned to any specific portfolio or to any client's particular needs. On the contrary, they circulate for sale to the public at large in a free, open market—a public forum in which typically anyone may express his views.<sup>96</sup>

As long as the communications between petitioners and their subscribers remain entirely impersonal and do not develop into the kind of fiduciary, person-to-person relationships that were discussed at length in the legislative history of the Act and that are characteristic of investment adviser-client relationships, we believe the publications are, at least presumptively, within the exclusion and thus not subject to registration under the Act.<sup>97</sup>

Justice White, while reaching the same judgment, criticized the route taken by Justice Stevens. He argued that the statutory exclusion for publishers did not apply to Lowe. He believed that the SEC's interpretation was entitled to deference.<sup>98</sup> He also criticized Justice Stevens' analysis of the legislative history<sup>99</sup> and pointed to numerous other sources that indicated that "the Act [was intended to] cover the publishers of investment newsletters."<sup>100</sup> Concluding that a constitutional determination was necessary, Justice White characterized the case as one involving "a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment."<sup>101</sup> He felt that it was the Court's responsibility to determine both when the government could claim to be regulating the

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94. *Id.* at 204-05.

95. *Id.* at 205.

96. *Id.* at 207-08.

97. *Id.* at 210.

98. *See id.* at 216 (White, J., concurring in the result).

99. *See id.* at 219-21.

100. *Id.* at 219. Justice White also argued that the Court's interpretation rendered other parts of the statute superfluous, *see id.* at 218-19, and noted that it would prevent the antifraud and disclosure sections of the Act from applying to impersonal newsletters, a result contrary to the Court's earlier precedents. *See id.* at 224-25 (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963)).

101. *Lowe*, 472 U.S. at 228.

practice of a profession and when regulation would be an impermissible infringement on the right of free speech.<sup>102</sup> Recalling Justice Jackson's concurrence in *Thomas*, Justice White formulated the following oft-quoted rule:

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 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."<sup>103</sup>

Although the Court's opinion in *Lowe* was technically a ruling based on the statutory construction of the Investment Advisers Act, subsequent court cases have agreed that the Court's opinion has clear

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102. See *id.* at 231.

103. *Id.* at 232. Justice White went on to hold that it was unnecessary to determine whether the speech at issue was "commercial" in nature, since under either the commercial or noncommercial First Amendment standards, a prior restraint was not "narrowly tailored" to achieve the government's aims. See *id.* at 234-35. The commercial speech aspect of *Lowe* has been subject to much commentary, but is not addressed in this Article. See, e.g., Nicholas Wolfson, *The First Amendment and the SEC*, 20 CONN. L. REV. 265 (1988) (arguing that much speech in the securities industry cannot be classified as commercial, but that even commercial securities speech should be strictly protected); Estreicher, *supra* note 44 (presenting a framework for analyzing First Amendment claims in the securities-related speech context); Lively, *supra* note 13, at 853 (arguing against a constitutional distinction between commercial and political speech and suggesting that the SEC regulate by means of disclosure or direct communication with the public); Peter Miller, Comment, *The Right to a Free Press and the Regulation of Securities Newsletters: The Controversy Continues*, 56 U. CIN. L. REV. 1445 (1988) (lauding the Court's implicit rejection of the applicability of the commercial speech doctrine); Carol Garver, Note, *Lowe v. SEC: The First Amendment Status of Investment Advice Newsletters*, 35 AM. U. L. REV. 1253, 1283-84 (1986) (arguing that "interested" publishers, who have an economic stake in the performance of the securities they recommend, are engaging in commercial speech, but that "disinterested" publishers are not).

constitutional overtones.<sup>104</sup> Even Justice White opined that “[o]ne does not have to read the Court’s opinion very closely to realize that its interpretation of the Act is in fact based on a thinly disguised conviction that the Act is unconstitutional as applied to prohibit publication of newsletters by unregistered advisers.”<sup>105</sup> In other words, the Court’s opinion should be read as not only suggesting that Congress intended to exclude impersonal publishers from the registration requirements of the Investment Advisers Act, but that the inclusion of such advisers would have violated the First Amendment. Understood in this fashion, both the opinion of the Court and the White concurrence establish a test for when the licensure of professional speech is constitutional. In the following section, I will flesh out the precise contours of this “value-neutral test.”

### 3. Analysis

The concept of “fiduciaries” runs through the *Lowe* opinions.<sup>106</sup> *Lowe* can be read to suggest that government regulation of professional speech is permissible only when the communication occurs in the context of a fiduciary relationship—variously defined as a relationship in which “trust and confidence are reposed by one person in the integrity and fidelity of another,”<sup>107</sup> and “a relationship in which one person is under a duty to act for the benefit of the other.”<sup>108</sup> Other commentators have interpreted *Lowe* in this fashion.<sup>109</sup>

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104. See *Accountant’s Soc’y of Va. v. Bowman*, 860 F.2d 602, 603-05 (4th Cir. 1988) (applying *Lowe* as a constitutional standard); *Taucher v. Born*, 53 F. Supp. 2d 464, 476-78 (D.D.C. 1999); In the matter of *Rowe*, 604 N.E.2d 728, 731 (N.Y. 1992). See also Lani M. Lee, *The Effects of Lowe on the Application of the Investment Advisers Act of 1940 to Impersonal Investment Advisory Publications*, 42 BUS. LAW 507, 534 (1987) (noting the constitutional ramifications of *Lowe*); Kathryn M. Mohr, Note, *Lowe v. SEC: Avoidance of the Commercial Speech Definition—the Right Result for the Wrong Reason*, 17 U. TOL. L. REV. 1007, 1040 (1986) (criticizing the Court’s decision to resolve the case on statutory grounds rather than addressing the First Amendment explicitly); Stacy P. Thompson, Comment, *Lowe v. SEC: Investment Advisers Act of 1940 Clashes with First Amendment Guarantees of Free Speech and Press*, 21 U. RICH. L. REV. 205, 225 (1986) (same).

105. *Lowe*, 472 U.S. at 226 (White, J., concurring in the result).

106. See *id.* at 210 (discussing “the kind of fiduciary, person-to-person relationships that were discussed at length in the legislative history of the Act and that are characteristic of investment adviser-client relationships”); *id.* at 228 (White, J., concurring in the result) (the “strictest observance of fiduciary responsibility”); *id.* at 230 (relating the government’s argument that “investment advisers—including publishers such as petitioner—are fiduciaries for their clients”).

107. 36A C.J.S. *Fiduciary* (1961).

108. BLACK’S LAW DICTIONARY 640 (7th ed. 1999); 36A C.J.S. *Fiduciary* (1961).

109. See Estreicher, *supra* note 44, at 299, 302 (justifying government regulation of professional speech on the grounds that the fiduciary nature of the relationship creates potential for fraud, deception, or overreaching); David B. Levant, *Financial Columnists as Investment Advisers: After Lowe and Carpenter*, 74 CALIF. L. REV. 2061, 2094-95 (1986) (arguing that *Lowe* should be read as establishing a test as to whether the speaker is acting in a fiduciary capacity); Denise

However, the utility of phrasing the *Lowe* test in terms of fiduciaries is limited because it puts no restraints on what sorts of relationships the government may define to be “fiduciary.” Congress and the states are normally free to modify common law definitions of fiduciary relationships as the need arises.<sup>110</sup> Justice White noted this difficulty:

Surely it cannot be said, for example, that if Congress were to declare editorial writers fiduciaries for their readers and establish a licensing scheme under which ‘unqualified’ writers were forbidden to publish, this Court would be powerless to hold that the legislation violated the First Amendment.<sup>111</sup>

The relevant question in determining the scope of the professional speech doctrine is not *whether* the government may regulate a fiduciary relationship, but *which* speakers the government may regulate by defining them to be fiduciaries of their customers. The reasoning of *Lowe*, and the substance of the value-neutral test, address this question.

Many academics read *Lowe* as establishing a rule that “personalized advice” is professional in nature and thus subject to regulation. This cursory analysis is inadequate because it fails to recognize that the term “personalized” has multiple meanings. Personalized advice could mean any advice that depends on the personal characteristics of the recipient. Personalized advice could also mean any advice that is directed at one particular recipient. Finally, personalized advice could mean the combination of these two: advice that is delivered to a specific individual in light of that individual’s needs and circumstances.

In this Article, I will adopt the following terminology: “Characteristic-dependent” advice means advice whose communicative content varies depending on the characteristics or circumstances of the person receiving it, regardless of the manner in which it is delivered. Speech is characteristic-dependent if the personal traits or circumstances of the listener determine the substance of the message he ultimately receives.<sup>112</sup>

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Coffman, *Lowe v. Securities and Exchange Commission: The Deterioration of Financial Newsletter Regulation*, 10 NOVA L.J. 1276, 1279 (1986) (noting that “The *Lowe* Court appeared to formulate a definition of investment adviser which was based on personal interaction and trust between investor and adviser. This definition places the adviser and investor in a fiduciary relationship.”).

110. See, e.g., *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993) (White, J., dissenting) (noting that ERISA imposed fiduciary duties on those who would not have been fiduciaries under the common law).

111. *Lowe*, 472 U.S. at 231 (White, J., concurring in the result).

112. Consider the simple example of a doctor diagnosing a patient. Suppose the doctor asks the patient whether she feels a pain in her head. If the patient answers “yes,” the doctor advises her to take an aspirin. In this case, the message being communicated (“take an aspirin”)

“Person-to-person” advice is advice that is directed at one particular individual with whom the speaker has some form of personal contact. At a minimum, this means that the advisor must make a distinct communicative effort to impart information to that particular individual, and that the advisor must actually be aware of the identity of the recipient.<sup>113</sup>

“Personalized” speech means speech that is both “characteristic-dependent” and “person-to-person.” In other words, it is advice that

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depends upon a personal characteristic of the listener (the headache). The communication is therefore characteristic-dependent. Of course, a doctor's diagnosis would normally consist of an analysis of several different characteristics of the patient. One could say that the more personal factors the message depends on, the more “characteristic-dependent” the speech becomes; this creates differences of degree. When the content of the message does not depend upon any personal characteristics of the listener at all, the speech is not characteristic-dependent.

113. Courts often address the “person-to-person” inquiry by asking whether there was any “personal contact” between the advisor and her customers. Indeed, person-to-person communication implies some form of personal contact between the speaker and listener. However, person-to-person communication should not be confused with “face-to-face” communication—the former does not imply any particular medium of communication. See *Order Denying Plaintiffs’ Motion for Summary Judgment* at 2-3, *Taucher v. Born*, 55 F. Supp. 2d 464 (D.D.C. 1999) (No. 97-1711) (“In today’s technologically advanced society a professional can exercise judgment on behalf of another without ever having [face-to-face] contact.”); Ross Vincenti, *Self-Help Legal Software and the Unauthorized Practice of Law*, 8 *COMPUTER/LAW J.* 185, 200 (1988) (“It is not necessary for the [professional] [to] actually to meet with his customer face to face.”). Thus, conversations with specific clients in person, over the telephone, or by exchanges of e-mail or letters can be considered person-to-person, while newsletters, web pages, e-mail sent to a distribution list, noncustomized software, or prerecorded telephone messages cannot. Prerecorded telephone messages, also known as “telephone hotlines,” have been the subject of repeated litigation. The district court in *Lowe* held that while newsletters were a form of protected publication, telephone conversations could be regulated as professional speech. See *SEC v. Lowe*, 556 F. Supp. 1359, 1371 (E.D.N.Y. 1983). The court held that *Lowe*’s telephone communications with subscribers “create[d] dangers of personal advice.” *Id.* This conclusion seems infirm in light of the fact that *Lowe* offered only prerecorded telephone communications to his subscribers, a fact that was pointed out, but rejected, on a motion for rehearing. Discussion with Michael Schoeman, Schoeman, Marsh & Kaufman (Nov. 17, 1999). This aspect of *Lowe* did not reach the Supreme Court, although the intermediate appellate court did express its doubts that telephone hotlines could be considered “personal” communications while newsletters were not. See *Lowe v. SEC*, 725 F.2d 892, 896 (2d Cir. 1984). In contrast, a district court in a more recent case determined that telephone hotlines are properly classified as an impersonal form of communication. See *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, No. 97 C 2362, 1999 WL 965962 (N.D. Ill. Sept. 28, 1999). This latter conclusion is clearly the correct application of *Lowe*. A prerecorded telephone message does not require the publisher to make an independent communicative effort to convey information every time a person calls. Furthermore, the fact that the publisher is not even aware of the identity of the callers makes it hard to argue that any sort of “personal nexus” is created. See also Phillip R. Stanton, Note, *A Bear Market for Freedom of Speech*, 76 *WASH. U. L.Q.* 1121, 1122 n.9 (1998) (noting that when a hotline message is prerecorded, it cannot be considered a “direct” form of communication between the CTA and the customer); Exemption from Registration as a Commodity Trading Advisor, 65 *Fed. Reg.* 12,938 (Mar. 10, 2000) (adopting the view that telephone hotlines are an impersonal form of communication and exempting their operators from the CTA registration requirement).



is tailored to the needs and circumstances of its recipient, communicated specifically to an individual with whom the advisor is directly acquainted.

Some language in both the majority and concurring opinions in *Lowe* addresses primarily the question of characteristic-dependent speech.<sup>114</sup> Other language (including Justice White's oft-quoted "personal nexus" rule) more clearly discusses person-to-person speech.<sup>115</sup> *Lowe's* focus on the latter also tracks the distinction made in *Thomas* between advice rendered to a broad audience and advice rendered to a specific listener.<sup>116</sup>

To properly understand *Lowe*, it is important to distinguish the two aspects of the professional speech inquiry. In this section, I will argue that both these aspects must be examined when determining whether advice is "professional" under the value-neutral test in *Lowe*. The first, which focuses on the content of the advice, involves an inquiry into whether it is characteristic-dependent. The second, which focuses on the manner in which the advice is delivered, looks at whether it is person-to-person.

Although these two aspects are related, neither implies the other. It is obvious that speech can be delivered in a person-to-person manner while not being characteristic-dependent. A person who tells a friend to buy a certain stock because its price is likely to increase is giving person-to-person advice that is not characteristic-dependent, unless the person believes that the stock would be uniquely suitable to his friend's portfolio. Similarly, a political activist in a park who urges individual passers-by to reject a capitalist economic system is giving person-to-person advice that does not depend on the characteristics of the listeners.

Speech may also be characteristic-dependent without being person-to-person. Consider the case of a medical self-help book. Suppose the book is written in a "question-and-answer" format that leads the

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114. See *Lowe*, 472 U.S. at 193 n.34 ("advice in connection with the specific condition of a particular individual"); *id.* at 193 ("advice with the peculiar, particular, specific financial condition of the individual and what he hopes to accomplish"); *id.* at 196 ("appropriate to that client's needs"); *id.* at 207-08 ("advice attuned to a client's concerns"); *id.* at 232 (White, J., concurring in the result) ("exercise judgment on behalf of the client in the light of the client's individual needs and circumstances").

115. See *Lowe*, 472 U.S. at 195 ("a close personal and confidential relationship between the investment-counsel firm and its client [that] requires frequent and personal contact of a professional nature between [professionals and] clients. . ."); *id.* at 196 ("frequent personal contact with a client"); *id.* at 210 ("fiduciary, person-to-person relationships"); *id.* at 232 (White, J., concurring in the result) ("takes the affairs of a client personally in hand"); *id.* ("personal nexus"); *id.* ("[client] with whose circumstances he is directly acquainted").

116. See *supra* text accompanying notes 69-71, 73.

reader through a series of questions concerning her symptoms. Based on the answers to those questions, the book suggests a possible diagnosis and recommends a course of action (for example, to see a doctor). In this case, the “message” being conveyed by the book depends upon the personal characteristics of the reader because, if the book is used as intended, the only message conveyed will be the recommendation appropriate to the set of personal circumstances that the user supplied in answering the questions. The book’s advice is therefore characteristic-dependent. At the same time, the advice rendered by self-help books is clearly not person-to-person. Books do not involve any sort of direct, one-to-one communication between the author and readers. The author does not make a separate effort to communicate with each reader. Rather, she simply places her work into general circulation for all who may be interested to read. The advice contained in the book is written in advance, without direct knowledge of the circumstances of those who may eventually read it. The advice is characteristic-dependent not because the author is familiar with the circumstances of particular readers, but because she anticipates the circumstances that hypothetical readers might have.

As either of these factors can exist without the other, we can classify advice into four categories. The first consists of advice that is neither characteristic-dependent nor person-to-person, such as books, newsletters, or websites that render recommendations that are the same for all people. The second consists of advice that is characteristic-dependent but not person-to-person, typified by self-help books and other generally-circulated publications that require the reader to supply personal information in order to get a meaningful recommendation. The third consists of advice that is person-to-person but not characteristic-dependent—advice substantively similar to that in the first category but rendered in a one-on-one communicative context. The last consists of advice that is truly personalized, that is, both characteristic-dependent and person-to-person.

*Lowe* clearly implies that the first category of speech is constitutionally protected and that the fourth category is professional speech that a state can license. Less clear is *Lowe*’s view of the second and third categories. Is speech that is characteristic-dependent but not person-to-person, or vice-versa, protected or professional in nature? Put another way, is each of the two factors necessary, or merely sufficient, in determining whether speech is professional rather than protected for the purposes of evaluating a licensing requirement?

A careful reading of *Lowe* and a consideration of other precedent suggests that both factors are necessary to determine whether speech is

professional in nature. Advice that lacks either of these two qualities does not constitute professional speech.

The clearest evidence for this interpretation comes from the concurrence of Justice White. He describes a professional as “[o]ne 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.”<sup>117</sup> By using the conjunction “and” rather than “or” in this definition, Justice White formulates a rule that requires both a personal-relationship context (taking someone’s affairs in hand) *and* characteristic-dependent advice (advice in light of the client’s needs and circumstances).<sup>118</sup>

The language in the lead opinion is ambiguous, but it also suggests that both factors are necessary to a finding that speech is professional. Justice Stevens concludes that advice is protected “[a]s long as the communications . . . remain entirely impersonal and do not develop into the kind of fiduciary, person-to-person relationships that . . . are characteristic of investment adviser-client relationships. . . .”<sup>119</sup> Stevens’ holding essentially restricts the scope of the Act (and, implicitly, the scope of permissible regulation) to those communications “characteristic of investment adviser-client relationships.”<sup>120</sup> Because the historical evidence supplied by Justice Stevens suggests that communications “characteristic of investment adviser-client relationships” involve both characteristic-dependent and person-to-person speech,<sup>121</sup> it follows that communications that involve only one of the two factors do not fall within the Act’s purview.

This interpretation—that speech is professional only if it is both characteristic-dependent and person-to-person—is consistent with historical tradition and precedent. There have been many cases in

117. *Lowe*, 472 U.S. at 232 (White, J., concurring in the result) (emphasis added).

118. A later passage in Justice White’s opinion also shows that he believes a person-to-person relationship to be, by itself, a necessary factor. White writes that government regulation is impermissible “[w]here 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.” *Lowe*, 472 U.S. at 232 (White, J., concurring in the result). These factors—“personal nexus” and “direct acquaintance”—focus on the direct, person-to-person nature of the relationship rather than the content of the speech. White’s statement suggests that where there is no person-to-person relationship between the speaker and the listener, government regulation is impermissible, regardless of whether the advice is characteristic-dependent.

119. *Id.* at 210.

120. This analysis assumes that Justice Stevens’ requirement that protected speech “remain entirely impersonal” was meant to restate, rather than qualify, the clause it precedes. The meaning of the term “impersonal” in this context is ambiguous.

121. See *supra* notes 114, 115.

which courts have held speech protected when only one of the two factors was present.

First, consider the case of speech that is characteristic-dependent but not person-to-person. As explained earlier, a prime example of speech in this category is a self-help book that recommends a given course of action based on personal characteristics that the reader identifies.<sup>122</sup> For example, a legal self-help book might recommend that the user employ one of two alternative paragraphs in a contract depending on a particular personal characteristic.<sup>123</sup> An examination of the First Amendment treatment of self-help books is instructive in determining whether a person-to-person relationship is a necessary factor to a finding of professional speech.

Self-help legal books have a long history in this country.<sup>124</sup> In 1879, John Wells published a newly revised edition of *Every Man His Own Lawyer*, a legal self-help book that contained "legal forms for drawing the necessary papers, and full instructions for proceeding, without legal assistance, in suits and business transactions of every description."<sup>125</sup> Other self-help books predated even this, and were available to the layperson as early as the 18th century.<sup>126</sup>

Legal self-help materials have often been the target of state bar associations, and "unauthorized practice of law" suits against the publishers of such books have been frequent. Generally, such suits have been resolved by statutory interpretation rather than constitutional analysis. Explicit or not, freedom of speech concerns have played an important role in shaping this jurisprudence. Although early cases were mixed,<sup>127</sup> the now virtually uniform rule is that some sort of personal contact between the publisher and its customers ("person-to-person" communication, in *Lowe* parlance) is necessary for a finding of unauthorized practice.

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122. See, e.g., EDWARD HAMAN, *HOW TO FILE YOUR OWN DIVORCE* (3d ed. 1998) (legal self-help book); DAVID WERNER, *WHERE THERE IS NO DOCTOR: A VILLAGE HEALTH CARE HANDBOOK* (Rev'd ed. 1992) (medical self-help book); ERNST & YOUNG'S PERSONAL FINANCIAL PLANNING GUIDE (3d ed. 1999) (financial planning self-help book).

123. See *Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1192 (Fla. 1978) ("There are numerous texts in our state law libraries which . . . purport to give legal advice to the reader as to choices that should be made in various situations.").

124. See generally Mort Rieber, *100 Years of Self-Help Law Books* (visited July 22, 1999) <<http://www.nolo.com/Texas/History.html>>.

125. *Id.*

126. See *id.*

127. Compare, e.g., *People ex rel. Dunbar v. Schmitt*, 251 P.2d 915 (Colo. 1952) (holding the distribution of pamphlets discussing "Living Trusts" to be unauthorized practice of law); *Shortz v. Yetter*, 38 Pa. D. & C. 291 (1940) (enjoining distribution of pamphlets giving legal advice on wills) with *People ex rel. Atty. Gen. v. Bennett*, 74 P.2d 671 (Colo. 1937) (distribution of bankruptcy forms not unauthorized practice).

The leading case is *New York County Lawyers' Association v. Dacey*.<sup>128</sup> Dacey published various legal self-help materials, including *How to Avoid Probate!*, a manual containing some 55 pages of instructions and 310 pages of forms explaining how to use wills and inter vivos trusts.<sup>129</sup> The court ruled that Dacey's activities could not be considered the unauthorized practice of law. It noted that "[t]here [was] no personal contact or relationship with a particular individual. Nor [was there] that relation of confidence and trust so necessary to the status of attorney and client. This is the essential of legal practice—the representation and the advising of a particular person in a particular situation."<sup>130</sup> The court held that this was so, even though "the principles or rules stated in the text may be accepted by a particular reader as a solution to his problem."<sup>131</sup>

The focus of *Dacey* was on the presence or absence of personal contact between the advisor and customer, not on whether the ultimate advice the reader derived was dependent on his circumstances. Judge Stevens explicitly recognized that the "principles or rules" contained in the book would lead the reader to a solution to his particular circumstances.<sup>132</sup> In *Lowe's* terminology, *Dacey* stands for the proposition that in the absence of person-to-person communication between the advisor and the customer, a publication cannot be licensed as professional practice even when it contains detailed "rules" that allow the reader to receive a recommendation tailored to his particular circumstances.

Other states followed *Dacey's* lead and interpreted their unauthorized practice statutes not to apply to impersonal publishing activities, such as the distribution of books, forms, and "do-it-yourself kits."<sup>133</sup> The Florida Supreme Court briefly declined to adopt the rea-

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128. 28 A.D.2d 161 (N.Y. App. 1967), *reversed and dissenting opinion adopted by* 21 N.Y.2d 694 (1967).

129. *See id.* at 171-72 (Stevens, J., dissenting).

130. *Id.* at 174 (Stevens, J., dissenting).

131. *Id.* at 173 (Stevens, J., dissenting).

132. *See supra* text accompanying note 131.

133. *See, e.g., Oregon State Bar v. Gilchrist*, 538 P.2d 913, 916 (Or. 1975) ("[D]efendants cannot be enjoined from merely publishing or selling their divorce kits so long as the defendants have no personal contact with their customers."); *State Bar v. Cramer*, 249 N.W.2d 1, 8-9 (Mich. 1976) ("We also believe [the presence or absence of personal contact] to be a significant distinction. The advertisement and distribution to the general public of forms and documents utilized to obtain a divorce together with any related textual instructions does not constitute the practice of law."); *In re Thompson*, 574 S.W.2d 365, 369 (Mo. 1978) ("[T]he advertisement and sale [of] divorce kits does not constitute the unauthorized practice of law so long as the respondents . . . refrain from giving personal advice as to legal remedies or the consequences flowing therefrom."); *New Jersey State Bar Ass'n v. Divorce Ctr. of Atl. County*, 477 A.2d 415, 418 (N.J. Ch. 1984) (finding "a significant distinction between [the sale of do-it-yourself divorce kits] and activity which included personal contact between the distributor of the kit and its customers

soning of *Dacey*, holding that legal forms could be distributed by laypersons only if they were not accompanied by instructions on their use.<sup>134</sup> However, it later overruled itself and adopted the *Dacey* rule.<sup>135</sup> Texas also declined to adopt *Dacey*,<sup>136</sup> and for many years remained the sole state to do so.<sup>137</sup> However, in 1999 the Texas legislature amended its unauthorized practice statute, overruling state precedent and essentially adopting the *Dacey* rule.<sup>138</sup>

In all of these cases, the relevant distinction was whether there was some sort of personal contact between the advisor and customer. No case focused on whether the publication contained advice that depended on the reader's personal characteristics or circumstances. From this it follows that the mere fact that a book or other publication offers characteristic-dependent advice—in other words, recommends a different course of action depending on the reader's circumstances—does not remove it from the scope of the First Amendment's protection.<sup>139</sup> Although the Supreme Court opinion in *Lowe* did not explic-

in the nature of . . . consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms or suggesting or advising how the form should be used in solving the particular customer's marital problems"); *In re Samuels*, 176 Bankr. 616, 621 (Bankr. M.D. Fla. 1987) (selling "printed materials purporting to explain legal practice and procedure" does not constitute the unauthorized practice of law). See also Patricia Jean Lamkin, *Sale of Books or Forms Designed to Enable Laymen to Achieve Legal Results Without Assistance of Attorney as Unauthorized Practice of Law*, 71 A.L.R.3d 1000 (1977 & 1998 Supp.) (discussing cases).

134. See *Florida Bar v. American Legal and Bus. Forms, Inc.*, 274 So. 2d 225 (Fla. 1973); *Florida Bar v. Stupica*, 300 So. 2d 683 (Fla. 1974).

135. See *Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1193 (Fla. 1978) ("[*American Legal and Business Forms* and *Stupica*] should be reevaluated[;] . . . the sale of forms necessary to obtain a divorce, together with any related textual instructions directed towards the general public, does not constitute the practice of law.").

136. See *Palmer v. Unauthorized Practice Comm.*, 438 S.W.2d 374 (Tex. Ct. App. 1969); *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162 (Tex. Ct. App. 1992); *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ. A. 3:97CV-2859-H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated following legislation*, 179 F.3d 956 (5th Cir. 1999) (discussed *infra* Part II.B.2).

137. See *Self-Help Law Books and Software: Why the First Amendment Protects Your Right to Use Them* (visited July 22, 1999) <<http://www.nolo.com/Texas/rights.html>> (stating that Texas was the only jurisdiction not to follow *Dacey*).

138. H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999) ("[T]he 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of written materials,] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.").

139. The publisher/professional distinction of the *Dacey* line of cases has also been applied in other professional contexts. See, e.g., Mark Hall, *Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment*, 137 U. PA. L. REV. 431, 455-56 (1988) (applying *Dacey* in the unauthorized practice of medicine context and arguing that the establishment of corporate medical guidelines without reference to particular patients does not constitute the unauthorized practice of medicine); see also *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216 (D. Md. 1988) (declining to hold liable the publisher of a self-help medical remedy book); cf. *Kelley*

itly rely on the *Dacey* line of cases,<sup>140</sup> it seems highly likely that those cases laid the groundwork for the *Lowe* opinions. Without some sort of person-to-person relationship in which the speaker is directly acquainted with the person advised, the speech is not professional in nature.

Next, consider the case in which the speaker engages in direct, person-to-person communication but does not render characteristic-dependent advice. The pre-*Lowe* case law on this point is ambiguous. In some contexts, courts have been willing to infer the existence of characteristic-dependent advice from the mere fact that communications were person-to-person. The lower court decision in *Lowe* itself provides an example. In an aspect of the case that did not reach the Supreme Court, the district court ruled that *Lowe* could not provide investment advice to interested parties who called a certain telephone number.<sup>141</sup> The district court did not base its judgment on evidence that *Lowe's* advice was actually personalized; instead, it held that this form of communication merely created "dangers" of personalized advice.<sup>142</sup> Thus, the court did not rule that the fact the advice was person-to-person was *itself* a sufficient justification for prior restraint. Rather, it held that regulation was appropriate because this form of person-to-person communication created a danger that the advice would also be tailored to the recipient's circumstances.<sup>143</sup>

This form of "inference" is certainly open to criticism. A person who makes stock recommendations to others over the telephone does not necessarily give characteristic-dependent advice. While it is certainly *possible* that these communications could include remarks tailored to the recipient's circumstances, that should at least be a question for the finder of fact. In any event, cases of personalization-presumption such as this do not disprove the rule that characteristic-dependency is required for a finding of professional speech. These

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v. Texas State Bd. of Med. Exam'rs, 467 S.W.2d 539 (Tex. Civ. App. 1971) (enjoining the uncensored publication of a medical book when the author also misrepresented his qualifications and formed actual doctor-patient relationships with his readers).

140. The dissenting judge in the Court of Appeals did, however, refer to *Dacey*. See *Lowe v. SEC*, 725 F.2d 892, 903 (2d Cir. 1984) (Breiant, J., dissenting).

141. See *SEC v. Lowe*, 556 F. Supp. 1359, 1371 (E.D.N.Y. 1983).

142. See *id.* ("The offer of defendants to their subscribers to provide current information by telephone goes beyond impersonal communication. It creates dangers of personal advice."). In this context, "personal" presumably means "personalized" rather than merely "person-to-person;" otherwise the judge would simply have written "It is personal advice" rather than "It creates dangers of personal advice."

143. For a critique of the trial judge's finding that telephone hotlines are in fact a form of person-to-person advice, see *supra* note 113.

cases merely imply that in certain circumstances, personalization can be inferred rather than proved directly.<sup>144</sup>

This review of materials can be summarized as follows: The *Lowe* concurrence explicitly states that both characteristic-dependent advice and person-to-person communication are necessary before the government may regulate advice as "professional speech." The lead opinion implies that both elements are relevant but is ambiguous as to whether both are necessary. The prior history establishes that person-to-person communication is clearly necessary but is ambiguous as to characteristic-dependency.

From these premises, we can make one more deduction. If prior history establishes that person-to-person communication is a *necessary* factor for regulation,<sup>145</sup> and Justice Stevens' opinion establishes that characteristic-dependency is at least a *relevant* factor,<sup>146</sup> one could infer from these two premises alone that characteristic-dependency is a *necessary* factor.<sup>147</sup> Thus, even in the absence of Justice White's concurrence, the lead opinion, considered in light of the relevant history, confirms that both factors are necessary before the government may license advice. Justice White spares us the trouble of this logical foray, as he states the conclusion outright.<sup>148</sup>

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144. See also *Commodity Futures Trading Comm'n v. AVCO Fin. Corp.*, 28 F. Supp. 2d 104 (S.D.N.Y. 1998) (presuming the existence of personalized advice from the fact that a publisher engaged in person-to-person communications with his subscribers). See also *id.*, appealed to the Second Circuit *sub nom* *Commodity Futures Trading Comm'n v. Vartuli*, Transcript of Oral Argument at 5 (Sept. 13, 1999) (counsel for appellant criticizing the district court's finding: "The District Court did not find that we had personalized advice. They found that we had personal contacts, and then drew a conclusion of law that they were personalized, that there was a personalized relationship. But there was no instance anywhere in the record where we gave advice to anybody based on that person's financial circumstances."); cf. *id.* at 14 (counsel for the CFTC arguing for a broader view of what constitutes "personalized" advice: "I think if personalized is going to be at all reliable as a standard of professional speech outside the [investment advice] context, you have to take a somewhat broader approach.").

145. See *supra* notes 130-32 and accompanying text.

146. See *supra* notes 119-21 and accompanying text.

147. To see this, suppose that characteristic-dependency was not a necessary factor. The outcome of any case would then turn solely on whether the communication was person-to-person. If it was not, the government could not license the communication (because person-to-person communication is a necessary factor). If it was, then the government could license it whether it was characteristic-dependent or not (because characteristic-dependency is *not* a necessary factor). Therefore, characteristic-dependency would be an *irrelevant* factor, contrary to our premises. This argument assumes, among other things, that the legal test depends on the presence or absence of the two factors and not on matters of degree.

148. The Commodity Futures Trading Commission at one point came to a different conclusion. It believed that "interactive communications with individual clients, such as face-to-face or telephone conversations or electronic mail exchanges between individuals" were a form of professional speech under *Lowe* whether or not the advice was characteristic-dependent. See Exemption from Registration as a Commodity Trading Advisor, 64 Fed. Reg. 68,304, 68,307 (proposed rule, Dec. 7, 1999).



One final point should be noted with respect to the lead opinion in *Lowe*. Justice Stevens adopted the personal/impersonal framework at the insistence of petitioner *Lowe*, who argued that *Ohralik v. Ohio State Bar Association*<sup>149</sup> mandated such a distinction.<sup>150</sup> Justice Stevens also cited *Ohralik* for the assertion that “[t]he dangers of fraud, deception, or overreaching . . . are present in personalized communications but are not replicated in publications that are advertised and sold in an open market.”<sup>151</sup> This statement—even if it were empirically true<sup>152</sup>—is not an adequate basis for the constitutional professional speech test recognized in *Lowe*.

In *Ohralik*, the Court decided that a state could constitutionally prohibit in-person solicitation by attorneys. The Court distinguished an earlier decision, *Bates v. State Bar of Arizona*,<sup>153</sup> which held that a state could not constitutionally prohibit the general advertising of legal services.<sup>154</sup> Although these two decisions do mirror *Lowe*’s distinction between person-to-person and impersonal communications, they are different from *Lowe* in a critical respect. Both *Bates* and *Ohralik* involved concededly commercial speech: the speech involved did nothing more than propose a commercial transaction. *Ohralik* did not purport to create a novel category of personalized speech that received limited First Amendment protection; it merely held that when speech is subject to lowered scrutiny for some other reason (for example, because it is commercial), the fact that it is also personalized may be relevant in balancing the interests involved.<sup>155</sup>

*Lowe* was an extraordinary extension of *Ohralik*, because it suggested that regulation of professional speech is constitutional even if it is noncommercial and would thus otherwise be fully protected.<sup>156</sup> Subsequent lower court decisions have explicitly rejected the contention that financial newsletters are a form of commercial speech, yet these decisions have continued to apply *Lowe*’s value-neutral professional speech test.<sup>157</sup> In this manner, the distinction has become completely unhinged from any roots it may have had in *Ohralik*.<sup>158</sup>

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149. 436 U.S. 447 (1978).

150. See *Lowe v. SEC*, 472 U.S. 181, 189 (1985).

151. *Id.* at 210.

152. But see *infra* note 158.

153. 433 U.S. 350 (1977).

154. See *Ohralik*, 436 U.S. at 448.

155. See *id.* at 455-56.

156. Both the majority and concurring opinions avoided the question of whether securities newsletters were commercial or noncommercial speech. See *supra* note 103.

157. See, e.g., *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 149 F.3d 679 (7th Cir. 1998); *Taucher v. Born*, 53 F. Supp. 2d 464, 469, 471-72 (D.D.C. 1999). The confusion over whether financial newsletters constitute commercial speech can be traced to

Despite this infirmity, the value-neutral test provides a workable framework for evaluating First Amendment claims regardless of the profession in which they arise. Since *Lowe*, the value-neutral test has been employed by lower courts in evaluating First Amendment challenges in the legal profession,<sup>159</sup> the accounting profession,<sup>160</sup> the commodity trading advisory profession,<sup>161</sup> and in other contexts.<sup>162</sup> Academics have noted its applicability in other areas as well.<sup>163</sup>

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the Court's decisions in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980). In the former case, the Court defined commercial speech as speech that "does no more than propose a commercial transaction," 425 U.S. at 772 n.24 (which would exclude financial newsletters); in the latter case, as speech that is "expression related solely to the economic interests of the speaker and its audience," 447 U.S. at 561 (which might include financial newsletters, but see *Taucher*, 53 F. Supp. 2d at 470). When the Court decided *Lowe*, it was unclear which definition applied. More recently, the Court has tended to phrase its inquiries in terms of the *Virginia State Board* standard, so lower courts have assumed that it governs. See *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998); *Taucher*, 53 F. Supp. 2d at 471.

158. This evolution is even more unwarranted since the reasons *Ohralik* gave for its distinct treatment of person-to-person commercial speech are not readily applicable to the field of professional speech that is not commercial. For example, *Ohralik* noted that person-to-person solicitation may be more invasive of privacy than general advertising. See *Ohralik*, 436 U.S. at 465 ("[T]he overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy."). This distinction is inapplicable to noncommercial professional speech. In those cases, the communicative relationship is consensual; whether the advice is personal or impersonal, the client (or subscriber) consciously desires to receive the information that the professional is offering. *Ohralik* also justified its distinction by noting that "[u]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Ohralik*, 436 U.S. at 457. This distinction is also tailored to the unique case of commercial speech. When a professional is simply rendering advice to a client rather than attempting to sell a service, he usually has no economic self-interest in having the client follow the advice, since he receives compensation either way.

159. See *In re Rowe*, 604 N.E.2d 728, 731 (N.Y. 1992).

160. See *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 603-05 (4th Cir. 1988).

161. See *Taucher v. Born*, 53 F. Supp. 2d at 464 (D.D.C. 1999); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, No. 97C2362, 1999 WL 965962 (N.D. Ill. Sept. 28, 1999); *Commodity Futures Trading Comm'n v. AVCO Fin. Corp.*, No. 97 Civ. 3119, 1998 WL 524901 (S.D.N.Y. June 29, 1998).

162. See *Long Island Lighting Co. v. Barbash*, 779 F.2d 793 (2d. Cir. 1985) (Winter, J., dissenting) (proxy solicitation).

163. See Claude D. Montgomery et al., *Solicitation Under Section 1125 of the Bankruptcy Code: Century Glove and the First Amendment*, 23 SETON HALL L. REV. 1570, 1586-89 (1993) (addressing applicability of *Lowe* to the bankruptcy solicitation process); Phillip R. Stanton, Note, *A Bear Market for Freedom of Speech: The First Amendment and Regulation of Commodity Trading Advisors Under the Commodities Exchange Act*, 76 WASH. U. L.Q. 1121 (1998) (applicability to the commodity trading newsletter industry); Jill Hornstein, Note, *Proxy Solicitation Redefined: The SEC Takes an Incremental Step Toward Effective Corporate Governance*, 71 WASH U. L.Q. 1129, 1147 (1993) (applicability to proxy solicitation); Amy K. Rhodes, *The Role of the SEC in the Regulation of the Rating Agencies: Well-Placed Reliance or Free Market Interference?*, 20 SETON HALL LEGIS. J. 293, 329-30 (1996) (applicability to rating agencies).

To summarize, the value-neutral test is a rule that looks at both the content and context of advice in determining whether a legislature can subject it to a professional licensing requirement. Advice constitutes “professional speech” only if it is characteristic-dependent in nature and delivered in the context of a person-to-person relationship between the speaker and listener.

### C. *The Value-Based Test for Restraints on Professional Speech*

The Supreme Court’s approach to professional speech cases would be simplified if it applied only the value-neutral test in evaluating professional speech questions. However, on several occasions, the Supreme Court has ruled that speech was protected by the First Amendment despite the fact that it was both characteristic-dependent and person-to-person. In these cases, the Court has justified its decisions by explaining that the substance of the speech involved values that are particularly important in the First Amendment hierarchy. These cases are best understood as applying a second, value-based test for professional speech.

#### 1. *NAACP v. Button* and Its Progeny

A leading example of this approach is illustrated in *NAACP v. Button*.<sup>164</sup> This case concerned the public-interest litigation activities of the NAACP in the State of Virginia. The state had enacted a statute that prohibited acting as “an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability.”<sup>165</sup> Many of the client solicitation activities of NAACP members fell within this definition, and the organization consequently challenged the law on constitutional grounds.<sup>166</sup>

The Supreme Court held the law’s application to the NAACP impermissible. It found that “the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business . . . .”<sup>167</sup> The Court noted that “[i]n the context of NAACP objectives, litigation is . . . a

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164. 371 U.S. 415 (1963).

165. *Id.* at 423.

166. *See id.* at 417-18.

167. *Id.* at 428-29.

means for achieving the lawful objectives of equality of treatment by all government . . . . It is thus a form of political expression."<sup>168</sup>

The Court considered and rejected Virginia's contention that the law was enacted pursuant to the state's power to regulate the legal profession. It held broadly that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."<sup>169</sup> The Court compared the activities of the NAACP with the traditional offenses of "fomenting or stirring up litigation."<sup>170</sup> It held that the latter generally involved "malicious intent" or "urg[ed] recourse to the courts for private gain, serving no public interest."<sup>171</sup> It further held that "[r]esort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain."<sup>172</sup> Finally, the Court distinguished solicitation activities of lawyers who were motivated by financial self-interest from those of lawyers with nonpecuniary motives.<sup>173</sup>

Justice Harlan, writing a dissent for three justices, argued that the law fell within the legitimate "desire of the profession, of courts, and of legislatures to prevent any interference with the uniquely personal relationship between lawyer and client . . . ."<sup>174</sup> He acknowledged the constitutional right of a person "to acquaint colored persons with what [he] believes to be their rights, or [to] advis[e] them to assert those rights in legal proceedings[.]" but held that this right did not extend to solicitation.<sup>175</sup> He reasoned that the latter could be regulated as a component of professional conduct.<sup>176</sup> Justice Harlan disputed the Court's claim that the solicitation was nonremunerative, but reasoned that even in the absence of remuneration the state had a valid interest in regulating professional conduct.<sup>177</sup>

Since *Button* involved professional solicitation, it implicated both commercial speech and professional speech issues. The Court's holding that the speech was fully protected by the First Amendment meant that the NAACP's activities were subject to neither the state's power to regulate the advertising of services nor its power to regulate professional activity.

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168. *Id.* at 429.

169. *Id.* at 439.

170. *Id.*

171. *Id.* at 440.

172. *Id.* at 443.

173. *See id.* at 441-43.

174. *Id.* at 460 (Harlan, J., dissenting).

175. *Id.* at 451.

176. *See id.* at 454.

177. *See id.* at 457-60.

The Court's analysis of the professional speech issue is not well-developed. The Court relied on *Thomas v. Collins* for its position.<sup>178</sup> However, *Thomas* drew a distinction between an impersonal address urging an assembly of people to undertake a course of action and a communication in which there was some sort of individualized contact between the speaker and listener.<sup>179</sup> In *Button*, the Court did not consider whether the communication was personal or impersonal in deciding whether it was protected by the First Amendment, despite the dissent's identification of the state's interest in regulating "uniquely personal" relationships.<sup>180</sup> Rather, it held that the NAACP's actions were protected because they were a form of political expression related to the public interest.<sup>181</sup> Thus, the relevant distinction for the Court was not the person-to-person form or characteristic-dependent nature of the advice at issue, but rather the subject matter of, and motivation for, the NAACP's expression. One might infer a rule that professional speech is immune from licensure when it relates to the political process and is not motivated by pecuniary self-interest.

A series of cases, beginning with *Brotherhood of Railroad Trainmen v. Virginia State Bar*, reaffirmed and further extended the holding of *Button*.<sup>182</sup> These cases considered arrangements in which workers' associations would recommend particular legal counsel to clients seeking representation in injury compensation claims.<sup>183</sup> The Court "upheld the right of workers to act collectively to obtain affordable and effective legal representation."<sup>184</sup> These decisions are markedly

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178. See *id.* at 430 (majority opinion) ("We have deemed privileged, under certain circumstances, the efforts of a union official to organize workers.").

179. See *supra* notes 69-71 and accompanying text.

180. Whether the speech in *Button* was characteristic-dependent or person-to-person under the value-neutral test is unclear. The solicitations at issue did generally involve addresses to groups of schoolchildren and their parents. See *id.* at 421. However, the organizers of the meetings would bring authorization forms for individual attendees to sign, which suggests that more person-to-person contact may have been involved than in the typical group-address scenario. See *id.* See also *In re Primus*, 436 U.S. 412, 444-45 (1978) (Rehnquist, J., dissenting) (distinguishing *Button* on the grounds that in that case, the only activities of individual solicitation were carried out by laypersons). In any case, the Court did not feel it necessary to resolve the question.

181. Cf. Clark A. Remington, *A Political Speech Exception to the Regulation of Proxy Solicitation*, 86 COLUM. L. REV. 1453, 1474 (1986) (arguing that proxy solicitations should be treated as fully protected speech when they involve issues of political significance).

182. See *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971); see also *Hopper v. City of Madison*, 256 N.W.2d 139 (Wis. 1977) (applying this collective-action First Amendment theory); *Great W. Cities, Inc. v. Bernstein*, 476 F. Supp. 827 (N.D. Ill.), *aff'd without opinion*, 614 F.2d 775 (7th Cir. 1979) (same).

183. See, e.g., *Trainmen*, 377 U.S. at 2.

184. *United Transportation Union*, 401 U.S. at 584.

broader than *Button* because the subject-matter of the advisory services at issue was not political.<sup>185</sup>

Rejecting the relevance of the nonpolitical nature of the speech, the Court instead focused on the fact that the services provided were a form of collective action and thus implicated associational First Amendment values.<sup>186</sup> To the extent the Court specially treated speech that was part of a collective activity, its analysis borrowed from the value-neutral test applied in *Thomas*.<sup>187</sup> However, the Court's application of that test here was more protective than usual. The Court seemed content to find that the activity was part of some collective undertaking when invoking the First Amendment, even if specific instances of person-to-person consultation were an element of that collective action.<sup>188</sup>

This line of cases is more easily explained as an extension of the value-based test of *Button*. The Court thought it relevant that the subject-matter of the speech, while not strictly political, was socially desirable in that it allowed individuals to obtain meaningful access to the justice system.<sup>189</sup> Furthermore, the Court examined the motivations of those providing this service and found that they were not pecuniary in nature.<sup>190</sup> By focusing on these aspects of the case, the Court's analysis resembles *Button* more than *Thomas*.

The Court revisited the constitutionality of attorney practice rules when it decided *In re Primus*<sup>191</sup> and *Ohralik v. Ohio State Bar Association*.<sup>192</sup> These companion cases dealt with individual solicitation by lawyers. *Primus* involved an ACLU lawyer who offered representation services to a woman who had been forced to undergo sterilization as a condition of continued receipt of Medicaid benefits.

185. See *supra* cases cited at note 182 (finding First Amendment protection for collective activity to assist individuals in filing workers' compensation claims); *Trainmen*, 377 U.S. at 10 (Clark, J., dissenting) (decrying the Court's extension of *Button* beyond the context of political activity); *United Mine Workers*, 389 U.S. at 221 (noting the extension of *Button*); Rhode, *supra* note 48, at 68-70 (discussing this development).

186. Compare *Trainmen*, 377 U.S. at 5-6, with *Trainmen*, 377 U.S. at 10 (Clark, J., dissenting).

187. See *supra* notes 69-71 and accompanying text.

188. See, e.g., *Trainmen*, 377 U.S. at 5. Recall that *Thomas* shied from applying First Amendment protection to advice rendered to a specific individual even if it was part of some broader collective activity. See *supra* text accompanying notes 69-71.

189. See *Trainmen*, 377 U.S. at 7 (comparing this interest to that asserted in *Gideon v. Wainwright*, 372 U.S. 335 (1963)). But see *United Mine Workers*, 389 U.S. at 223 ("[T]he rights of free speech and a free press are not confined to any field of human interest.").

190. See *Trainmen*, 377 U.S. at 6 ("[This] is not 'ambulance chasing.'").

191. 436 U.S. 412 (1978).

192. 436 U.S. 447 (1978).

*Ohralik* involved a lawyer's solicitation of the victim of an automobile accident.

The Court held that a state could proscribe the activities in *Ohralik*, but not those in *Primus*. In *Primus*, the Court's analysis was similar to that in *Button*. It ruled that "[t]he ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public."<sup>193</sup> It further found that the actions of the staff attorney in question were not motivated by a desire for financial gain.<sup>194</sup> In contrast, the court noted that *Ohralik* "does not contend, and on the facts of this case could not contend, that his [solicitations] involved political expression or an exercise of associational freedom"<sup>195</sup> and that *Ohralik's* activities constituted the mere "procurement of remunerative employment."<sup>196</sup> The Court's examination of the political nature of the speech at issue and the motivation of the professional are consistent with the approach in *Button* and are a clear example of the value-based test.<sup>197</sup>

Justice Rehnquist dissented in *Primus*. He believed that there was no principled basis for deciding the two cases differently.<sup>198</sup> He acknowledged that *Button*, *Trainmen*, and related cases established a First Amendment right of "collective" action, but he believed that "[n]either *Button* nor any other decision of this Court compels a State to permit an attorney to engage in uninvited solicitation on an individ-

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193. *Primus*, 436 U.S. at 431.

194. *See id.* at 428-29. Like *Button*, *Ohralik* and *Primus* involve questions of both commercial and professional speech. The commercial speech analysis is similar to that in *Button*. Since the Court found that *Ohralik's* solicitations were motivated by a desire for personal financial gain, his solicitations were merely a form of service advertising and any speech therein can be viewed as doing no more than proposing a commercial transaction. On the other hand, the lack of a financial motive in *Primus's* solicitation indicates that those communications did *more* than merely propose a commercial transaction. This finding makes the professional speech determination in *Ohralik* moot, but the Court's holding in *Primus* implies that the activities in that case also fell outside the state's authority to regulate the practice of a profession.

195. *Ohralik*, 436 U.S. at 458.

196. *Id.* at 459.

197. *See also* Richard L. Barnes, *A Call for a Value-Based Test of Commercial Speech*, 63 WASH. U. L.Q. 649, 664-65 (1985) (criticizing the Court's use of the profit motive as a distinguishing factor); Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093, 1125 (1991) (criticizing the fact that the *Primus/Ohralik* distinction requires a court to assess "the political or social significance of the lawsuit" and criticizing the Court's consideration of the profit motive); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 570-72 (1999) (discussing the distinctions running through *Button*, *Primus* and *Ohralik*).

198. *See Primus*, 436 U.S. at 440-41 (Rehnquist, J., dissenting) ("We can, of course, develop a jurisprudence . . . in which 'ambulance chasers' suffer one fate and 'civil liberties lawyers' another. But I remain unpersuaded by the Court's opinions . . .").

ual basis."<sup>199</sup> The Court's rejection of this view diminishes the importance of collective action to the value-based professional speech test, at least where political speech is involved.<sup>200</sup>

The Court's near-unanimous decision to extend First Amendment protection to Primus's activities removes any doubt about whether the Court applies different standards depending on a subjective analysis of the value of the speech at issue. The Court is plainly more solicitous of professional speech that contains political subject-matter, particularly where the speaker is not primarily motivated by economic gain. Speech that fits within that description is protected by the First Amendment even though it would fail the value-neutral test.

## 2. Other Cases

Cases applying variations of the value-based test also arise outside the context of the legal profession. One area that has been extensively litigated is state regulation of charitable fundraising. In a series of cases,<sup>201</sup> the Court held that charitable solicitation activities enjoyed broad First Amendment protection.

The most recent decision is *Riley v. National Federation of the Blind*.<sup>202</sup> This case involved North Carolina's restrictions on the activities of professional fundraisers. Specifically, the law "define[d] the *prima facie* 'reasonable fee' that a professional fundraiser may

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199. *Id.* at 441 (emphasis added).

200. Of course, the individualized or collective nature of the speech may still be relevant in applying the value-neutral test. Primus's speech clearly fails that test. Primus had sent a letter to a potential plaintiff that advised her to contact Primus if she was interested in pursuing litigation. The content of Primus's letter was personalized to the circumstances of the prospective client, Marietta Williams, to whom it was addressed. *See id.* at 417 n.6. She rendered the advice contained in the letter (namely, to contact Primus if the recipient was interested in pursuing litigation) only because the recipient had previously been sterilized by the state. Had the client not exhibited this personal characteristic, Primus would have given different advice, or more likely, no advice at all. The advice was also person-to-person because it was rendered to one, specific individual with whose circumstances Primus was directly familiar. *See id.* ("You will probable [sic] remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you."). Unlike a mass-mailing addressed to a group of potential litigants, this letter required Primus to make an independent effort to convey a message to one particular individual. Since the speech was both characteristic-dependent and person-to-person, under the value-neutral test, it would be a proper subject for government regulation. The Court's resolution of the value-based test, however, made it unnecessary to apply the value-neutral test.

201. *See Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988).

202. 487 U.S. 781 (1988); *see also* Kevin R. Knight, Note, *The Life of Riley: Complete First Amendment Protection Versus Deferential Commercial Speech Standards for Professional Fundraising Solicitors*, 23 IND. L. REV. 145 (1990); Stephen Block, *The Post-Riley Era: An Analysis of First Amendment Protection of Charitable Fundraising*, 10 CARDOZO ARTS & ENT. L.J. 101 (1991).



charge as a percentage of the gross revenues solicited; require[d] professional fundraisers to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations; and require[d] professional fundraisers to obtain a license before engaging in solicitation."<sup>203</sup>

The Court invalidated each of the requirements. Addressing the commercial speech issue, the Court held that charitable solicitation was not commercial speech because it was "inextricably intertwined with otherwise fully protected speech."<sup>204</sup> The Court paid only minimal attention to the question of professional speech, citing *Thomas* and stating simply that it was not "persuaded by the . . . assertion that this statute merely licenses a profession . . . . Although Justice Jackson did express his view that solicitors could be licensed, a proposition not before us, he never intimated that the licensure was devoid of all First Amendment implication."<sup>205</sup>

This holding ignores the value-neutral test entirely. *Thomas* (as clarified by *Lowe*) did indeed hold that government licensure schemes implicate the First Amendment, but not when the speech at issue is characteristic-dependent and person-to-person.<sup>206</sup> *Riley* made no attempt to analyze the activity of professional solicitors under these rules.<sup>207</sup> Instead, the Court applied a value-based analysis, much as it had in *Primus*. Relying on *Schaumburg*, the *Riley* Court extended First Amendment protection to charitable speech because, unlike commercial solicitation, it involves "informative and perhaps persuasive speech seeking support for particular causes or for particular views."<sup>208</sup>

*Riley* broke new ground in two respects. First, it involved speech that was not political, in a context arguably devoid of any associational values.<sup>209</sup> In this sense, *Riley* was the next step in a doctrinal evolu-

203. *Riley*, 487 U.S. at 784.

204. *Id.* at 796. See also *Schaumburg*, 444 U.S. at 632 ("[Charitable] solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views. . . . [B]ecause charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.").

205. *Id.* at 801.

206. See *infra* Part I.D.

207. In fact, the Court could have concluded that the speech at issue was protected under *Thomas* and *Lowe* (at least for the purposes of the licensing requirement). Although door-to-door solicitations involve person-to-person communications, the Court could plausibly have found that any "advice" given (recommendations that a person financially support a given charity because of that charity's good work) was not characteristic-dependent. Under *Lowe*, the licensing requirement would have been invalid.

208. *Schaumburg*, 444 U.S. at 632.

209. If any associational values did exist, they did not figure in the Court's reasoning.

tion. *Button* applied First Amendment protection under the value-based test to speech that was both political and collective.<sup>210</sup> *Trainmen* reached the same result with speech that was collective but not political,<sup>211</sup> and *Primus* with speech that was political but not collective.<sup>212</sup> *Riley* completes the pattern by applying First Amendment protection to speech that is neither political nor collective, but merely "seek[s] support for particular causes or for particular views."<sup>213</sup>

Second, the *Primus* opinion noted that the speaker in question was not motivated by an economic interest.<sup>214</sup> However, in *Riley*, the charitable fundraisers received a percentage of the funds raised<sup>215</sup> and thus had an obvious economic self-interest in their solicitation. The Court apparently found it sufficient that the fundraisers' economic self-interest co-existed with some other message of public concern.<sup>216</sup> After *Riley*, one could argue that the value-based test prohibits the application of professional licensing requirements to speech on matters of public concern (whether or not they are political), even if the speaker has a self-enriching motive (as long as that is not the *sole* motive).

*Primus* and *Riley* can be compared with cases in which the Court held professional speech unprotected under the First Amendment. In *Lowe*, *Thomas*, and *Ohralik*, the Court held (or implied) that the government could regulate the activities of investment advisers, union organizers, and non-"public interest" lawyers, provided the regulation was permissible under the value-neutral test. This is consistent with the value-based framework in that each case involves speech on a matter of private, rather than public, concern, and speakers who may have a primarily pecuniary interest in conveying information. The Court reached a similar First Amendment conclusion when considering doctors' advice to patients in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>217</sup>

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210. See *supra* notes 167-68 and accompanying text.

211. See *supra* notes 184-86 and accompanying text.

212. See *supra* notes 193, 199 and accompanying text.

213. *Schaumburg*, 444 U.S. at 632; see also Jon Strauss, *First Amendment Protection of Charitable Solicitation*, 13 WHITTIER L. REV. 669, 673 (1992) (questioning whether a meaningful distinction exists between the advocacy of charitable organizations and product advertising).

214. See *supra* note 194 and accompanying text.

215. See *Riley*, 487 U.S. at 781.

216. See *id.*

217. 505 U.S. 833, 881 (1992) (examining provisions that required a doctor to make various disclosures to a patient before performing an abortion, including "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") (citations omitted). In evaluating the mandatory disclosure requirement, the Court held that "[t]o be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of

Other cases apply the value-based test more erratically. In an older case, *United States v. Harriss*,<sup>218</sup> the Court considered the constitutionality of the Federal Regulation of Lobbying Act, which imposed registration and reporting requirements on professional lobbyists.<sup>219</sup> The Court sustained the constitutionality of the Act.<sup>220</sup> While this decision is consistent with the value-neutral test,<sup>221</sup> the Court's implicit rejection of a value-based argument is inexplicable. Political lobbying is obviously a form of political expression, perhaps even more so than the speech at issue in *Button* and *Primus*, and clearly deserves protection under the value-based test.<sup>222</sup>

This survey of cases demonstrates the evolutionary nature of the Court's value-based test within the broader doctrine of professional speech. This doctrine can be summarized as follows: Notwithstanding that speech would be considered professional under the value-

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medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here." *Id.* at 884. *Casey* is consistent with the value-neutral test for professional speech. However, one can question the Court's application of the value-based test. A doctor's decision to render, or not to render, advice about reproductive options to a patient arguably implicates matters of public concern. Furthermore, it is not normally a decision motivated by the doctor's economic self-interest. It is probably relevant that the law at issue in *Casey* was a disclosure requirement rather than a suppression of speech. *Cf. Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 651-52 (1985) (applying a more relaxed standard to a disclosure requirement in the commercial speech context). For academic analyses of the professional speech issue in *Casey*, see Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201 (1994) (criticizing the Court's tolerance of ideological interference with doctor-patient communication); Paula Berg, *Lost in a Doctrinal Wasteland: The Exceptionalism of Doctor-Patient Speech Within the Rehnquist Court's First Amendment Jurisprudence*, 8 HEALTH MATRIX 153 (1998); Halberstam, *supra* note 44, at 835-38 (concluding that the Court's brief treatment of this issue is not instructive). *But cf. Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting) ("The right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion."). For a subsequent lower court case reaching a contrary conclusion about the government's authority to regulate doctor-patient speech, see *Conant v. McCaffrey*, 172 F.R.D. 681, 694-95 (N.D. Cal. 1997) (determining that "speech between physicians and their patients is protected by the First Amendment"). See also Dixon, *supra* note 45 (discussing *Conant*).

218. 347 U.S. 612 (1954).

219. 2 U.S.C. §§ 261-70 (1994) (repealed 1995).

220. See *Harriss*, 487 U.S. at 626. Justice Jackson dissented on vagueness grounds but agreed with the Court that lobbyists could be regulated as professionals. See *id.* at 636 (Jackson, J., dissenting) ("The Court's opinion presupposes, and I do not disagree, that Congress has power to regulate lobbying for hire as a business or profession and to require such agents to disclose their principals, their activities, and their receipts.").

221. The Court interpreted the statute to apply only to those for whom "the intended method of accomplishing this purpose [was] through direct communication with members of Congress." *Id.* at 623 (majority opinion). Thus, the operation of the statute was restricted to those who engaged in person-to-person communication; by virtue of the unique political positions of the targets of lobbyists' efforts, their speech is also characteristic-dependent.

222. One possible explanation is simply that *Harriss* predated many of the other cases in the field and would be decided differently after *Primus* and *Riley*.

neutral test, it may nevertheless be protected by the First Amendment if it involves subject matter and motivations that are particularly important under the First Amendment. Currently, the Court protects speech that involves matters of public concern (whether or not political), so long as the speaker is not solely motivated by economic self-interest. The Court has held the activities of public interest lawyers and charitable fundraisers protected under this test, but has found unprotected (i.e., protected only by the value-neutral test) the activities of doctors, lawyers (other than public interest lawyers), investment advisers, union organizers, and political lobbyists.<sup>223</sup>

#### D. Summary

The foregoing sections have reviewed the doctrines that courts should consider when evaluating First Amendment challenges to professional licensing regimes (the validity of the assumptions underlying these doctrines will be examined in greater detail in Part III). This methodology can be summarized as follows.

The first question in any professional speech case should be whether the government law or regulation at issue aims at the expressive or nonexpressive component of the alleged professional's activity. Where the government action targets the nonexpressive component, actual conduct is at issue and the regulation is normally constitutional under traditional *O'Brien* principles.

If the regulation aims at the expressive component of the activity, a court should analyze it under the value-neutral test. Two questions need to be addressed: (1) Is the speech characteristic-dependent, in that the substance of the advisor's message depends on the recipient's circumstances? (2) Is the speech delivered in the context of a person-to-person relationship, one in which the professional is communicating to a single person with whom he is directly acquainted? Unless both of these questions can be answered in the affirmative, the government licensing scheme is impermissible.

Finally, even if a regulation is valid under the value-neutral test, a court should apply the value-based test. The court should examine whether the professional's speech involves a matter of public concern. The court should also consider whether the speaker is motivated at least in part by interests other than self-enrichment. If both of these conditions are met, the government restriction is invalid.<sup>224</sup>

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223. Compare *supra* notes 193 and 201 with notes 217-18 and accompanying text.

224. A recent decision that seems inconsistent with this framework is *Edenfield v. Fane*, 507 U.S. 761 (1993), where the Court held that states could not prohibit in-person solicitation by professional accountants. The Court examined the case under a commercial speech framework,

## II. CURRENT APPLICATION OF THE PROFESSIONAL SPEECH DOCTRINE

### A. *The Question of Software*

A legal rule's usefulness depends on its ability to resolve future controversies. There will always be cases that fall neatly on one side of a rule or the other. A rule faces a more difficult test when the facts of a case were not contemplated at the time of its adoption. In the context of First Amendment law, this frequently happens when traditional First Amendment principles are applied to a new medium of communication.<sup>225</sup>

One example of a new medium is "expressive" software, defined as software that communicates a recommendation or analysis for a user to interpret. This can be distinguished from "functional" software, which goes beyond the mere rendering of advice and actually performs a nonexpressive function. Expressive software may implicate professional speech concerns because it can convey advice to the user on subjects that have traditionally been the domain of professionals.

As an example, consider the *Drug Checker* software program offered on the website *drkoop.com*, a provider of medical information over the Internet.<sup>226</sup> This program "allows [users] to determin[e] whether the drugs [they are] taking interact with each other, or interact with a certain food, and cause a bad reaction in [their] bod[ies]."<sup>227</sup> To use this software, a person enters the names of the drugs she is cur-

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and held that the special risk of attorney overreaching present in *Ohralik* was not present in the context of accountant solicitation. *See id.* at 773-77. While this analysis is a satisfactory treatment of the commercial speech issue, the Court did not consider the separate question of whether in-person accountant solicitation may be regulated as a form of professional speech. A professional who advises a specific individual to procure his services because of that individual's particular needs and circumstances is engaging in person-to-person, characteristic-dependent speech. In this sense, *Edenfield* differs significantly from the Court's earlier rulings on impersonal forms of attorney solicitation. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bates v. State Bar of Az.*, 433 U.S. 350 (1977); *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85 (1977). These cases involved commercial speech but not professional speech since no "personal nexus" was involved. *See also Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618 (1995). Under the value-neutral test, the state should not have had to justify its regulation under even an intermediate standard of First Amendment scrutiny. And surely it cannot be claimed that *Edenfield* would have passed the value-based test.

225. *See, e.g., ACLU v. Reno*, 117 S. Ct. 2329 (1997) (Internet); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (cable programming).

226. *See Drug Checker* (visited July 14, 1999) <<http://www.drkoop.com/drugstore/interactions/>>.

227. *Id.*

rently taking. The software program then determines, among other things, whether any of those drugs interact.

Is *drkoop.com* engaged in the unauthorized practice of medicine?<sup>228</sup> No person actually evaluates the information a user submits; a preset algorithm determines the program's response based on the information entered. The software's creator engages in no personal contact with the user. On the other hand, the implicit recommendation received (presumably, "Stop taking one of these drugs!") does depend on the personal characteristics of the user.

The growing prevalence of software as an informative tool makes it important to perform a rigorous First Amendment analysis to determine the appropriate constitutional standards. The doctrinal framework described in Part I can be used to perform this analysis (although I will question the justifications for this framework in Part III).

The first question is whether the software at issue is expressive or functional for the purposes of government regulation. This determination involves an inquiry into whether the restriction targets the expressive or nonexpressive elements of the software. If the software is properly characterized as functional, the restriction will normally be constitutional.

Outside the context of professional regulation, First Amendment challenges to software restrictions have arisen mainly in the context of encryption programs (that is, software capable of encrypting text so that only the intended recipient can understand it).<sup>229</sup> Some of these precedents are not on point because they deal with the constitutional protection afforded to source code, rather than to a compiled software product.<sup>230</sup> Nevertheless, when courts have considered compiled soft-

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228. Cf. Prospectus, *drkoop.com*, at 16 (Subject to completion, May 14, 1999) (asserting that although the firm has "endeavored to . . . avoid violation of state licensing requirements, . . . a state regulatory authority may at some point allege that some portion of our business violates these statutes"); see also Kathleen M. Vyborny, *Legal and Political Issues Facing Telemedicine*, 5 ANNALS HEALTH L. 61, 82-83 (1996) (noting the complicated issues presented by medical software and unauthorized practice of medicine statutes).

229. See *Bernstein v. Department of Justice*, 176 F.3d 1132 (9th Cir. 1999); *Junger v. Daley*, 8 F. Supp. 2d 708 (N.D. Ohio 1998), *rev'd*, No. 98-4045, 2000 WL 343566 (6th Cir. Apr. 4, 2000); *Karn v. Department of State*, 925 F. Supp. 1 (D.D.C. 1996), *remanded in an unpublished opinion on other grounds*, 1997 U.S. App. LEXIS 3123 (D.C. Cir. 1997).

230. Source code is the actual instructions that a programmer writes when designing a piece of software. This text must be "compiled" into "object code" before a computer can comprehend and execute the instructions. The source code itself could be considered expressive even if its compiled counterpart is functional in a given case because the programmer might use the source code to convey programmatic ideas to colleagues even if the ultimate compiled product is functional in nature. For example, a piece of software that controls a missile guidance system would probably be considered functional. However, a computer scientist who relays an algorithm for a missile guidance system, written in the form of source code, to an interested colleague is engaged in an expressive activity. Cf. *Bernstein v. Department of Justice*, 176 F.3d 1132 (9th

ware, they have examined whether the software is expressive or functional in nature.<sup>231</sup>

The following examples help illustrate this distinction in the professional speech context. Many banks and brokerages offer software products over the Internet that permit users to effect transactions in their personal accounts. This software is functional for the purposes of most government regulation because the government could plausibly claim to be regulating its nonexpressive elements. The government might be concerned that bugs in the software would result in a customer's accounts being improperly credited or debited, or a customer's request not being processed when a transaction is submitted. These are nonexpressive aspects of the software because they do not relate to any information that the software may communicate to the user. Rather, they relate to the software's ability to effect a transaction that has legal consequences for the user.

On the other hand, software that merely recommends a given transaction—for example, software that predicts the direction of stock price trends—is expressive. Government restrictions on this software address the danger that the advice rendered will induce the user to undertake some ill-advised action. Such justifications aim at the expressive component of the software because the program by itself is not capable of taking any action that has a real-world effect. It is only after the user has affirmatively decided to follow the advice that any negative consequences ensue.<sup>232</sup>

In most cases, software that renders advice should be considered protected speech under the First Amendment rather than a form of professional practice that the government is free to license. *Lowe* requires that advice be characteristic-dependent in nature and given in the context of a person-to-person relationship before it can be classified as professional.<sup>233</sup> While a software program's advice may in many cases be characteristic-dependent, the nature of the relationship between the publisher and the user is normally not person-to-person. As a result, *Lowe* bars the government from attempting to license such a program as a form of professional speech.

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Cir. 1999).

231. See *id.* (stating in dicta that software should be considered protected speech if it has a "close enough nexus to expression"); *Junger*, 8 F. Supp. 2d at 716, *rev'd* No. 98-4045, 2000 WL 343566 (6th Cir. Apr. 4, 2000) (distinguishing between software that is "inherently expressive [containing an] exposition of ideas" and software that is "inherently functional").

232. See *Taucher v. Born*, 53 F. Supp. 2d 464, 468 (D.D.C. 1999) (noting that the plaintiffs' software "is incapable of actually executing trades on behalf of the customer, or otherwise performing any trading-related activity other than causing a computer to display [information] for a user to interpret").

233. See *supra* notes 117-48 and accompanying text.

I will first address the question of characteristic-dependency. Software is unquestionably capable of rendering advice that depends upon the personal characteristics of the user.<sup>234</sup> When a software program renders different information to a user depending on the personal information she supplies, that advice is characteristic-dependent. In this regard, the advice given by a software program is analogous to the advice given by a traditional printed self-help publication. For example, a legal self-help software program might require the user to input information about her family relations before recommending an appropriate form for a will. Similarly, a self-help legal book on will preparation might ask the user whether she has any children; depending on the user's response, the book might recommend either will form "A" or will form "B."

These examples are, of course, simplified. In reality, a self-help software program will ask a series of questions and will make a recommendation based on all of the answers given. In many cases, the answer to one question will determine whether or not certain subsequent questions are even posed. The same is true of self-help books. On the basis of the answer to one question, a book might advise the reader to turn either to page X or to page Y, each with a different series of further questions that affect the ultimate recommendation. Thus, software, like books, can have varying "degrees" of characteristic-dependency.

Other types of software may not render any characteristic-dependent advice at all. Simple reference software, such as a CD-ROM encyclopedia, may take as input only search terms that indicate the subjects on which the user wishes to receive information.<sup>235</sup> Technical analysis software that analyzes stock market or futures market trends and recommends trades is also not characteristic-dependent when the only user input is historical price data and mathematical

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234. See Matthew A. Chambers, *Investment Advisors and Investment Companies on the Internet*, 1046 PLI/Corp 605, 623 (1998) ("[M]arketing for [financial planning] software often promotes it as providing personalized investment advice—that is, advice tailored to the user's particular financial circumstances.").

235. Although one could conceivably define "personal needs and circumstances" so as to include "areas of interest" as a "personal need," courts have historically not taken such a broad view. See, e.g., *Taucher*, 53 F. Supp. 2d at 469 (D.D.C. 1999) (finding that plaintiff Miner's website allows users to indicate areas of interest); cf. *id.* at 468 (holding that Miner did not "tailor [his publications] to the particular needs and circumstances of any individual reader"). See also *Plaintiffs' Amended Proposed Findings of Fact and Conclusions of Law* at 50, *Taucher v. Born*, 53 F. Supp. 2d at 464 (D.D.C. 1999) (No. 97-1711) (arguing that advice tailored merely to a user's "areas of interest" is not personalized advice); *Exemption from Registration as a Commodity Trading Advisor*, 65 Fed. Reg. 12,938, 12,941-42 (Mar. 10, 2000) (substantially adopting this view).



parameters unrelated to the user's circumstances.<sup>236</sup> As these examples show, some software programs give advice that depends on the personal characteristics of the user and other software programs do not. Determining how to classify software involves an examination of the particular program at issue, especially the information it requires a user to supply in order to receive a recommendation.

Even where the software gives advice that depends on the user's circumstances, a second inquiry is necessary to determine whether it gives that advice in the context of a person-to-person relationship. Where a "personal nexus" is lacking, a software program, like a book, cannot be subjected to prior restraint even if the advice it gives depends on the user's characteristics.<sup>237</sup>

Mass-marketed, "off-the-shelf" software does not give rise to any sort of personal relationship between the publisher and the purchaser.<sup>238</sup> The programmer is not familiar with the identities of individual ultimate users. Therefore, he does not "exercis[e] judgment on behalf of [a client] with whose circumstances he is directly acquainted,"<sup>239</sup> nor does he take her affairs "personally in hand."<sup>240</sup>

A publisher of off-the-shelf software does not have to make an independent effort to communicate information every time a different user executes the program. Once the program has been shipped, the publisher's direct involvement in the communicative process is over. The publisher's speech is therefore not directed at a specific individual.

These observations demonstrate that a publisher of off-the-shelf software does not engage in the sort of person-to-person communicative relationships described in *Lowe*.<sup>241</sup> Any sort of "personal nexus"

236. See *Taucher*, 53 F. Supp. 2d at 467-68, discussed *infra* Part II.B.1.

237. See *supra* notes 117-48 and accompanying text.

238. See *Chambers*, *supra* note 234, at 623 ("[I]nteraction with a computer can hardly be described as a 'personalized relationship.'").

239. *Lowe*, 472 U.S. at 232 (White, J., concurring in the result).

240. *Id.*

241. Of course, the fact that the software by itself is protected speech does not exempt a publisher from a licensing requirement if that publisher's distribution of the software is complemented with some other form of communication that is person-to-person. Compare *Commodity Futures Trading Comm'n v. AVCO Fin. Corp.*, 979 F. Supp. 232 (S.D.N.Y. 1997) (finding that a software publisher was subject to regulation because he supplemented the software's recommendations with telephone advice directed at particular individuals) with *Taucher*, 53 F. Supp. 2d at 478 (noting that plaintiffs, unlike AVCO, did not supplement their standard advice with "individual consultations"). But cf. *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, No. 97 C 2362, 1999 WL 965962 at \*9 (N.D. Ill. Sept. 28, 1999) (finding that isolated instances of conversations with subscribers "fall far short of . . . [showing that one is] engaged in the business of providing personalized investment advice for profit"); *Lively*, *supra* note 13, at 860 ("[A] columnist who occasionally addressed individual readers' questions about investments might be deemed to be giving 'personal advice' that required regulatory control. . . .

is completely absent. In this regard, the programmer resembles a publisher of a self-help book rather than a personal advisor who gives advice to a specific individual. To the extent the advice depends on the user's characteristics, it is not because the author is familiar with any individual's circumstances, but merely because he anticipated relevant traits that hypothetical future users might have.<sup>242</sup> Because this type of software is not a form of personalized speech under *Lowe*, its authors and publishers cannot be considered fiduciaries of its users and are protected from licensure by the First Amendment.

On the other hand, "made-to-order" software, which a programmer contracts to write at the behest of a particular client, is a form of person-to-person communication.<sup>243</sup> In this case, the publisher is directly acquainted with the client's needs and circumstances and writes the software with those needs in mind. The programmer's efforts are directed at communicating with one particular client. If the software's advice is characteristic-dependent, a state can constitutionally impose fiduciary responsibilities upon its publisher.

As a practical matter, the value-based aspect of the professional speech inquiry is unlikely to come into play very often. This stage would be reached only when software (i) is expressive rather than functional, (ii) is custom-designed rather than mass-marketed, and (iii) renders advice that depends on the user's characteristics. If these prerequisites are met, a court should ask whether the software program should nonetheless be protected by the First Amendment because it addresses matters of public concern and because the programmer is not motivated solely by self-enrichment.<sup>244</sup>

To summarize, the inquiry into whether software is protected from a professional licensure law by the First Amendment turns primarily on two inquiries: whether the law aims at the expressive rather than the functional aspects of the software, and whether the software is

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[This] result would be constitutionally catastrophic.".)

242. See Chambers, *supra* note 234, at 623 ("[T]he advice provided by software depends entirely on its quantitative analysis of the responses provided by the user.").

243. The distinction between off-the-shelf and customized software is reflected in the CFTC's new regulations exempting impersonal publishers from the scope of the registration requirement. This exemption applies to makers of "noncustomized" computer software. See Exemption from Registration as a Commodity Trading Advisor, 64 Fed. Reg. 12,938, 12,939 (Mar. 10, 2000).

244. With a little imagination, one can construct a scenario that might fall into this category. For example, suppose that a charity retains a software firm to develop a program that analyzes census data and recommends which districts would be the most profitable in light of the charity's target groups. If the state had a burdensome licensing law for custom-order software developers, an as-applied challenge to it would likely be successful after *Riley*.

mass-marketed or made-to-order. The sale of expressive, off-the-shelf software cannot be subjected to a professional licensing requirement.

The First Amendment status of software that renders advice in traditionally professional fields has been a subject both of recent lower court decisions and academic commentary. I will first consider two recent cases that analyzed the question, *Taucher v. Born*<sup>245</sup> and *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*<sup>246</sup>

## B. Recent Caselaw

### 1. *Taucher v. Born*

*Taucher v. Born* involved a constitutional challenge to the Commodity Exchange Act's registration provisions as applied to impersonal financial publishers.<sup>247</sup> The Commodity Exchange Act (CEA) is the federal legislation regulating commodity futures markets.<sup>248</sup> The relevant sections of the CEA apply (subject to certain exceptions) to any person who, "for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in [commodity futures or option contracts]; . . . or promulgates analyses or reports concerning [such activities]."<sup>249</sup>

Such persons are deemed Commodity Trading Advisors (CTAs) and must register with the Commodity Futures Trading Commission (CFTC),<sup>250</sup> the federal regulatory agency charged with administering the CEA. The penalty for failing to register is a fine of up to \$500,000 or imprisonment for up to five years.<sup>251</sup> Registration requirements include the payment of a filing fee, fingerprinting and background checks, mandatory attendance at ethics training classes, the mainte-

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245. 53 F. Supp. 2d 464 (D.D.C. 1999).

246. No. Civ. A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated following legislation*, 179 F.3d 956 (5th Cir. 1999).

247. See *Taucher*, 53 F. Supp. 2d at 465.

248. A commodity futures contract is a standardized legal instrument that obligates a party to buy or sell a specified commodity (for example, wheat) at a specified future date and price. The principal function of commodity futures is to allow businesses to reduce risk by entering into "hedging" transactions. However, because futures contracts can be freely traded, they are also bought and sold by speculators who attempt to profit by predicting future price trends. In this sense, commodity futures bear a resemblance to traditional securities, and futures markets serve a function similar to that of stock markets. See Expert Testimony of Gerald Gay, *Taucher v. Born*, 53 F. Supp. 2d 464 (D.D.C. 1999) (No. 97-1711); JERRY W. MARKHAM, *THE HISTORY OF COMMODITIES FUTURE TRADING AND ITS REGULATION* 203-09 (1987) (defining and discussing commodity futures contracts).

249. 7 U.S.C. § 1a(5)(A) (1994).

250. See 7 U.S.C. § 6n(1) (1994).

251. See 7 U.S.C. § 13(a)(5) (1994).

nance of books and records that are subject to on-demand audit by the CFTC, and the filing of various forms.<sup>252</sup> The CFTC may deny registration for reasons including an individual's previous convictions, failure to supervise employees, "potential disregard of or inability to comply with the [CEA, or] moral turpitude."<sup>253</sup>

In a series of decisions in the 1990s, the CFTC interpreted the CTA registration provisions to apply even to impersonal publishers, notwithstanding the Supreme Court's decision in *Lowe*.<sup>254</sup> In 1997, a group of publishers including Frank Taucher, Stephen Briese, and Robert Miner challenged the CFTC's actions on First Amendment grounds.<sup>255</sup>

While the nature of the legal claim in *Taucher* was similar to that in *Lowe*, there were also some important differences. First, *Lowe* was ultimately decided on statutory grounds.<sup>256</sup> Because the statute at issue in *Lowe*, the Investment Advisers Act, included a statutory exemption for "bona fide publishers," the Court could avoid addressing the constitutional issue directly by interpreting this clause broadly to cover all impersonal publishers.<sup>257</sup> The parallel provision of the Commodity Exchange Act, however, expressly applied "only if the furnishing of such services . . . is solely incidental to the conduct of [the advisor's] business or profession."<sup>258</sup> Since the *Taucher* plaintiffs' publications primarily concerned commodity trading, they could not

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252. See 7 U.S.C. § 6n (1994); 17 C.F.R. §§ 3.1-3.5 (1995). Although some of these requirements are not burdensome, others are viewed by members of the publishing industry as being particularly onerous. Publishers especially object to the CFTC's requirement that it have access to subscriber lists. When a federal regulatory agency contacts a publisher's customers, the result is often a suspicion that the publisher is untrustworthy or engaging in an illegal activity and a concomitant loss of customer goodwill. See *Taucher*, 53 F. Supp. 2d at 468, 472. Furthermore, on-demand audits may be highly invasive when a publisher's business is conducted at home. See *id.* at 472, 474.

253. See 7 U.S.C. § 12a(3)(M) (1994); 7 C.F.R. Part 3, App. A (1995).

254. See, e.g., *In re Armstrong* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,657 (CFTC Feb. 8, 1993), *aff'd*, 77 F.3d 461 (3d Cir. 1993); *In re R & W Technical Services, Ltd.*, CFTC Docket No. 96-3 (CFTC Mar. 16, 1999), *aff'd in relevant part*, No. 99-60182 (5th Cir. Feb. 24, 2000). But see *Ginsburg v. Agora, Inc.*, 915 F. Supp. 733 (D. Md. 1995) (interpreting the CEA to exclude all impersonal publishers from the definition of a CTA).

255. For a thorough pre-*Taucher* analysis of the legislative history of the CEA and an argument that commodity trading newsletters should be considered protected speech under *Lowe*, see Phillip R. Stanton, Note, *A Bear Market for Freedom of Speech: The First Amendment and Regulation of Commodity Trading Advisors Under the Commodities Exchange Act*, 76 WASH. U. L.Q. 1121 (1998).

256. See *supra* notes 104-05 and accompanying text.

257. See *supra* text accompanying note 86.

258. 7 U.S.C. § 1a(5)(C) (1994). Thus, publications of general interest such as *Barron's* and the *Wall Street Journal* that render incidental commodity trading advice were not required to register.

avail themselves of the CEA's publisher exclusion.<sup>259</sup> All parties agreed that their activities were plainly covered by the CEA.<sup>260</sup> This forced the *Taucher* court to confront the First Amendment issue directly.

The second important distinction involved the nature of the publications at issue. The plaintiffs in *Lowe* published only financial newsletters. The plaintiffs in *Taucher* published a broad range of materials, including "books, newsletters, Internet websites, detailed written instruction manuals (known in the industry as "trading systems"), and computer software."<sup>261</sup> For example, plaintiff Stephen Briese published a software program entitled *CrossCurrent*. Based on currency price data series, this program would display a currency trading recommendation (buy, sell, or do nothing) to the user.<sup>262</sup> Plaintiff Frank Taucher published a printed trading system (i.e., a detailed written instruction manual) in *The SuperTrader's Almanac* that performed a similar function. By using a price data series in conjunction with a set of instructions contained in this publication, the user could derive a recommendation to buy or sell a commodity futures contract.<sup>263</sup> This diversity of publication media forced the court to approach the First Amendment question in a medium-independent way.

The district court ruled that the registration requirements of the CEA could not constitutionally be applied to impersonal publishers such as the plaintiffs.<sup>264</sup> The court considered the CFTC's authority to regulate the plaintiffs' publishing activities as a form of professional regulation. Citing the concurring opinions in *Thomas* and *Lowe*, the court held that

[t]he plaintiffs, through their publishing activities, do not go so far as to "exercise judgment" on behalf of those who purchase their products. Through their products, they provide advice on commodities futures trading strategies and techniques; they sell trading systems designed to influence their customers' trading decisions; in some instances, they even go so far as to offer specific buy and sell recommendations; but their advice and rec-

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259. See *Taucher v. Born*, 53 F. Supp. 2d 464, 475 (D.D.C. 1999).

260. See *id.*; *id.*, Plaintiffs' Response to Notice of Supplemental Authority at 2 (filed Apr. 21, 1999) (No. 97-1711) (conceding that Plaintiffs are covered by the CEA).

261. *Taucher*, 53 F. Supp. 2d at 465.

262. See *id.* at 472-73.

263. See *id.* at 470.

264. Following its promulgation of a rule exempting impersonal publishers from the Registration requirement, see *infra* text accompanying notes 284-88, the CFTC voluntarily dismissed its appeal of the *Taucher* decision. See *Taucher v. Born*, No. 99-5293 (filed D.C. Cir. Mar. 8, 2000).

ommendations are identical for every customer and their products are available to all who wish to purchase them. Moreover, the plaintiffs never have any personal contact with their customers. They never supplement their general recommendations with specific recommendations directed at individual customers. They never make any trades for their customers. They simply sell their products and leave it to their customers to decide for themselves whether and how they will use the advice purchased from the plaintiffs.<sup>265</sup>

This language can be read to encompass three specific lines of analysis that closely track the analytical framework discussed in Part II.A. The first of these is the inquiry as to whether the regulations at issue target expression or conduct. In the context of the commodity trading advisory profession, this distinction is relevant because many individuals who render commodity trading advice also have discretionary authority over client accounts. These money-managing CTAs do business by executing power of attorney agreements with their clients that permit the CTA to execute trades on their behalf. The CTA can then make trading decisions without obtaining the client's approval for each trade. Usually, the client will not even find out about the trade until receiving the next statement of account balance.<sup>266</sup>

The government may constitutionally impose a licensing requirement on a CTA who has discretionary authority over a client account.<sup>267</sup> This is true even though a part of that professional's activities may involve the rendering of trading advice.<sup>268</sup> In these cases, the government can plausibly claim to be regulating the nonexpressive component of the CTA's actions; namely, the execution of trades on behalf of a client. When the government asserts a consumer-protection interest here, it concerns an activity that has direct financial consequences for the client independent of any decision that the client might make. On the other hand, when a CTA merely recommends that a customer execute certain trades, regulations are necessarily aimed at the expressive activities of the CTA. Any adverse consequences that may befall the customer arise only as a result of the customer's independent decision to follow the advice of the CTA.

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265. *Taucher*, 53 F. Supp. 2d at 478. The court went on to rule that the publications at issue could not be considered commercial speech, citing a recent Seventh Circuit decision to that effect. *See id.* at 480-81 (citing *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998)).

266. *Taucher*, 53 F. Supp. 2d at 466.

267. *Cf. Exemption from Registration as a Commodity Trading Advisor*, 65 Fed. Reg. 12,938, 12,939 (Mar. 10, 2000) (reserving authority over CTAs who direct client accounts).

268. *Cf. supra* notes 42-43 and accompanying text.

The court's opinion properly applied this distinction to the facts of the case. It found that "[plaintiffs do] not have discretionary control over customer accounts, nor [do they] execute trades on customers' behalf or otherwise manage customer money."<sup>269</sup> It further explained that "[plaintiffs] never make any trades for their customers. They simply sell their products and leave it to their customers to decide for themselves whether and how they will use the advice purchased from the plaintiffs."<sup>270</sup> This section of the court's reasoning applies the *O'Brien* speech vs. conduct distinction described earlier.<sup>271</sup>

The court also applied this analysis to the plaintiffs' software publications. It found that "[the] software is incapable of actually executing trades on behalf of the customer, or otherwise performing any trading-related activity other than causing a computer to display [information] for a user to interpret."<sup>272</sup> Here, the court examined whether the plaintiffs' software was capable of performing any nonexpressive function, and concluded that it was not.<sup>273</sup>

The remaining two lines of the *Taucher* court's analysis address the second step in the professional speech inquiry—whether, notwithstanding the fact that the regulations target speech in the traditional sense, they are permissible under *Lowe* because the speech at issue is both characteristic-dependent and person-to-person.

Various aspects of the court's opinion address each factor. As to the question of characteristic-dependency, the court found that when the plaintiffs published their materials, they did not "tailor their contents to the particular needs and circumstances of any individual reader [or user]."<sup>274</sup> In the context of the plaintiffs' trading systems and trading software, the court found that every person who used these products in a given way "receive[d] the same output regardless of his individual needs and circumstances."<sup>275</sup> Finally, the court examined the input that a user supplied in order to use the plaintiffs' trading systems and software. It found that these publications did not "require the user to input any personal information. Specifically, they [did] not require the user to input information about his particular

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269. *Taucher*, 53 F. Supp. 2d at 468 (Miner), 470 (Taucher), 473 (Briese).

270. *Id.* at 478.

271. *See supra* Part I.A.

272. *Taucher*, 53 F. Supp. 2d at 468 (Miner), 473 (Briese).

273. *See id.*

274. *Id.* at 468 (Miner), 470 (Taucher), 473 (Briese).

275. *Id.* at 468 (Miner), 470 (Taucher), 473 (Briese). The output in any given case might vary depending upon the particular price series and mathematical parameters supplied by the user. *See, e.g., id.* at 467. However, since these inputs do not convey any information about the personal circumstances or characteristics of the person using the trading system or software program, they do not result in characteristic-dependent advice.

investment objectives, available capital, risk preferences, current portfolio holdings, or personal risk exposures to fluctuations in other economic variables . . . ."<sup>276</sup> On these facts, the court concluded that "[plaintiffs'] advice and recommendations are identical for every customer."<sup>277</sup> All of these inquiries address the characteristic-dependency aspect of the value-neutral test. Since the communicative substance of the plaintiffs' publications did not depend on the individual circumstances of their customers, the court correctly concluded that the advice was not characteristic-dependent.

Other aspects of the court's opinion address the person-to-person aspect of the value-neutral test. The court examined whether the relationship between the plaintiffs and their subscribers involved communication to specific individuals and whether it arose in the context of a relationship where the plaintiffs were directly acquainted with their subscribers. The court found that the plaintiffs "furnishe[d] to every purchaser . . . an identical copy of [each publication]"<sup>278</sup> and that they did not "alter the contents of the [publications] after [they had] been distributed to a given [subscriber]."<sup>279</sup> It also found that the plaintiffs did not "advise, by any medium, a specific user of [their publications] to either ignore or follow a specific recommendation . . . ."<sup>280</sup> Finally, it found that the plaintiffs were "unfamiliar with the particular needs and circumstances of [their subscribers]."<sup>281</sup> On the basis of these facts, the court concluded that the plaintiffs "never have any personal contact with their customers [and] never supplement their general recommendations with specific recommendations directed at individual customers."<sup>282</sup> Thus, the court found that the nature of the communicative relationships between the plaintiffs and their subscribers was not "person-to-person" as the term is used in *Lowe*.

Because the plaintiffs rendered advice that was neither characteristic-dependent in substance nor person-to-person in form, the court correctly concluded that the CFTC could not subject their publications to prior restraint under the guise of professional regulation.<sup>283</sup> Since the value-neutral test applied, the court did not have to consider

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276. *Id.* at 467-68 (Miner), 470 (Taucher), 473 (Briese).

277. *Id.* at 478.

278. *Id.* at 468 (Miner), 470 (Taucher), 474 (Briese).

279. *Id.* at 468 (Miner), 470 (Taucher), 474 (Briese).

280. *Id.* at 468 (Miner), 470-71 (Taucher), 474 (Briese).

281. *Id.* at 468 (Miner), 470 (Taucher), 474 (Briese).

282. *Id.* at 478.

283. See also *Commodity Trend Serv. v. Commodity Futures Trading Comm'n*, No. 97 C 2362, 1999 WL 965962 at \*7-14 (N.D. Ill. Sept. 28, 1999) (citing *Taucher*, applying substantially the same reasoning, and reaching the same conclusion on similar facts).



whether the publications were also protected under the value-based test.

*Taucher* left one important question unanswered. Because the advice rendered by the plaintiffs was neither characteristic-dependent nor person-to-person, it was unnecessary for the court to determine whether the presence of one of those two factors alone would be sufficient to validate a licensing scheme. Just as one can imagine a commodity trading newsletter that recommends different strategies depending on the risk preferences of the reader, or a printed "trading system" that requires the user to supply her available capital at one stage of the instructions, one can imagine a trading software program that considers the user's current portfolio positions in making recommendations. Each of these conveys recommendations that are characteristic-dependent, but they do not deliver those recommendations in the context of a person-to-person relationship between the publisher and one particular customer. That situation was not implicated by the facts in *Taucher*, but will undoubtedly arise in future litigation.

Following the *Taucher* decision, the CFTC proposed to amend its rules to provide an exemption for impersonal publishers. As originally proposed, the rules would have exempted a CTA from the registration requirement if the CTA

[did] not engage in any of the following activities: (i) Direct client accounts; (ii) Provide commodity interest trading advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients; or (iii) Provide commodity trading advice through interactive communications with individual clients, such as face-to-face or telephone conversations or electronic mail exchanges between individuals.<sup>284</sup>

Subsection (iii), as proposed, would have required registration of CTAs who gave person-to-person advice, whether or not the advice was characteristic-dependent. The CFTC apparently believed that the person-to-person aspect of the *Lowe* inquiry was a sufficient, rather than a necessary, factor in determining whether speech was professional. Several groups criticized the inclusion of subsection (iii).<sup>285</sup> Responding to this criticism, the CFTC deleted it from the final version of the rule.<sup>286</sup>

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284. Exemption from Registration as a Commodity Trading Advisor, 64 Fed. Reg. 68,304, 68,307 (proposed rule, Dec. 7, 1999).

285. See Institute for Justice, Comment (Feb. 3, 2000) <<http://www.cftc.gov/foia/comment99/cf9943c006.pdf>> ("We believe that [subsection (iii)] is inconsistent with the First Amendment except in cases where the advice is actually given 'in the light of the client's individual needs and circumstances.'"); Law & Compliance Division, Futures Industry Association,

Subsection (ii), as proposed, was ambiguous, since the CFTC did not indicate whether “advice based on, or tailored to . . . [the] circumstances or characteristics of particular clients” referred to personalized advice (as the term is used in this Article) or to all characteristic-dependent advice in general. If the former, then subsection (ii) merely tracked the value-neutral test explained in Part I. If the latter, the CFTC was taking the position that the characteristic-dependent aspect of *Lowe* was a sufficient, rather than necessary, factor in the test. Various groups noted this ambiguity and urged the CFTC to resolve it in its final rule.<sup>287</sup>

The CFTC declined to amend subsection (ii) and did little to clarify the scope of the rule.<sup>288</sup> On the one hand, the CFTC stated its view that “the medium through which advice is communicated is, for the most part, not relevant to whether the CTA can be said to be exercising judgment on behalf of the client in light of the client’s individual needs and circumstances.”<sup>289</sup> However, it then went on to suggest that

[i]n a borderline case as to whether advice is ‘based on or tailored to’ within the meaning of [the rule], . . . the context of the advice might be taken into account. For example, . . . if [characteristic-dependent] advice is provided in a book or periodical,

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Comment (Feb. 7, 2000) <<http://www.cftc.gov/foia/comment99/cf9943c006.pdf>> (“The mere fact that the protected speech . . . is delivered personally, rather than through a newsletter, fax machine, or similar medium, does not [render it constitutionally unprotected].”); Committee on Futures Regulation, Association of the Bar of the City of New York, Comment (Feb. 4, 2000) <<http://www.cftc.gov/foia/comment99/cf9943c006.pdf>> (“[Subsection (iii)] unnecessarily blurs the distinction between the nature of the advice provided and the mode of communication of that advice.”)

286. See Exemption from Registration as a Commodity Trading Advisor, 64 Fed. Reg. 12,938, 12,941 (final rule, Mar. 10, 2000) (“By [deleting subsection (iii)], the Commission intends to reduce the legal uncertainty created by the First Amendment in this area . . .”).

287. See Institute for Justice, Comment (Feb. 3, 2000) <<http://www.cftc.gov/foia/comment99/cf9943c006.pdf>> (“We believe that [subsection (ii)] is consistent with the First Amendment as applied to CTAs who have actual direct knowledge of their client’s circumstances or characteristics. However, it is unclear whether this [subsection] is intended to apply to a CTA that publishes a printed trading system or a computer software program that allows a user to receive a recommendation appropriate to his circumstances by supplying personal information.”); Law & Compliance Division, Futures Industry Association, Comment (Feb. 7, 2000) <<http://www.cftc.gov/foia/comment99/cf9943c006.pdf>> (“[I]mpersonal advice may be provided on a website that is interactive in nature, requiring a client to select among inquiry paths or categories of information.”)

288. See Exemption from Registration as a Commodity Trading Advisor, 64 Fed. Reg. 12,938, 12,940 (final rule, Mar. 10, 2000). Thus, the final rule exempts a CTA if “[i]t does not engage in any of the following activities: (i) directing client accounts; or (ii) providing commodity trading advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients.” See *id.* at 12,943 (to be codified at 17 C.F.R. Pt. 4, § 4.14(a)(9)).

289. *Id.* at 12,940 (citation omitted).

that factor may weigh against finding that the CTA is providing advice 'based on or tailored to' the client's characteristics . . . . On the other hand, if the advice is provided to a particular client in a face-to-face communication or over the telephone, that factor may weigh in favor of [such] a finding . . . .<sup>290</sup>

Whether the CFTC would demand the registration of a CTA who publishes characteristic-dependent advice outside the context of any sort of "personal nexus" or person-to-person relationship with an individual client is therefore a question that remains largely unanswered. A proper application of the Supreme Court's professional speech doctrine would extend First Amendment protection to those scenarios as well.

## 2. *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*

A second recent case examining the First Amendment status of expressive software was *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*<sup>291</sup> This case involved an injunctive suit brought by Texas' Unauthorized Practice of Law Committee (UPLC), a committee appointed by the Texas Supreme Court with the responsibility of enforcing Texas' Unauthorized Practice of Law Statute. The UPLC alleged that Parsons Technology was violating the statute by publishing a computer software program, Quicken Family Lawyer (QFL).<sup>292</sup> This program contained a library of legal forms, as well as instructions on how to fill them out.<sup>293</sup> The program interviewed the user through a series of questions, and based on the responses, recommended an appropriate form.<sup>294</sup> The program also added, removed, or altered clauses within forms based on the user's responses.<sup>295</sup>

Parsons defended its actions in part by arguing that its publishing activities were protected by the First Amendment.<sup>296</sup> The court determined that the first inquiry should be whether the Unauthorized

290. *Id.* at 12,940 n.7.

291. No. Civ. A. 3:97CV-2859-H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated following legislation*, 179 F.3d 956 (5th Cir. 1999).

292. The efforts of bar associations to restrict the public's use of legal software dates back to 1968, when the American Bar Association's Special Committee on Electronic Data Retrieval recommended that the use of "analytical" or "advisory" legal software be restricted to lawyers. See Bart Thomas, *Unauthorized Practice and Computer Aided Legal Analysis Systems*, 10 JURIMETRICS J. 41, 47-48 (1979).

293. See *Parsons*, 1999 WL 47235, at \*3.

294. See *id.* at \*1-2.

295. See *id.* at \*2.

296. See *id.* at \*7.

Practice of Law Statute was content-based or content-neutral.<sup>297</sup> The court believed that the relevant inquiry was not "what specific speech . . . the Statute prohibits, but whether the government is evidencing a disagreement with the speaker's message, as well as the underlying purpose behind the statute."<sup>298</sup> The court concluded that "[t]he Statute is aimed at eradicating the unauthorized practice of law. The Statute's purpose has nothing to do with suppressing speech."<sup>299</sup> It proceeded to apply an intermediate level of First Amendment scrutiny, and finding that the statute did not burden more speech than necessary, granted summary judgment for the UPLC.<sup>300</sup>

In response to the district court's decision, the Texas legislature amended the Unauthorized Practice of Law Statute to read that "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."<sup>301</sup> The Fifth Circuit Court of Appeals proceeded to summarily vacate the district court's decision.<sup>302</sup>

Although the district court's decision was vacated on statutory grounds, it is instructive to analyze the decision on its constitutional merits. The opinion is open to criticism on a number of points. First, the court's conclusion that the statute is content-neutral is dubious. The court believed that the appropriate test involved examining the statute's purpose, rather than its facial scope.<sup>303</sup> Although the Supreme Court's decision in *Ward v. Rock Against Racism*<sup>304</sup> can be read to endorse this approach, the Court later cast doubt on it in *Turner Broadcasting System, Inc. v. FCC*.<sup>305</sup> In that case, the Court held that "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based," and that "the mere assertion of a content-neutral purpose is not enough to save a law which, on its face, discriminates based on

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297. *See id.*, at \*7-8.

298. *Id.* at \*8.

299. *Id.*

300. *See id.* at \*8-10.

301. H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999).

302. *See Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956 (5th Cir. 1999).

303. *See Parsons*, 1999 WL 47235, at \*8.

304. 491 U.S. 781 (1989).

305. 512 U.S. 622 (1994).

content.”<sup>306</sup> Thus, the Court had already rejected the mode of analysis the district court used.<sup>307</sup>

Even aside from the fact that the court employed the wrong legal test, its claim that the “eradication of the unauthorized practice of law” is a purpose that has “nothing to do with suppressing speech” is unconvincing. On the contrary, the whole point of the unauthorized practice statute is to prevent any person other than a licensed attorney from providing legal advice. Since this purpose implicates the subject matter of the advice being rendered,<sup>308</sup> the restriction should have been considered content based even under the court’s test. While the court claimed that the statute was aimed at the “noncommunicative impact of Parsons’ speech,”<sup>309</sup> it never identified precisely what this noncommunicative impact was.

Finally, even if the court were correct that the statute was content-neutral, it ignored the general rule that even content-neutral laws must not operate as a complete ban on a class of speech. As the Supreme Court stated in *Renton*, an otherwise permissible content-neutral restriction must “not unreasonably limit alternative avenues of communication.”<sup>310</sup> The content-neutrality rule allows the state to regulate the time, place and manner of speech, but not to prohibit it outright. It seems unlikely that the statute, as applied, would pass this test, particularly since earlier state court decisions held that QFL-type advice could not be given even over traditional print media.<sup>311</sup> The unauthorized practice statute did not seek to regulate merely the time, place, or manner in which Parsons delivered its legal advice. Rather, it was designed to prohibit the advice outright.

Since the legislature promptly overruled the district court’s decision, the court of appeals did not review the district court’s opinion for

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306. *Id.* at 642-43.

307. The one area in which the Court does look at purpose rather than scope is the so-called “secondary effects” doctrine. When a law targets conduct that just happens to be associated with a given class of speakers, the Court permits laws that facially discriminate based on content. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). This was of no help to the *Parsons* court, however, since the Supreme Court later clarified that “listeners’ reactions to speech are not the sort of ‘secondary effects’ we were describing in *Renton*.” *Boos v. Barry*, 485 U.S. 312 (1988). The UPLC’s consumer-protection interests, see *Parsons*, 1999 WL 47235, at \*9, relate solely to listeners’ reactions to Parsons’ software. The UPLC is concerned that the advice given will be faulty and that, as a result, the listeners will make poor legal decisions.

308. See *Parsons*, 1999 WL 47235, at \*8 (noting that the UPLC would not prosecute Parsons for publishing its nonlegal titles).

309. *Id.*

310. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

311. See *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162 (Tex. App. 1992) (holding that the sale of a do-it-yourself manual explaining how to draft a will constituted the unauthorized practice of law); see also *Parsons*, 1999 WL 47235, at \*5 (citing *Fadia*).

legal error. As just described, the opinion has several analytical shortcomings.<sup>312</sup> *Parsons* presented an opportunity for a court to apply the value-neutral test of *Lowe* to legal self-help software. By failing to apply the appropriate constitutional rules and instead upholding the statute under plainly inapplicable rules for content-neutral speech restrictions, the court left important questions unresolved.

### C. Academic Commentary

Academic commentary on expressive software has focused primarily on legal self-help products such as the one at issue in *Parsons*. Several authors have suggested that legal self-help software poses a threat to the public,<sup>313</sup> and that the sale of such software to laypersons should either be licensed<sup>314</sup> or banned outright.<sup>315</sup> However, there is no compelling reason to treat software publications differently from print publications.

Many of the objections raised apply equally to software and to traditional print publications. For example, authors note that users of legal self-help software may not identify all the relevant facts to enter into the program,<sup>316</sup> or may misunderstand the question posed and consequently enter an inappropriate response.<sup>317</sup> These risks are equally applicable when a layperson uses a printed question-and-answer aide or a checklist in a self-help book to evaluate his own legal

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312. See also Richard Zorza, *Reconceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice*, 67 *FORDHAM L. REV.* 2659, 2660 n.5 (1999) (arguing that the *Parsons* decision is "untenable" because it ignores the Sixth Amendment right to self-representation); *Bates v. State Bar*, 433 U.S. 350, 351-52 (1977) (noting that "most legal services may be performed legally by the citizen for himself"); *Faretta v. California*, 422 U.S. 806, 807 (1975) (recognizing the Sixth Amendment right to represent oneself at criminal trial). The court also failed to recognize the constitutional importance of *Lowe* to unauthorized practice suits where there is no direct relationship between the publisher and user. This, despite the fact that at least one commentator had already noted *Lowe's* significance in this very context. See Timothy Howard Skinner, Comment, *Legal Software, the First Amendment, and the Unauthorized Practice of Law: Regulating the Sale of Software That Provides Legal Services*, 2 *SOFTWARE L.J.* 319, 326-27 (1988).

313. See, e.g., Earl Taylor & Rita D'Arcangelis, *Expert Computer Software and the Unauthorized Practice of Law*, 45 *VIRG. J. SCI.* 257, 262 (1994) (expressing concern at the lack of accountability for the advice rendered by legal software).

314. See Skinner, *supra* note 312, at 335-36.

315. See Ross Vincenti, *Self-Help Legal Software and the Unauthorized Practice of Law*, 8 *COMPUTER/LAW J.* 185, 208-09 (1988); Christopher James, *Software and Hard Choices*, *OR. ST. BAR BULL.* (July 1992) at 15. *But see* Thomas, *supra* note 292, at 50-51 (concluding that the benefits of the public availability of self-help software outweigh the risk of harm). It should not go unnoticed that many legal commentators are themselves members of state bars, which have an economic interest in maximizing the scope of unauthorized practice laws. See *infra* Part III.C. Canvassing the opinions of lawyers on these matters presents a special risk of subjectivity.

316. See Thomas, *supra* note 292, at 44.

317. See Vincenti, *supra* note 315, at 190; Thomas, *supra* note 292, at 44.

situation. Authors also note that legal software may not handle changes in the law after the software's release,<sup>318</sup> that software may not consider additional factors such as custom and social justice,<sup>319</sup> and that lawyers, unlike legal software, may challenge unjust precedents and seek to effect change in the law.<sup>320</sup> Again, these are objections to self-help materials in general rather than to legal software in particular. Courts now agree that printed self-help materials are protected by the First Amendment in the absence of any personal contact with the recipient.<sup>321</sup> The question, then, is not whether self-help materials in general entail the risk of harm, but whether software poses particular additional risks relevant in some way to the First Amendment analysis.

Many commentators try to distinguish between the function performed by self-help software and that performed by a self-help book. Principally, they argue that legal software has a functional aspect not present in a legal self-help book. Vincenti, for example, argues that "[s]elf-help legal software goes far beyond other self-help legal materials by providing an analysis of the specific user's problem, instead of the user performing his own analysis."<sup>322</sup> Similarly, Skinner argues that "[w]hile form books merely provide the consumer with information and instruction, legal software actually acts upon the user's information and performs a legal task."<sup>323</sup>

This distinction is unpersuasive, because the analytical process involved in the use of legal software is no different from that involved in a self-help book. This is best demonstrated by way of example. Consider a book that requires a reader to answer a yes/no question concerning her personal circumstances. The book advises that if the answer is yes, she should follow the instructions on this page; if not, she should follow the instructions on the next page. Now, compare this with a software program that poses the same yes/no question to the user, and, based on the user's response, displays a different recommendation. There is no plausible, meaningful distinction between these two examples. Each case involves the same analytical process: the author (or programmer) analyzes the law and identifies a legal rule. She then drafts a question that captures which factual circumstances fall on which side of the line, and writes a recommendation applicable

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318. See Skinner, *supra* note 312, at 334; Vincenti, *supra* note 315, at 190; Thomas, *supra* note 292, at 45.

319. See Vincenti, *supra* note 315, at 193.

320. See Vincenti, *supra* note 315, at 193; Thomas, *supra* note 292, at 45.

321. See *supra* text accompanying notes 124-38.

322. See Vincenti, *supra* note 315, at 185; see also *id.* at 189, 191-92.

323. See Skinner, *supra* note 312, at 327.

for each outcome. The product is then shipped. The reader (or user), upon using the product, is confronted with the question. The reader (or user) analyzes her own circumstances to determine the correct answer to that question. At this point, the generation of the appropriate recommendation is completely algorithmic. Every "yes" answer always leads to one particular recommendation, every "no" answer always leads to another. The only way in which the two examples differ is that the reader of the book must follow instructions to turn to a specified page while the user of the software need take no action; after submitting a response, the appropriate text appears automatically. This is merely a peculiarity of the medium—books, unlike expressive software, cannot control the form of their own presentation after being printed. It is a far cry from the distinction claimed by Vincenti and Skinner—that a book forces the reader to perform his own analysis, whereas software performs that analysis for him. The reality is that both programmers and authors of self-help materials perform legal analysis by identifying legal rules and creating structural relationships to lead readers and users to an appropriate recommendation. The product itself (whether book or software) merely applies the result of that analysis algorithmically.<sup>324</sup>

Even if a cogent distinction could be made between the two processes, the evil addressed by unauthorized practice statutes is the same in each case. The target of state regulation is the recommendation ultimately made by the program, not the analysis performed. Any faults in the program's design are entirely harmless until they are put in an expressive form for the user to interpret.

Opponents of self-help software often attempt to skew the analysis by comparing the sort of software just described with books that merely provide descriptive overviews of the law.<sup>325</sup> This argument makes an incorrect comparison. Books may provide broad overviews of the law, or may attempt to assist their readers with their own specific legal problems (as in the example just noted). Similarly, legal software may be broad and general (such as a program that merely stores and displays the text of court cases) or specific. The distinction, then, is not between legal software and legal books, but between different types of legal self-help products.

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324. See also Chambers, *supra* note 234, at 625 ("[M]any books and magazines [provide advice similar to that provided by software], in that they may offer equations or worksheets for individuals to make investment decisions. *The difference between such publications and software is one of degree and not of kind.*") (emphasis added).

325. See, e.g., Vincenti, *supra* note 315, at 191 ("Self-help legal software is more specific than other self-help materials which typically give a broad overview of the law . . .").



Ironically, a publication that minimizes the amount of analysis the user must perform presents a *weaker* state interest in regulation, since it lessens the chance that the user, through his own incompetence, will miscomprehend the publisher's advice. On a more fundamental level, there is simply no constitutional requirement that speakers couch their advice in nebulous, abstract terms. Specific recommendations, as well as general commentary, are protected by the First Amendment, even though they obviate any need for the recipients to perform their own extensive analysis.<sup>326</sup>

In addition, Vincenti's and Skinner's arguments prove too much, since they imply that software that "performs analysis" is unprotected whether or not the advice given is characteristic-dependent. The court in *Taucher* rejected this proposition. That case involved software that analyzed commodity futures market trends and gave the user advice unrelated to any personal characteristics.<sup>327</sup> Under Vincenti's argument, the fact that the software, rather than the user, performed analyses would strip it of First Amendment protections. However, the court held that the First Amendment protected both the plaintiffs' software and their other publications.<sup>328</sup>

Vincenti raises a second distinction, which involves the drafting capabilities of self-help software. He notes that unlike a self-help book that merely recommends one of a set of preconstructed forms, self-help software determines "what [goes] where and the selection and structure of the language in the document."<sup>329</sup> To this, one might add the fact that software is capable of "filling in the blanks." While a self-help book can only advise a reader to write his name in every blank labeled 'name,' software can take that information and insert it in the appropriate places.

The ability to manipulate form content in this fashion does not make a program any less expressive in nature.<sup>330</sup> There is no conceptual distinction between drafting a form containing certain language, and recommending that a user adopt certain language in a form.

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326. See, e.g., *Lowe v. SEC*, 472 U.S. 181, 185 (1985) ("specific recommendations" are protected); *Taucher v. Born*, 53 F. Supp. 2d 464, 478 (D.D.C. 1999) (same); *Bernstein v. Department of State*, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996) ("Instructions, do-it-yourself manuals, recipes, even technical information" all receive the full protection of the First Amendment.).

327. See *Taucher*, 53 F. Supp. 2d at 467-68, 471-72.

328. See *id.* at 465 (grouping plaintiffs' software with their other publications).

329. Vincenti, *supra* note 315, at 206. See also Skinner, *supra* note 312, at 328 (describing the form assembly function of legal software).

330. Cf. Rhode, *supra* note 48, at 65 (examining regulations of professionals' form-completion activities and arguing that the assumption that such regulations target conduct rather than expression is "problematic").

“Form-drafting” is merely a subset of the broader category of “advice-rendering.” A recommendation that a user execute a contract in certain terms is nothing more than a recommendation. As noted in Part A.I, an *executed* legal agreement has a significance beyond the mere words of the contract because it binds the parties to its terms; the government can constitutionally regulate contracts.<sup>331</sup> But, until the user takes the affirmative step of actually executing a document that a software program recommends, the drafted instrument has no legal force. The government may not regulate mere words just because those words, in the future, may be used to create something over which the government has authority.<sup>332</sup> When the government asserts an interest in protecting the public from ineffectively drafted suggestions for contractual language, it addresses expression and implicates the First Amendment.

Of course, when professional speech is at issue, determining that a restriction fails *O'Brien* is only the first step in the analysis. The next step is the value-neutral test. Form-drafting capability allows a software program to offer characteristic-dependent advice. However, it does not create a person-to-person relationship between the publisher and the user (assuming the software is not custom-programmed); a “personal nexus” is still absent. Under *Lowe*, the program is protected.

Vincenti makes one final point worth mentioning. He asserts that software can create an “aura of credibility” that lulls the user into a false sense of security.<sup>333</sup> He believes that this is particularly true for younger generations that “have grown up accustomed to [computers] and, because of their familiarity . . . , may tend to rely more heavily on the [results].”<sup>334</sup> These speculations are open to question. It is likely that individuals who are more familiar with the operation of computers would better understand the algorithmic nature of the advice, and thus appreciate the difference between a computer aide and a human consultant. In any case, as I will explain further in Part III.B, the “aura of credibility” associated with a given source of information comes primarily from the recipient’s cultural expectations about the quality of that information. Information from a licensed professional generates an aura of credibility because of the public’s expectation of

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331. See *Lowe*, 472 U.S. at 232 (White, J., concurring in the result).

332. Cf. *Bernstein v. Department of Justice*, 176 F.3d 1132, *withdrawn and reh'g granted*, 192 F.3d 1308 (9th Cir. 1999) (holding that the government may not impose a prior restraint on encryption source code despite the fact that the source code can be used to generate an encryption product which the government could regulate).

333. See Vincenti, *supra* note 315, at 192-93.

334. *Id.* at 192.

quality for that advice. These expectations result largely from the fact that professional advice is generally regulated.<sup>335</sup> Software, which has no comparable history of regulation, is unlikely to create similar expectations. This is particularly true when software includes disclaimers to assist the public in distinguishing “unlicensed” software from the advice of a licensed professional.

The applicability of much of this academic commentary to current legal questions is limited because the pieces either predated *Lowe*<sup>336</sup> or failed to mention it.<sup>337</sup> The one article to examine *Lowe* concluded that it had a direct bearing on the question of self-help software: Skinner determined that “[i]t could be inferred from Justice White’s concurrence that the [F]irst [A]mendment protects the publishers of self-help materials against state regulation.”<sup>338</sup> This conclusion, subject to the qualifications discussed in Part II.A above, is consistent with my own.

#### D. Doctrinal Significance

Self-help software is just one example of a professional speech issue currently facing lower courts. However, the issue has a doctrinal significance far beyond the specific fact patterns it involves. In this section, I briefly explain why the software question may ultimately lead to a reconsideration of the value-neutral test for professional speech set out in *Lowe*.

When like messages are communicated over two different media, courts normally apply the same First Amendment rules unless the selection of medium somehow affects the content of the speech itself.<sup>339</sup> One aspect of the *Lowe* test, however, presents just such a medium-dependent rule. The person-to-person aspect of the test distinguishes speech delivered in the context of a personal nexus from speech delivered over an impersonal medium, even when the content of the speech is the same.<sup>340</sup>

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335. See *infra* Part III.B.

336. See Thomas, *supra* note 292.

337. See Vincenti, *supra* note 315.

338. Skinner, *supra* note 312, at 327; see also *id.* at 329 (“[I]f a majority of the Supreme Court adopts Justice White’s concurrence . . . there may be no constraints on the marketability of [self-help legal software] programs.”). Skinner believes that the reasoning in *Lowe* should be reevaluated in light of technological advance. See *id.*

339. See, e.g., *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); *Martin v. City of Struthers*, 319 U.S. 141 (1943).

340. One might argue that the nature of the communication is different in that customers are more likely to trust information rendered in a person-to-person relationship. This is an argument that I address in Part III.B.

In the past, this rule seemed sensible because speech delivered over a person-to-person medium also tended, in practice, to be substantively different from impersonal speech. This is because the ability of the speaker to make his speech highly characteristic-dependent has been heavily dependent on whether it was delivered within or without a personal nexus.

Books and software programs have always had the capacity to render characteristic-dependent advice to the reader or user. However, this advice has historically been much *less* characteristic-dependent than the sort of advice that one could get from a personal advisor. A personal advisor can consider a large number of relevant factors in determining what recommendation to make. Because the advisor is not constrained to any particular algorithm, he can apply a "cognitive" approach: interviewing the client in a free-form, open-ended manner, analyzing the relevant information without any hard-and-fast rules, and making a recommendation based on whatever facts he deems most relevant. On the other hand, the author of a step-by-step self-help book or computer program can only anticipate the traits that a hypothetical future user might have. The fact that the publication itself must contain a preconstructed algorithm for each factor constrains the degree of characteristic-dependency that is achievable.

In the case of books, this limitation is particularly harsh for two reasons. First, the printed medium imposes practical size constraints on the number of factors that the author can consider. For every potential characteristic to which the author wants to attune the book, she must include in the actual text the results for each possible outcome. If the author of a financial planning self-help book instructs the reader that the optimal level of investment in risky securities depends on his income, the author would have to include instructions to deal with each case. This process is recursive, with every subsequent determination requiring additional sets of instructions. Limits on the marketability of excessively voluminous books tends to constrain the amount of information that the book can contain, which in turn constrains the degree of characteristic-dependency that the author can accomplish.

The second reason relates to reader accessibility. Books do not have the power to alter the form of their own presentation after they are created. This makes it difficult for an author to convey highly characteristic-dependent advice to the reader without causing confusion.<sup>341</sup> Some mechanisms exist that an author can use to simplify the

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341. Cf. Vincenti, *supra* note 315, at 190-91 ("[I]f the amount of information presented to the user is enormous and exhaustive, the user may ignore important information because he is

advice-rendering process. He can pose step-by-step questions to the reader, and then, on the basis of the answer to each question, direct the reader to a different page.<sup>342</sup> Or, he can provide a flowchart, with each node directing the reader to a different question based on the answer to a previous one.<sup>343</sup> However, in each case, it may be difficult for the author to organize the questions in an easily understandable fashion while at the same time providing a high level of detail in the questions and advice.

Self-help software greatly alleviates (but does not remove) both of these concerns. The actual written advice that the user will ultimately see is not physically stored as written words, but is encoded and stored on a compact electronic medium. Furthermore, the ability of a computer program to assemble text from multiple sources before displaying it allows the author to avoid redundancy in storage. The sheer amount of information a computer program can store is greater, so the degree of characteristic-dependency it can accomplish is higher.

In addition, self-help software programs can convey their advice to the user more clearly. Unlike the print medium, software can actively control the form of the advice it displays after it has left the hands of the author. The program can display relevant information on an as-needed basis, which may prevent the user from being intimidated by an excess of information or confused by the proximity of multiple concepts.

For these reasons, the medium of computer software allows a greater degree of characteristic-dependency than the medium of a self-help book. Of course, that degree is still far short of what can be offered by a personal advisor. However, as the quality of computer software programs continues to increase, that gap will continue to narrow. The presence of a personal nexus will make less of a difference to the degree of characteristic-dependency that the publisher or professional can convey. In *Lowe's* value-neutral test, the personal nexus aspect of the speech will become more and more important as the only legal distinction between fully protected publishing activities and professional practice. And the Supreme Court will find itself in the position of treating substantively similar kinds of speech in radically different fashions depending solely on whether the speech was delivered in the context of a personal nexus.

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unable to resist the temptation to skip relevant background information necessary for him to understand the legal theory applicable to the case.”).

342. Cf. *HAMAN*, *supra* note 122, at 87 (“If you are using a procedure for joint petition allowed in your state, you do not need to worry about the information in this chapter.”).

343. See, e.g., *DAVID PRESSMAN, PATENT IT YOURSELF 7/3* (7th ed. 1999) (providing a decision flowchart for the patent process).

This uneasy result may cause the Court to reevaluate the status of the personal nexus as a First Amendment determinant. This would present the Court with at least two alternatives. First, it could hold that advice that depends on the characteristics of the recipient constitutes professional practice even if delivered over an entirely impersonal medium such as a book or a software program. Alternately, it could hold that characteristic-dependent advice is constitutionally protected whether or not a personal nexus exists. In either case, the Court would need to re-examine the fundamental assumptions of *Lowe's* value-neutral test. In the next section, I present the case for abandoning *Lowe* in favor of greater First Amendment protection.

### PART III. RECONSIDERING PROFESSIONAL SPEECH

#### A. *The Historical Perspective*

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>344</sup> This clause was made applicable to the states by the Fourteenth Amendment.<sup>345</sup> Interpreted textually, the First Amendment imposes a serious obstacle to any government effort to license a professional's activity when that activity consists of nothing more than rendering advice.

Although some academics argue for an "absolutist" approach to the First Amendment,<sup>346</sup> most courts have acknowledged that a literal interpretation would be unworkable. Looking to historical practice, courts have held that a variety of forms of speech, including threats, conspiracy, incitements to lawlessness, obscenity, and "fighting words" generally fall outside the ambit of First Amendment protection.<sup>347</sup> The relevant question, then, is whether the advice of professionals should be included in this list of substantive exclusions.

In answering this question, one would expect the normal first step to be an analysis of the legislative practices of the states when they ratified the First and Fourteenth Amendments.<sup>348</sup> If state governments had a common practice of imposing licensing requirements

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344. U.S. CONST. amend. I.

345. See *Duncan v. Louisiana*, 391 U.S. 145 (1968); see also *Fiske v. Kansas*, 274 U.S. 380 (1927).

346. See, e.g., Solveig Singleton, *Reviving First Amendment Absolutism for the Internet*, 3 TEX. REV. L. & POL. 279 (1999).

347. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

348. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517-18 (1996) (Scalia, J., concurring in part and concurring in the judgment) (noting the relevance of ratification-era state legislative practices in deciding First Amendment questions).

on those who did no more than render advice, one could infer that the drafters did not intend those activities to be constitutionally protected.<sup>349</sup> Most modern decisions do not undertake this analysis.<sup>350</sup>

Before examining the specific case of “professionals” who did no more than render advice, it will be helpful to review the history of professional licensing practices in general. Although some states passed professional licensing laws following the American Revolution, these were largely repealed during the Jacksonian era (beginning around 1840) because they were thought to be “inconsistent with the . . . democratic political ideology.”<sup>351</sup> Through most of the rest of the century, states generally did not impose a licensing requirement on the practice of either law or medicine.<sup>352</sup> “[A]lmost anyone could practice ‘medicine,’ and many did. . . . Would-be lawyers typically read cases and helped a senior attorney as a clerk.”<sup>353</sup> One writer explains, “[t]o restrict the practice of any art to people specially trained would have been intolerable in a country where every man had to be able to be his own farmer, manufacturer, doctor, lawyer, builder, and banker.”<sup>354</sup>

Modern licensing laws did not begin to show up until the 1880–1920 era.<sup>355</sup> In the legal profession, organized professional resistance to unauthorized practice did not begin to materialize until well into the twentieth century.<sup>356</sup> Thus, when the Fourteenth Amendment was

349. Even where such a historical practice exists, however, the Supreme Court has often declared it nonetheless unconstitutional. See, e.g., *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). If the Supreme Court is willing to find First Amendment protection in the face of contrary ratification-era practice, it would be odd indeed to deny protection where ratification-era practice would support it.

350. See, e.g., *Oregon State Bar v. Smith*, 942 P.2d 793, 801-02 (Or. Ct. App. 1997) (reviewing the historical evidence but then declining to apply it, believing that unauthorized practice of law statutes can be sustained as a regulation of speech incidental to conduct).

351. ELLIOTT A. KRAUSE, *DEATH OF THE GUILDS* 30 (1996); see also *STANDING COMM. ON LAWYERS' RESPONSIBILITY FOR CLIENT PROTECTION, AMERICAN BAR ASSOC. CTR. FOR PROFESSIONAL RESPONSIBILITY, 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE* at xiii (1996) (“By the 1820’s, the egalitarian spirit of Jacksonian democracy . . . explains the hiatus in UPL enforcement during most of the nineteenth century.”); STEVEN BRINT, *IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* 38 (1994) (describing the “Jacksonian distaste” for professions); SAMUEL HARBER, *THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750–1900* at 91-190 (1991) (describing the lack of professional power during the 1830–1880 era).

352. See KRAUSE, *supra* note 351, at 30.

353. *Id.*; see also YOUNG, *supra* note 7, at 12 (“[B]y the mid-1800s the medical profession was open to almost anyone who chose to hang out a shingle.”).

354. LIEBERMAN, *supra* note 18, at 46 (1970)

355. See KRAUSE, *supra* note 351, at 31; LIEBERMAN, *supra* note 18, at 46 (“Until after the Civil War, the would-be professional was not restricted.”).

356. See *Foreword* to *STANDING COMM. ON UNAUTHORIZED PRACTICE OF THE LAW*,

ratified in 1868, the scope of professional power was at an all-time low in the United States.<sup>357</sup> Because Reconstruction-era states believed it was inconsistent with democratic ideals to enact licensing requirements *in general*, they would have thought licensing requirements on the advice-rendering subset of professional practice—which struck much closer to free speech rights—singularly repugnant.

States exercised virtually no licensing authority over the mere rendering of advice during either the post-colonial or Reconstruction eras. Legislative practices in the legal profession are the clearest demonstration of this point. During the eighteenth and nineteenth centuries, what statutes there were that licensed the legal profession dealt only with laypersons' activities in court—not with the mere rendering of legal advice.<sup>358</sup> State governments have traditionally exercised greater control over speech in the context of a governmental forum.<sup>359</sup> The presence of occasional laws restricting in-court appearances thus falls far short of showing that the states would have tolerated restrictions on giving advice in general.<sup>360</sup> State laws restricting the render-

AMERICAN BAR ASSOC., *INFORMATIVE OPINIONS 1* (1960) ("Those interested in the movement to protect the public by prohibiting the Unauthorized Practice of Law have perhaps not always been aware of its slow historical development in this country, or of the comparatively recent chronology of its significant events. . . . [B]y early in the last century, it had finally become pretty clear that only lawyers could practice [in the courtroom]. . . . Until 1930, . . . few efforts were made to restrain Unauthorized Practice."); State Bar v. Cramer, 249 N.W.2d 1, 6 (Mich. 1976) (reviewing historical development of unauthorized practice laws and noting that "[t]he development of the organized bar was sporadic until the early 1900's"); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 319-33 (1950) (describing the history of unauthorized practice enforcement, beginning in 1914 with the formation of the first unauthorized practice committee in New York); *id.* at 323 ("The depression of the 1930's stimulated the first really widespread and organized concern of the bar with its lay competition.").

357. See YOUNG, *supra* note 7, at 14 (describing "the relative absence of guildlike behavior in the 19th century").

358. See Rhode, *supra* note 48, at 7; see also Oregon State Bar v. Smith, 942 P.2d 793, 796 (Or. Ct. App. 1997) ("[In early state history,] [t]he restrictions that were imposed pertained solely to litigation practice—that is, to qualifications to appear before courts and to sign pleadings. There were few, if any, restrictions on the rendition of general out-of-court legal advice."); Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2583 (1999) ("Outside the courtroom, . . . nonlawyers were free to engage in a wide range of activities which would be considered UPL today, such as giving legal advice and preparing legal documents."); Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 169-74 (discussing historical practices in several states); cf. HARBER, *supra* note 351, at 46 (discussing early postcolonial medical licensing laws and noting that although they purported to grant monopoly status, they were infrequently enforced and served merely an identification function to prospective patients).

359. See *supra* note 47.

360. It is also noteworthy that other democracies do not extend their unauthorized practice laws to out-of-court advice. See Rhode, *supra* note 48, at 90 n.367 (discussing the examples of present-day Great Britain and France).



ing of legal advice outside governmental fora postdated the Reconstruction by more than fifty years.<sup>361</sup>

Simply put, the historical practices at the time of the ratification of the First and Fourteenth Amendments show that the rendering of personalized advice to specific clients was not one of the “well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem.”<sup>362</sup> Viewed in this light, the licensure of professional advice is inconsistent with the original understanding of the First Amendment.

### B. First Amendment Theories and Their Limitations

Although the First Amendment exception for the regulation of professional speech has no principled basis in historical practice, I propose that the Court’s rules can be understood as applications of two well-known theories explaining the purpose of the First Amendment. Specifically, I suggest that the value-neutral test derives from the Holmes “marketplace of ideas” theory, and that the value-based test derives from the Meiklejohn “self-governance” theory. Although these theories are helpful in explaining the thinking underlying the Court’s articulation of the two rules, the two theories have limitations in fully explaining their scope.

The marketplace of ideas theory of the First Amendment is most commonly associated with Justice Holmes, who first articulated it in *Abrams v. United States*:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely may be carried out.<sup>363</sup>

The marketplace of ideas theory protects speech for its instrumental value as a tool to ascertain the truth. Speech that is particularly valuable as a truth-seeking aid is “core” First Amendment speech, while speech having less of an effect (or even a negative effect) on the

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361. See Rhode, *supra* note 48, at 7.

362. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

363. *Abrams v. United States*, 250 U.S. 616, 630 (1919); see also Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 135-36 (1989) (analyzing the truth-seeking function of speech).

truth-seeking process might enjoy less First Amendment protection.<sup>364</sup> This rationale explains why a lower standard of scrutiny applies to demonstrably false statements of fact.<sup>365</sup>

The self-governance theory, on the other hand, is most closely associated with Alexander Meiklejohn. He explained it as follows:

[Free men are governed] by themselves. [What,] then, does the First Amendment forbid? [The] town meeting suggests an answer. That meeting is called to discuss and, on the basis of such discussion, to decide matters of public policy. [The] voters, therefore, must be made as wise as possible. [And] this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented [so] that all the alternative lines of action can be measured in relation to one another . . . .<sup>366</sup>

The self-governance theory ties the value of free speech primarily to the political decision-making process in a democracy. Whatever other forms of speech may fall within its protection, political speech lies at the core of the First Amendment. An unenlightened electorate compromises the proper functioning of government. Meiklejohn also believes that the self-governance rationale extends protection to other fields that allow the electorate to obtain the necessary faculties to make rational self-governance decisions, including education, science and philosophy, literature and the arts, and public discussion of public issues.<sup>367</sup> This theory explains doctrines that treat speech on public issues, especially political speech, preferentially.<sup>368</sup>

We can examine the professional speech tests in the context of these two theories. As explained before, the value-based test prohibits the government from licensing professionals who speak on matters of public concern when their motivation is not solely pecuniary self-interest. The value-neutral test prohibits the government from licens-

364. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4-5.

365. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (false statements of fact are unprotected in some circumstances); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) (same).

366. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 15-16 (1948); See also Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971); Lillian BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 301 (1992).

367. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-57. But see Bork, *supra* note 366, at 26-28 (criticizing this extension).

368. Compare, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) with *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) (false statements of fact are treated preferentially under the First Amendment when they involve a public figure).

ing individuals as professionals unless they render characteristic-dependent advice in the context of a person-to-person relationship. I will begin the analysis with the value-based test.

The value-based test is primarily an extension of the Meiklejohn self-governance model. The Court's disparate treatment of public interest legal activities in *Button* and *Primus* shows a greater solicitude for activities that implicate core political speech. Public interest law serves an important role by giving individuals an opportunity to assert their rights against the government, ensuring that it acts within its legitimate constitutional authority. The professional activities of an investment adviser or commodity trading adviser usually lack this political aspect. The extension of the value-based test to nonpolitical professional speech reflects Meiklejohn's view that certain discussions of "public issues," though not technically political, help develop the faculties necessary for self-governance. This rationale explains the Court's approach in *Riley*.<sup>369</sup>

The Meiklejohn rationale does not explain all aspects of the value-based test. For example, it does not reconcile the Court's contrary decisions in *Trainmen* and *Ohralik*.<sup>370</sup> Collective action to secure access to the courts for personal injury litigation seems no more or less related to self-governance concerns than individual solicitation. Nor does the self-governance theory explain the Court's attention to the presence or absence of a self-enriching motive in almost all the value-based professional speech cases—an anomaly in First Amendment analysis.<sup>371</sup> The self-governance theory focuses on the value of the speech and its relation to political discourse; it has no clear relation to the motives of the speaker. Despite these infirmities, the self-governance theory provides a helpful reference for understanding the value-based test.

The value-neutral test, in comparison, is an application of the marketplace of ideas theory. This test seeks to identify those types of communicative relationships that may properly be regulated as "fiduciary" in nature. Rather than give the government free reign to decide which relationships are fiduciary, the Court only permits professional licensing of characteristic-dependent, person-to-person advice.<sup>372</sup>

In terms of content alone, there is no particular reason to believe that this class of advice is less likely than impersonal advice to con-

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369. See *supra* Part I.C.1 & I.C.2 (discussing *Button*, *Primus*, *Riley*, and other cases).

370. See *supra* Part I.C.1.

371. Cf. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) ("Speech . . . is protected even though it is carried in a form that is 'sold' for profit.") (citations omitted); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (same).

372. See *supra* text accompanying notes 117-48.

tribute to the marketplace of ideas. "Everyone should do 'X'" and "Based on your circumstances, you should do 'X'" are both statements capable of either truth or falsity. When the government restricts the number of potential sources of this information, whether from impersonal publishers or personal advisors, the recipient's ability to weigh competing points of view is hampered.

One might argue that generally-applicable impersonal advice is more important in the marketplace of ideas because such advice is either true or false with respect to all; each expression of a competing proposition contributes to the resolution of a debate on a society-wide level. On the other hand, advice tailored to a specific person is true or false only with respect to that person, so multiple points of view are relevant only to him.

This argument fails to consider the government's interest. While the contribution to the marketplace of ideas is greater in the case of impersonal advice, the government's interest in prohibiting the distribution of fraudulent or incompetent advice is stronger in the same proportion. While a personal counselor can deceive or mislead only the person he advises, an impersonal publisher's false advice potentially harms all of his readers.<sup>373</sup>

In terms of its inherent content, personalized speech is no more or less valuable than impersonal speech in helping recipients ascertain the truth. Nevertheless, the marketplace of ideas theory may justify treating the two forms of speech differently if recipients naturally approach them with different levels of trust or skepticism. The marketplace of ideas presupposes multiple sources of information and a critical mind. Forms of advice that tend to lull the recipient into unquestioning reliance pose a stronger case for allowing the state to classify the speaker as a fiduciary.<sup>374</sup> Personalized advice has, at least in recent history, been the purview of professionals.<sup>375</sup> Therefore, if

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373. See David B. Levant, Comment, *Financial Columnists as Investment Advisers: After Lowe and Carpenter*, 74 CALIF. L. REV. 2061, 2096 (1986) (arguing that impersonal publications represent an increased risk to the public because of their wide distribution); Wolfson, *supra* note 103, at 295 ("[P]opular books and newspapers have a powerful influence for good or evil that far transcends the personalized influence of professionals on their relatively few clients."); Lori Denise Coffman, *Lowe v. Securities and Exchange Commission: The Deterioration of Financial Newsletter Regulation*, 10 NOVA L.J. 1276, 1294 (1986) (noting that "[a] newsletter is inherently dangerous because of the wide range of investors that can be readily approached through its subscribers" and providing an example); Barnes, *supra* note 197, at 696 (providing an example of a widely-disseminated publication causing harm to the public). This fact explains why regulatory agencies have historically been concerned with impersonal publishers as well as with personal advisors.

374. See *supra* text accompanying notes 107-08.

375. See WILBERT MOORE, *THE PROFESSIONS: ROLES AND RULES* 3 (1970) ("One [hallmark of a] 'true' professional . . . is that [he] typically deals with specific clients.")

listeners are particularly likely to blindly trust professional speakers, the marketplace of ideas theory supplies a possible explanation for the value-neutral test.

Sociologist Eliot Freidson advanced this view of professional-client relationships:

[T]he typical form of influence [of a practitioner upon a client] is not to persuade the client of the competence of advice on the basis of available evidence, but rather to close off alternatives to him so that he has little choice but to go to the practitioner and to rely upon the authority of incumbency in a status to which competence has been imputed.<sup>376</sup>

Freidson contrasts the interaction between a professional and client with that between an expert and client. Although both professionals and experts have greater knowledge and experience than the clients they serve, the way in which they use that knowledge differs. Experts may attempt to persuade their clients by presenting corroborative evidence. Professionals, according to Freidson, are more likely to rely on the authority of their professional status and encourage their clients to accept their professional judgment as a matter of faith.<sup>377</sup> Research has corroborated this view.<sup>378</sup>

The Court's value-neutral test comports with Freidson's sociological view. The Court assumes that certain types of communication are more likely to lead to undue customer reliance. This undue reliance prevents the marketplace of ideas from functioning properly, so the Court declines to apply normal First Amendment analysis.

Daniel Halberstam recently presented a different view of the Court's professional speech doctrine.<sup>379</sup> He argued that:

[U]nlike the street-corner speaker, . . . a professional fulfills a more defined social role by offering specific knowledge and

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376. ELIOT FREIDSON, *PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE* 122 (1970). See also *id.* at 81 (noting the applicability of his analysis to other professions).

377. See *id.* at 110. See also ELIOT FREIDSON, *PROFESSIONAL POWERS* 218 (1986) ("[T]he practitioners of personal service professions control clients by employing . . . institutionally generated means."); YOUNG, *supra* note 7, at 63 ("Whereas clients deliver themselves into professional hands, consumers see themselves as buyers governed by caveat emptor."); MOORE, *supra* note 375, at 18 ("By organizing, by licensing, and by public relations campaigns . . . various occupational groups seek to identify 'warranted practitioners,' and to encourage potential clients to think that self-help or assistance from less-than-adequate advisers or performers of services represents an inadequate substitute for authentic services.").

378. See, e.g., Berg (1994), *supra* note 217, at 225-30 (citing various studies examining the tendency of patients to defer to the judgments of their doctors rather than posing questions).

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

expertise to an audience that deliberately seeks access to such information and often to the professional's judgment about a particular issue. Clients seeking a professional's counsel expect the professional to adhere to this social role, and professionals generally hold themselves out as doing so. In this sense, professional and client share a predefined relationship . . . .<sup>380</sup>

. . . .

[G]overnment regulation may facilitate the existence of the speech practice, because meaningful . . . advice can only be gained when the [client] is assured that the [professional] providing the advice remains true to the precepts of the profession.<sup>381</sup>

. . . .

Government regulation both reflects and reinforces the common understanding about the content and purpose of the communication that speaker and listener must share in order for the particular speech practice to exist. . . . Without this precommitment to a defined discourse, it indeed would be impossible to seek the advice of a professional in a meaningful manner.<sup>382</sup>

Halberstam's conception of the professional speech doctrine can be summarized in the following four points: First, that there is a type of communication that can only be conveyed in the context of a relationship of trust;<sup>383</sup> second, that this relationship of trust has historically been a characteristic of professional-client relationships;<sup>384</sup> third, that licensing the speech of this institution is necessary to preserve the relationship of trust it enjoys with its listeners;<sup>385</sup> and finally (implicitly), that government restrictions on a speech practice are constitutional when necessary to preserve the existence of that speech practice.<sup>386</sup>

Both Freidson and Halberstam justify the regulation of professional speech by relying on the fiduciary character of the relationship. Freidson's theory suggests one view. The public exhibits a cultural

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380. *Id.* at 772.

381. *Id.* at 844.

382. *Id.* at 833-34.

383. *See id.*

384. *See id.* at 772.

385. *See id.* at 844.

386. Halberstam states that his article is intended merely to describe a model of professional speech, rather than to question its normative value. *See* Halberstam, *supra* note 379, at 777-78.

deference to professional authority and naturally places heightened reliance on the opinion of professionals. The government, acting as protector, regulates professional speech to ensure that an unwary public is not misled. Halberstam, on the other hand, suggests the public is conscious of its heightened reliance on professional opinion; the government, acting as an enabler, provides a forum where members of the public can receive advice they do not have to critically analyze.

We need not decide here which model better describes the nature of the fiduciary relationship between professional and client. While both models are helpful in explaining some aspects of the regulation of professional speech, neither is a sufficient justification for its licensure. Before examining each of these rationales, it will be helpful to recall the distinction between professional certification and professional licensure. Under a system of certification, the government (or a private authority) restricts the class of persons who may hold themselves out to the public as being certified practitioners, but does not otherwise prohibit their professional practice. Under a system of licensure, the government not only restricts the class of persons who may hold themselves out as being licensed, but also prohibits the practice of the profession by the unlicensed.<sup>387</sup> Some economists argue that nearly all the concerns cited to justify systems of licensure can be equally well addressed by certification.<sup>388</sup> As we will see, this objection applies squarely to the arguments of both Halberstam and Freidson.

First, Halberstam's theory justifies regulations that are necessary to the preservation of the fiduciary speech practice of professionals. This rationale validates two types of regulations. The first type are those that enable the public to distinguish persons who claim to offer a fiduciary communicative service from those who do not. The second type regulate the practice of those who actually do claim to offer such a service.

Each of these objectives can be met by either a certification or a licensure system. Both systems serve the function of informing prospective clients as to whether a regulatory agency attests to the qualifications of the professional. Both systems also permit an authority to prescribe appropriate standards of conduct for those wishing to hold a license or certification, and allow for its revocation in the event of professional misconduct.

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387. See *supra* note 12. See also *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 605 (4th Cir. 1988) (describing restrictions on using professional designations by noncertified accountants); Estreicher, *supra* note 44, at 294 (noting the identification function of the Investment Advisers Act registration provisions).

388. See YOUNG, *supra* note 7, at 18-19 (citing FRIEDMAN, *supra* note 16).

Halberstam's model is an adequate defense for systems of certification. The relationship of trust between professional and client is undoubtedly compromised when clients are unable to make an informed evaluation of a professional's qualifications, or of the state's assessment of that professional's abilities. Without the intervention of a certifying authority, the type of communication conveyed in a fiduciary advisor-client relationship might not be possible since the client would have difficulty determining which advisors are worthy of his trust. Halberstam's model also adequately explains antifraud laws, which prevent uncertified practitioners from misrepresenting their qualifications, and disclosure provisions requiring uncertified practitioners to affirmatively indicate that they are not certified to prospective clients. These laws assist the public in determining whether the advice it is about to receive is part of a fiduciary speech practice.<sup>389</sup>

Halberstam's rationale does *not*, however, provide a basis for the licensure of professional speech. *Lowe* allows the government to enforce a licensure requirement against an individual who renders characteristic-dependent advice in a person-to-person manner even if the speaker makes no claim to be offering a fiduciary service—even if the speaker *affirmatively disclaims* that she is offering any such service.<sup>390</sup> Halberstam's theory justifies only those restrictions that are *necessary* to allow licensed professionals to use their institutional status to establish a rapport of trust with their clients. Communications between unlicensed practitioners and customers who are fully informed of the practitioner's unlicensed status have little bearing on the ability of *licensed* professionals to establish a rapport of trust with *their* clients.<sup>391</sup> Indeed, if an unlicensed professional fails to perform

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389. See, e.g., H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999) (Texas statute mandating disclaimers on professional-subject advice provided through impersonal publications); see also Skinner, *supra* note 312, at 336-37 ("[D]isclosure [that a software program is not a substitute for professional advice] would put the user on notice that caution is required when relying on the information derived from the system."); Lorelie Masters, *Professionals Online: Advice for Travels on the Information Superhighway*, 16 No. 3 COMPUTER L. 1, 2 & n.11 (1999) (noting importance of disclaimers and proposing sample language). One might argue that even disclaimers are inadequate because clients may nonetheless choose to receive advice from an uncertified practitioner in circumstances where they may have been better off seeking advice from a certified practitioner. This argument is more patronizing than the claim that clients are incapable of evaluating the quality of professional advice without help, see *supra* note 15, since it questions not the client's understanding of relevant knowledge but the client's wisdom in opting for uncertified advice. One need not understand a body of professional knowledge in order to appreciate the importance of certification.

390. Cf. *State Bar v. Cramer*, 249 N.W.2d 1, 2 (Mich. 1976) (finding that a provider of a person-to-person form preparation service was engaged in the unauthorized practice of law, despite having clearly disclosed that she was not an attorney).

391. Cf. *Estreicher*, *supra* note 44, at 302. Estreicher argues that to the extent that unregistered publishers of generalized investment advice do not hold



adequately, one would expect the client's esteem for licensed professionals to *increase* relative to their unlicensed counterparts.

Licensure, unlike certification, places a substantial burden on speech because it prevents an unlicensed professional from offering individually tailored advice to specific clients, even when those clients are fully aware of the professional's unlicensed status. This result is achieved through the particularly egregious mechanism of a prior restraint. Certification, on the other hand, prohibits only speech that misleads clients as to the professional's qualifications. When a state regulates professional speech through licensure rather than certification, it burdens substantially more speech than necessary under Halberstam's theory.<sup>392</sup> In virtually any other context, this prior restraint would constitute a violation of the First Amendment.<sup>393</sup>

The Freidson "marketplace of ideas" rationale for regulating professional speech also has shortcomings. Recall that, whereas Halberstam believes that the suspension of critical analysis by a client in a fiduciary relationship is voluntary, Freidson believes that this suspension is the (perhaps involuntary) result of a cultural norm.<sup>394</sup> Freidson believes that a client's suspension of critical faculties derives not only from the professional's superior knowledge, but also from a cultural understanding of the significance of the professional-client relationship.<sup>395</sup> In other words, a client will place greater trust in a professional than in an impersonal publisher, even when both the professional and the publisher have the same level of knowledge, because of the client's cultural understandings of the degree of trust appropriate in each case.

Like Halberstam's theory, Freidson's theory can justify the regulation of those who hold themselves out as being licensed professionals. If judgmental deference to professionals is a cultural norm, then regulation of those who actually claim to offer professional ser-

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themselves out to be licensed investment advisers, the state's interest in the integrity of its professional licensing scheme is unimpaired. The public will be put on notice that the publishers of such newsletters have not qualified for licenses from the government, and should consider the caliber of the source in deciding whether and to what degree to rely on the advice contained in such publications.

*Id.* This form of argument is equally applicable to *personal* advisors who do not hold themselves out to be licensed.

392. Cf. *Skinner*, *supra* note 312, at 335 (noting that complete bans on speech are generally not the "least restrictive means" of addressing the harm at issue).

393. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (holding that under strict scrutiny, a regulation of speech must be "necessary to serve a compelling state interest and [must be] narrowly drawn to achieve that end").

394. See *supra* notes 376-86 and accompanying text.

395. See FREIDSON, *supra* note 376, at 111-13.

vices might be necessary to compensate for the client's lack of skepticism.

Licensing laws, however, also restrict the speech of advisors who don't claim to be licensed professionals. Any person who gives individually tailored advice to specific customers can be subjected to licensure, whether or not the person actually claims to be a licensed professional.<sup>396</sup> For Freidson's theory to even arguably justify the *Lowe* test, a cultural norm has to exist that not only is professional advice especially trustworthy, but also that characteristic dependent advice presented in a person-to-person manner is especially trustworthy, even when the speaker does not claim to be a licensed professional. Academics dispute the existence of this norm as an empirical matter.<sup>397</sup>

Even if the norm exists, however, Freidson's theory is problematic as a justification for licensure. This is because the origin of the norm, if it exists, lies largely in the simple fact that laws have granted monopolies over this form of speech to professional groups.

Culture is heavily influenced by the legal rules a society adopts. In the words of Justice Brandeis, "[o]ur government is the potent, the omnipresent teacher. For good for ill, it teaches the whole people by its example."<sup>398</sup> One commentator writes, "[the proposition] that governmental institutions in general have . . . an effect [on societal attitudes] . . . seems hard to contravene."<sup>399</sup> Justice Brandeis tells us that laws affect culture, and Freidson tells us that culture in turn affects the public's assessment of the trustworthiness of speech. Therefore, when a state regulates the quality of some forms of expression but not others, listeners will naturally approach the latter with greater skepti-

396. See *supra* notes 10-12 and accompanying text.

397. Compare Wolfson, *supra* note 103, at 301 ("[The *Lowe* test turns on the hypothesis] that the individual client is more easily gulled by the adviser or lawyer than is a reader of a book or article. . . . At best, . . . the vast edifice of government regulation of the professions now rests on a dubious empirical assumption.") with Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1192 (Fla. 1978) ("[We must] assume that most persons will not rely on [publications] in the same way they would rely on the advice of an attorney or other persons holding themselves out as having expertise in the area. The tendency of persons seeking legal assistance to place their trust in the individual purporting to have expertise in the area necessitates this Court's regulation of such attorney-client relationships, so as to require that persons giving such advice have at least a minimal amount of legal training and experience. Although [defendant advisor] never held herself out as an attorney, it is clear that her clients placed some reliance upon her."); Estreicher, *supra* note 44, at 274-75 (asserting that impersonal publications are inherently less likely to cause excessive reliance than the sort of speech held regulable in *Lowe*); Howard, *supra* note 197, at 1133 (claiming that "a person giving personalized advice is more like a fiduciary who owes a special duty to the reader").

398. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

399. Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1, 22 (1997).

cism than the former. The forms of speech that people view as especially trustworthy depend largely on which forms of speech the government has historically regulated. If a state begins regulating the quality of a class of speech, the public's normal skepticism of that speech will atrophy. Conversely, if a state ceases to regulate a class of speech over which it has historically exercised control, any heightened trust the public places in it will gradually abate. Over the long run, the cultural background that shapes customer expectations of the trustworthiness of a form of advice will tend to coalesce around whatever legal regime is enacted.

Because state governments have historically granted personalized advice monopolies to professionals whose speech the government regulates, the public assumes that personalized speech is inherently trustworthy, whether or not it is rendered by a professional.<sup>400</sup> The irony is apparent: the justification for the personalized speech exception to the First Amendment is the fact that, historically, such speech has been excepted from the First Amendment. Personalized speech may be regulated because people trust it; people trust it because it has been regulated. This circular reasoning does nothing more than allow the government to keep licensing those types of speech it has licensed in the past and prevent it from licensing those it has not. A doctrine of self-perpetuating regulatory authority offers little insight into why the government was permitted to regulate personalized advice, but not impersonal publishing, in the first place.<sup>401</sup>

The Holmes "marketplace of ideas" theory fails to justify professional licensure because over the long term, expectations of trustworthiness will tend to track whatever regulatory system the government enacts. Under a regime in which personalized individual consultations are regulated, the public tends to assume that advice given in this form is particularly trustworthy. If the government enacts only a system of certification, the public will likewise tend to assume that only the

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400. See, e.g., FREIDSON, *supra* note 376, at 83 ("The foundation on which the analysis of a profession must be based is its relationship with the ultimate source of its power and authority in modern society—the state. In the case of medicine, much, though by no means all, of the profession's strength is based on a legally supported monopoly over practice."); *id.* at 81 (noting the applicability of his analysis to other professions); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 236 (1977) ("The professional's sense of power and authority flows not only from his actual command over special knowledge but also from his control over interpersonal situations."); BRINT, *supra* note 351, at 75-78 (discussing professionals' acquisition of "Task Area Monopoly").

401. Cf. *Lowe*, 472 U.S. at 231 (White, J., concurring in the result) ("Surely it cannot be said, for example, that if Congress were to declare editorial writers fiduciaries for their readers and establish a licensing scheme under which 'unqualified' writers were forbidden to publish, this Court would be powerless to hold that the legislation violated the First Amendment.")

advice of certified individuals is particularly trustworthy. Since the "marketplace of ideas" rationale has no preference for one over the other in the long run, it cannot justify licensure for the same reason that Halberstam's model cannot—because certification is just as effective and burdens far less speech.

To summarize, while the "marketplace of ideas" theory is helpful in understanding one of the Court's tests, and, while the self-governance theory is helpful in explaining the other, neither justifies the breadth of regulatory authority that states currently assert over the advice of professionals. In particular, neither redeems the prior restraint of professional speech through a system of licensure.

### C. *The Legal Realist Perspective*

In the past two sections, I have endeavored to show that the Court's professional speech doctrines have little basis in history and push well beyond the conceptual bounds of the theories they are based on. Why, then, have the courts been so quick to uphold government statutes that would be considered a prior restraint in any other context? For an answer to this question, we should look beyond the legal doctrines offered by courts and consider the reality of the judicial decision-making process and the environment in which it operates.

A large body of social science scholarship has sought to explain judicial decisions (particularly the decisions of Supreme Court justices) as a product of extra-legal factors.<sup>402</sup> This view, which has its roots in the legal realist movement of the 1920s,<sup>403</sup> proposes that judges are heavily influenced by both their own attitudes and values,<sup>404</sup> as well as by various forces in the political and popular environment.<sup>405</sup> These views are supported by extensive empirical research.<sup>406</sup>

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402. See generally JEFFREY SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); Harold Spaeth, *The Attitudinal Model*, in *CONTEMPLATING COURTS* 296 (Lee Epstein ed. 1995); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

403. See SEGAL & SPAETH, *supra* note 402, at 65 ("[This] model has its genesis in the legal realist movement of the 1920s . . . led by Karl Llewellyn and Jerome Frank, among others.").

404. See SEGAL & SPAETH, *supra* note 402, at 65 (describing the "attitudinal model," which holds that courts "decide disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the [judges]"); EPSTEIN & KNIGHT, *supra* note 402, at 23 ("It is generally conceded, at least among social scientists, that members of the Court are by and large policy seekers.").

405. See LEE EPSTEIN & JOSEPH KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 22 (1992) ("We must consider public opinion as a potentially significant factor conditioning Court-driven legal change."); *id.* at 21 ("[T]he justices lack any real mechanism for enforcing their decisions. In this way, they depend not only on other political actors to support their positions but also on general public compliance."), SEGAL & SPAETH, *supra* note 402, at 302 ("Democratically elected Presidents, representing the

In particular, scholars have argued that interest groups can exert pressure on the judicial decision-making process.<sup>407</sup> This pressure may take a variety of forms, including the use of strategic litigation<sup>408</sup> and argumentation,<sup>409</sup> the commitment of superior financial resources to the litigation process,<sup>410</sup> the authorship or commissioning of scholarship in an attempt to persuade judicial opinion,<sup>411</sup> and the exertion of political influence in the judicial selection process.<sup>412</sup>

Before considering the applicability of this model to the judicial treatment of professional speech, it is helpful to examine the motives and goals of professional groups as a general matter. In his book, *Death of the Guilds*,<sup>413</sup> sociologist Elliott Krause develops a theory describing the behavior of professional groups, and shows how this theory is useful in explaining various phenomena of professional history in several countries.<sup>414</sup> Krause believes that professional groups have historically exercised what he terms "guild power."<sup>415</sup> He argues that modern professions, like medieval guilds, attempt to enhance their power over the professional association, the workplace, the market, and the state.<sup>416</sup> Krause describes how various professions in the

national political majority, will no doubt use that power to appoint justices whose views coincide with that majority.").

406. See, e.g., LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 37-42 (1997) (listing studies).

407. See EPSTEIN & KOBYLKA, *supra* note 405, at 24-33 (examining the various methods by which interest groups may exert pressure on judicial decisions, reviewing empirical evidence, and stating the authors' belief that such activities do have an effect on the course of legal development); see also *id.* at 24 ("[A] striking example of [judicial] politicization is the increasing incursion of [interest] groups into the judicial process.").

408. See *id.* at 26 (discussing the use of test cases to effect a "gradual erosion and replacement of precedent").

409. See *id.* at 24 ("The arguments [interest groups] make to the courts can shape the way the courts resolve the issues their cases present and thus establish a part of the interpretational context in which jurists do their work."); see also Joseph Kobylka, *The Mysterious Case of Establishment Clause Litigation: How Organized Litigants Foiled Legal Change*, in *CONTEMPLATING COURTS* 93, 125 (Lee Epstein ed., 1995) (discussing how strategic argumentation and litigation can have an impact on the evolution of constitutional doctrine).

410. See EPSTEIN & KOBYLKA, *supra* note 405, at 27; see also Kevin McGuire, *Capital Investments in the U.S. Supreme Court: Winning with Washington Representation*, in *CONTEMPLATING COURTS* 72, 73-74, 90-91 (Lee Epstein ed., 1995) (examining the effect that advocate selection can have on the outcome of court decisions).

411. See EPSTEIN & KOBYLKA, *supra* note 405, at 27.

412. See *Judicial Selections*, *USA TODAY*, Nov. 15, 1999, at 14A (quoting Justice Clarence Thomas as saying that "the greatest threat to the independence of judges is the involvement of special interest groups . . . in the choice of judges.").

413. ELLIOT A. KRAUSE, *DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT* (1996).

414. See generally *id.*

415. See *id.* at 2-3.

416. See *id.* at 3-6. See also CLINT BOLICK, *TRANSFORMATION: THE PROMISE AND POLITICS OF EMPOWERMENT* 80-83 (1998) (describing how professional associations use occu-

United States have been able to exert great influence in these four arenas.<sup>417</sup>

Economic analysis explains the efforts of professional groups to exert influence over the political environment in which they operate.<sup>418</sup> Professional groups have a strong economic self-interest in confining sources of competition. Limiting competition may be accomplished by restricting areas of practice to those possessing a license, and then exerting influence over the distribution of licenses and the enforcement of unlicensed practice laws.<sup>419</sup> By using these methods, professional groups can restrict sources of competition and benefit economically.

The legal profession, in particular, expends great effort litigating unauthorized practice challenges against layperson practitioners.<sup>420</sup> In 1981, professor Deborah Rhode performed a detailed empirical analysis of unauthorized practice of law challenges in different states.<sup>421</sup> This study sought to ascertain, among other things, "the extent to which public and professional concerns inform the enforcement process."<sup>422</sup> Professor Rhode concluded that "[w]ith relatively few exceptions, the impetus for occupational licensing has come not from the clamor of an aggrieved public but from the persistent lobbying of the group to be regulated."<sup>423</sup> For example, she found that "[o]f the 1188 inquiries, investigations, and complaints reported by [state bar com-

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pational licensing laws to restrict entry into the profession and insulate themselves from competitive forces); LARSON, *supra* note 400, at 47-48 (discussing the importance of power relations in determining the extent of professional influence over the marketplace); BRINT, *supra* note 351, at 24 (describing how professions exert influence through their control of the credentialing system).

417. See KRAUSE, *supra* note 413, at 38-39 (medical profession); 52-53 (legal profession). Krause believes that since the mid-twentieth century the influence of professions has declined relative to state and capitalist forces. See *id.* at 44-49 (medical profession); 54-57 (legal profession).

418. See generally FRIEDMAN, *supra* note 16; YOUNG, *supra* note 7.

419. See Walter Gelhorn, *Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 1, 11 (1976) ("Licensing has been eagerly sought—always on the purported ground that licensure protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members of the licensed group become protected against competition from newcomers.").

420. Professional organizations may exercise influence over their competitors even in the absence of legal authority to do so. See, e.g., Rhode, *supra* note 48, at 28 (describing the West Virginia bar's practice of sending cease and desist letters to legal kit publishers, despite the wealth of adverse court precedent in other states).

421. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

422. *Id.* at 13. See also Leef, *supra* note 12, at 21-30 (providing a broad critique of unauthorized practice laws on economic grounds). Professor Rhode conducted the study by reviewing state unauthorized practice caselaw, examining state administrative practices, and interviewing state bar and administrative personnel active in unauthorized practice enforcement.

423. *Id.* at 96.

mittee] chairmen . . . only 27 (2%) reportedly arose from customer complaints and involved specific customer injury."<sup>424</sup> Of the unauthorized practice cases that were actually decided by a judge, the vast majority, 89%, involved no allegation of specific customer injury.<sup>425</sup> This data is consistent with the views of most historians that unauthorized practice of law statutes arose not as a result of public demand, but rather from the self-protective actions of state bar associations.<sup>426</sup> It is also consistent with the public perception of unauthorized practice actions as being primarily the result of a self-interested bar, rather than a concern for the public welfare.<sup>427</sup>

Professor Rhode's study demonstrates the tenacity with which professional groups seek to protect their economic self-interest through political means. When the practice of a profession involves significant speech elements, however, licensing laws will undoubtedly raise constitutional issues. Professions have an acute vested interest in ensuring that licensing laws are upheld against First Amendment challenges.

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424. *Id.* at 33. Professor Rhode believes that her methodology, which relied in part on the responses of bar officials, would tend if anything to *overstate* the incidence of public injury. *See id.* Of the cases involving actual customer injury, "five (19%) concerned laymen fraudulently holding themselves out as attorneys. . . . [T]he cases where laymen misrepresented themselves to be attorneys were disproportionately likely to involve serious injuries." *Id.* at 33-34.

425. *See id.* at 34. Of the 11% involving specific allegations of customer injury, nearly half involved cases where the defendant fraudulently represented himself to be licensed. *See id.* *See also id.* at 86 (describing the failure of other studies to unearth any significant evidence of customer injury); Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976).

426. *See, e.g.,* J.W. HURST, *THE GROWTH OF AMERICAN LAW* 323 (1950) ("[T]he coincidence of events ill fitted claims that [unauthorized practice] activity was moved simply by regard for protecting the public against the incompetent or unscrupulous."); Sullivan, *supra* note 197, at 581 ("Since lawyers are in charge of their own regulation, the tendency to adopt regulations reflecting self-interest is unchecked."); Patricia Heim, *The Case for a Voluntary Bar*, 64-Feb. WIS. LAW. 10, 61 (1991) (observing "it is both true and somewhat bracing to note how routinely organizations of licensed occupations that have the stated purpose of promoting professionalism develop the actual purpose of giving primary attention to the protection or advancement of the groups' economic interests"); *cf.* Hall, *supra* note 139, at 477-78 ("We should be skeptical of the extent of judgmental latitude sought by doctors because much of the judgmental aura that surrounds medical practice is due to physicians' use of uncertainty to create domains of control and influence.").

427. *See* Rhode, *supra* note 421, at 43 ("[V]irtually all committee chairmen agreed that the public did not itself perceive unauthorized practice as a danger, or was skeptical of the bar's involvement in enforcement."). *See also id.* at 3-4 (noting evidence that the public is increasingly in favor of alternatives to attorney-provided advice); Jeff Simmons, *No Turning Back*, 30-Mar. ARIZ. ATT'Y 19, 32 (1994) (State bar official acknowledging that nonlawyers who perform document preparation services are "filling a gap in legal services to the public"); Denckla, *supra* note 358, at 2594 (challenging the assumption that lawyers are generally more competent than laypersons in specialized contexts); Bruce A. Green, *Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 FORDHAM L. REV. 1713, 1727-28 (1999) (same).

Krause argues that professional institutions, while influenced by governmental bodies, also exert their own influence over those same bodies.<sup>428</sup> Although Krause was referring to the political branches of government, we can use the analysis of Epstein and Kobylka<sup>429</sup> to extend this rationale to judicial actors in the political system. The professions are not only governed by First Amendment decisional law; they also exert their own influence on the judicial process of determining just what that law is.

Professions are in a position to exert considerable influence over the judicial process in the fashions envisioned by Epstein and Kobylka. Professions are well-organized, cohesive groups, whereas the clients they serve are typically widely dispersed and poorly organized.<sup>430</sup> The beneficiaries of alternative sources of professional information are frequently poor and lack the resources to assert their rights in any meaningful way.<sup>431</sup>

The legal profession, in particular, has immediate access to the legal resources and litigation expertise necessary to successfully argue cases.<sup>432</sup> Its members author the law review articles that judges read.<sup>433</sup> The judges who decide constitutional questions are themselves drawn from the legal profession, which raises the possibility of conflicts of interest.<sup>434</sup> Judges are also likely to retain social ties to members of the

428. See KRAUSE, *supra* note 413, at 1-2.

429. See *supra* text accompanying notes 407-11.

430. See FREIDSON, *supra* note 376, at 118 ("[T]he members of the occupation are relatively few in number and its clientele is a large, unorganized aggregate of individuals, leaving little possibility for the exertion of lay pressure to compromise occupationally preferred standards."); LIEBERMAN, *supra* note 18, at 18 ("Because there is no organized opposition from either the public or other professional groups, occupational groups find it relatively easy to push their licensing desires into law."); YOUNG, *supra* note 7, at 23 ("The political success of the professions at acquiring licensure is largely the result of the dynamics of small, well-organized, special-interest lobbying in the American political system."). But see ELIOT FREIDSON, PROFESSIONAL POWERS 219 (1986) ("A considerable amount of power can be generated in the United States by public opinion, mobilized and focused by the mass media and culminating in political actions that can markedly constrain the degree and manner in which practitioners and their administrators can control professional work.").

431. See YOUNG, *supra* note 7, at 75-80 (describing adverse effects of licensing laws on minorities and the poor); WALTER WILLIAMS, THE STATE AGAINST BLACKS xvi (1982) (arguing that licensing laws discriminate against "outsiders, latecomers, and the resourceless," among whom members of minority groups are "disproportionately represented"). See also *State Bar v. Cramer*, 249 N.W.2d 1 (Mich. 1976) (enjoining unauthorized provision of legal services to the poor); Green, *supra* note 427, at 1716 (noting that low-income individuals may benefit from alternative sources of legal information).

432. See Rhode, *supra* note 421, at 28 (discussing strategic aspects of state bars' decisions to bring unauthorized practice suits).

433. See Rhode, *supra* note 421, at 8 (counting 358 law review articles on unauthorized practice from 1930 to 1960).

434. See, e.g., *Judge Seeks Ban on Legal Software*, AP ONLINE, Feb 2, 1999 (noting the criticism of consumer groups in response to the ruling in *Parsons*; citing one source as saying



profession, increasing their exposure to the bar's perspective.<sup>435</sup> Although other professional groups presumably exert somewhat less influence on the judicial process, it seems unlikely that a judge would consider any professional licensing case without considering its ramifications for the legal profession.

Courts should reevaluate the normative justifications for the professional speech doctrine, while acknowledging that the guild power of interested professional groups may have influenced precedent on the subject. Courts should be particularly wary of establishing rules that arbitrarily favor the speech of powerful institutions at the expense of less influential individuals.

#### CONCLUSION: PROFESSIONAL SPEECH AND CLIENT EMPOWERMENT

In this Article, I have endeavored to describe the unique judicial treatment of professional advice under the First Amendment. In Part I, I argued that when professional speech is at issue, the Court's traditional speech/conduct analysis fails to fully explain the broad authority that courts allow state and federal regulatory agencies. Prior restraints on professional speech are currently permissible unless they fail one of two tests. One of these, the "value-neutral" test, has its roots in the marketplace of ideas theory of the First Amendment and the arguably fiduciary character of certain types of speech. This test prohibits governmental licensure unless the speaker offers advice tailored to the circumstances of a recipient with whom the speaker shares a person-to-person communicative relationship. The second test is the "value-based" test. Drawing on Meiklejohn's understanding of the purposes underlying the First Amendment, this test prohibits the states from licensing professional speech on matters of public concern, where the speaker's motivations are not purely self-enriching. In Part II, I showed how lower courts apply these principles to current professional speech questions (some more successfully than others).

In the final part of this Article, I examined the rationales underlying the professional speech doctrine. I argued that the historical practices at the time of the First and Fourteenth Amendments' ratifications do not support the broad authority to license advice-rendering activities that professions have claimed since the 1930s. I also argued

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"You can quote me: This is sick. This reeks of greed. . . . Boy, these lawyers are really sticking up for their own, aren't they? I don't think they're representing you or me.").

435. See Joan Biskupic, *Holding Court with Joan Biskupic*, WASHINGTONPOST.COM (visited Oct. 22, 1999) <<http://discuss.washingtonpost.com/zforum/99/courts102299.htm>> (discussing justices' social interactions with the lawyers who argue before them).

that while the Court's professional speech tests are extensions of two academic theories of the First Amendment, these theories do not extend so far as to justify licensure. Finally, I noted that professions have an acute interest in weak First Amendment protection for professional speech, and examined how they might use their professional power to influence the evolutionary course of First Amendment doctrine.

One particular aspect of my argument bears repeating. In Part III.B, I noted that many courts and academics have historically viewed the power structure of the professional-client relationship as an exogenous variable. They presume that, relative to the client, the professional has a disparate amount of power in the communicative relationship.<sup>436</sup> Courts rarely pause to consider the degree to which that power relationship is not just the basis for, but also the result of, the doctrines they establish. When declaring that the professional-client power disparity necessitates a certain rule, courts fail to consider the extent to which that rule further entrenches and exacerbates the power disparity.

First Amendment rules that restrict the class of speakers who may engage in certain forms of communication—essentially granting “speech monopolies” to those parties—further entrench the power of those speakers, not only relative to the outlawed would-be speakers,<sup>437</sup> but also relative to prospective clients.<sup>438</sup> Rules that increase the number of available sources of information empower both the entrepreneurs who would offer those services<sup>439</sup> and the clients whose options they enhance.<sup>440</sup> Client empowerment is not without cost: the government's ability to control the quality of advice is undoubtedly impaired. However, this “cost” is the same cost the First Amendment imposes on all forms of communication, be it the political pundit's

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436. See, e.g., Halberstam, *supra* note 379, at 845 (“[The professional-client] relationship is marked by an imbalance of authority.”); Estreicher, *supra* note 44, at 274-75 (“The state . . . justifies its fairly extensive regulation of [the professional-client] relationship because of the obvious disparities in knowledge and power between the speaker and the listener.”).

437. See generally YOUNG, *supra* note 7 (discussing the anticompetitive effects of professional licensing laws).

438. See Denckla, *supra* note 358, at 2581 (noting the deleterious effects of restricting alternative sources of legal information, and commenting that such restrictions “overwhelmingly affect people of limited means”).

439. Cf. BOLICK, *supra* note 416, at 88-89 (discussing the empowering effect of relaxing occupational licensing laws); Christensen, *supra* note 358, at 169-74 (“A product of frontier conditions, this egalitarian spirit, which held any man capable of doing anything, gave real impetus to the movement to open up the practice of law to any who might wish to pursue it.”).

440. See Green, *supra* note 426, at 1716 (explaining the benefits to low-income individuals of being able to procure legal advice from nontraditional sources).

social views expressed on a television program or the expert analyst's investment recommendations in a newsletter.

The power of American professions is currently in a state of decline.<sup>441</sup> Concurrently, technological advances have enabled clients to access a wealth of advice with minimal time and expense. The resulting empowerment of clients relative to professionals has been broadly observed. One writer explains that "[u]ntil the advent of the Web, doctors, hospitals and insurers maintained a virtual monopoly on medical information and treatment options. . . . The days of patients obediently accepting doctors' orders are numbered."<sup>442</sup> Another writer tells us that "emerging Internet-based technologies enable the client to know far more about the law of his or her case than ever before. . . . [C]lients can inform themselves in detail about the governing law, long before they deal with the advocacy professional."<sup>443</sup> Others have echoed these observations.<sup>444</sup> Legal doctrines that unnecessarily entrench professional power potentially hinder this reform movement. This is particularly ironic when those doctrines are themselves the result of the profession's exercise of guild power over the judicial process. Legal doctrines that continue to permit alternative sources of advice to flourish will do much to continue the trend away from unbridled professional power.

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441. See KRAUSE, *supra* note 413, at 44-49, 54-57; see also YOUNG, *supra* note 7, at 6-7 (describing greater opposition in recent years to abuse of professional licensing laws); *id.* at 87-94 (documenting the recent professional reform movement); Pat Newcombe, *Web Regulation Battle Heats Up*, AMERICAN LIBRARIES (Nov. 1999) (recounting the proceedings in *Taucher* and *Parsons* to support the view that the Internet poses a threat to "19th-century regulatory, guild-type appar[ati]").

442. Todd Woody, *Patient, Heal Thyself*, INDUSTRY STANDARD (March 29, 1999) <<http://www.thestandard.net/articles/display/0,1449,3993,00.html>>.

443. Zorza, *supra* note 312, at 2668.

444. See, e.g., Robert Davis & Leslie Miller, *Millions Scour the Web to Find Medical Information*, USA TODAY, July 14, 1999 at A1 ("No doctor—no human—can keep up with the results of billions of dollars of medical research undertaken each year, to say nothing of the treatment options and medical alternatives that spin off of it. In at least a simplistic way that alarms some medical professionals. A motivated patient who wants to learn about just one condition easily can surpass a doctor's knowledge of its latest developments after just a few days on line."); C. Everett Koop, quoted in Prospectus, *drkoop.com*, inside cover (subject to completion, May 14, 1999) ("During my tenure as U.S. Surgeon General, I saw first-hand the powerful impact a well-informed public made on the nation's health. Now, the World Wide Web presents exciting new opportunities to empower consumers to become active, informed participants in managing their own healthcare. I firmly believe that this is the path to significantly improving the quality of healthcare for years to come."). *But see* Barbara J. Tyler, *Cyberdoctors: The Virtual Housecall—The Actual Practice of Medicine on the Internet Is Here; Is It a Telemedical Accident Waiting to Happen?*, 31 IND. L. REV. 259, 273 (1998) ("For the luxury of accessibility of information, which is largely unregulated, users must not be naïve but must educate themselves to quality sites or become vulnerable to quacks and the unlicensed.").

In the commercial speech context, the Supreme Court noted the value of the free flow of information to the consumer, and significantly altered its approach to commercial speech restrictions.<sup>445</sup> The Court has yet to fully realize the importance of the free flow of information to the recipient of professional advice. Although the *Lowe* Court took a significant step in favor of client empowerment by reaffirming the First Amendment protection of impersonal publications, it fell short of articulating a consistent theory because it endorsed prior restraints on some unlicensed advisors, even when the customer is fully aware of the speaker's unlicensed status.

The Court would best serve the values of client empowerment by revisiting its professional speech tests and adopting rules more responsive to First Amendment concerns.<sup>446</sup> Certification laws and other regulations that merely assist the public in identifying state-sanctioned fiduciaries are reasonable responses to valid concerns. However, there is simply no basis in history or principle for a rule that permits experts like Christopher Lowe and Frank Taucher to express their esoteric views on the financial markets to a readership of thousands, but prevents Virginia Cramer from offering low-cost legal advice to the poor even when they are fully aware that she is not a licensed attorney.<sup>447</sup>

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445. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976).

446. To the extent the Court declines to abandon *Lowe*, client empowerment principles should at least inform its resolution of borderline cases.

447. Compare *Lowe v. SEC*, 472 U.S. 181 (1985) and *Taucher v. Born*, 53 F. Supp. 2d 464 (D.D.C. 1999) with *State Bar v. Cramer*, 249 N.W.2d 1 (Mich. 1976).