

PROFESSIONAL RIGHTS SPEECH

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ABSTRACT

Some regulations of professional-client communications raise important, but so far largely overlooked, constitutional concerns. Three recent examples of professional speech regulation—restrictions on physician inquiries regarding firearms, “reparative” therapy bans, and compelled abortion disclosures—highlight an important intersection between professional speech and constitutional rights. In each of the three examples, state regulations implicate a non-expressive constitutional right—the right to bear arms, equality, and abortion. States are actively, sometimes even aggressively, using their licensing authority to limit and structure conversations between professionals and their clients regarding constitutional rights. The author contends that government regulation of “professional rights speech” should be subjected to heightened First Amendment scrutiny. Many professionals perform critical, but under-appreciated, functions with regard to the recognition and effective exercise of constitutional rights. Moreover, the author contends that the mere fact that the speakers are professionals and the listeners are clients or patients does not extinguish or diminish First Amendment protections or concerns. To the contrary, the examples discussed in the Article demonstrate various reasons, rooted in free speech values, constitutional rights, and professionalism norms for subjecting at least some professional speech regulations to heightened First Amendment scrutiny.

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INTRODUCTION

In a recent Article, I argued that governmental regulation of “rights speech”—communications about or concerning the recognition, scope, or exercise of constitutional rights—raises distinctive constitutional concerns and merits heightened judicial scrutiny.¹ This Article elaborates on the intersection between freedom of speech and other constitutional rights, with a specific focus on professional-client relationships. It considers whether the fact that the speakers and audiences in this context are professionals and their individual clients minimizes or eliminates concerns regarding regulation of rights speech. To the contrary, the Article concludes that regulations of “professional rights speech” raise significant constitutional concerns and thus also merit heightened—sometimes strict—judicial scrutiny.

1. See Timothy Zick, *Rights Speech*, 48 U.C. DAVIS L. REV. 1 (2014).

The extent to which government can regulate communications between licensed professionals and their clients has received limited, but renewed, attention from courts and scholars. The Supreme Court has said relatively little about the First Amendment's coverage of professional advice and communications.² This is likely to change. States are becoming increasingly active, even aggressive, in the area of professional speech regulation. Lower courts are struggling to make sense of the cryptic guidance the Court has provided in this area. Scholars, particularly in recent years, have spent comparatively more time examining regulation of professional speech.³ Yet they too have struggled to clarify the professional speech doctrine.

In general, governments can impose basic licensure and registration requirements for professions.⁴ Thus, for example, even though it may prohibit expression, a state requirement that lawyers be licensed to practice law does not conflict with the Free Speech Clause.⁵ Further, the First Amendment does not protect professionals who fail to meet applicable standards of professional

2. See discussion *infra* Section I.A.

3. For scholarly commentary on professional speech, see ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012) [hereinafter POST, JURISPRUDENCE]; Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999); Claudia Haupt, *Professional Speech*, 125 YALE L.J. ___ (forthcoming) (draft on file with the author); Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885 (2000). For works that examine speech restrictions relating to specific professionals, such as lawyers or physicians 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); Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277 (2014); Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787 (1996); Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347 (2013); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 959–62 (2007) [hereinafter Post, *Informed Consent*]; Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 399–400 (2008); Kathleen Sullivan, *Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569 (1998).

4. See *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (upholding fortune-telling licensure regulations under the "professional speech doctrine"); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011) (upholding interior-design licensing law under rational basis standard); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604–05 (4th Cir. 1988) (upholding accountants' licensure requirement).

5. This does not mean that any and all licensing restrictions that apply to speakers-for-hire are valid under the First Amendment. See, e.g., *Edwards v. District of Columbia*, 755 F.3d 996, 1009 (D.C. Cir. 2014) (invalidating tour-guide licensing exam on free speech grounds); *Nefedro v. Montgomery Cty.*, 996 A.2d 850, 864 (Md. 2010) (invalidating fortune-telling licensure requirement on free speech grounds).

conduct and care.⁶ States can ban the prescription of certain medications, impose liability and professional discipline for bad advice, and protect clients from various harmful treatments or practices. They can also enforce rules of evidence and procedure, impose sanctions for frivolous lawsuits, and prohibit professionals from revealing client confidences.⁷ To be sure, some of these measures regulate communications between professionals and their clients. Nevertheless, they are typically considered merely incidental regulations of speech, and as such are not generally subject to First Amendment challenge or scrutiny.⁸

Despite these broad areas of authority over licensed professionals, governments presumably do not have unlimited power to regulate professionals' communications to their clients. In recent years, states have been testing that assumption. State regulations of professional speech have become more prevalent, more politically tinged, and more likely to structure and dictate the specific content of professional-client interactions. A new generation of professional speech regulations is placing considerable pressure on doctrinal, theoretical, and professional boundaries.

The Article focuses on three recent examples. Florida enacted a law that prohibits physicians from asking their patients about firearms possession, unless the physician determines in good faith that the question is "necessary" for effective treatment.⁹ In a remarkable set of opinions demonstrating the confusion surrounding professional speech, a panel of the Eleventh Circuit thrice considered (and thrice upheld) the Florida law under three different levels of First Amendment scrutiny—minimal, intermediate, and, finally, strict.¹⁰

California, New Jersey, and other states have recently barred licensed psychiatrists and psychotherapists from providing so-called "reparative"

6. See POST, JURISPRUDENCE, *supra* note 3, at 53 (explaining why medical malpractice litigation does not raise free speech concerns).

7. See Sullivan, *supra* note 3, at 569 ("Lawyers' freedom of speech is constrained in many ways that no one would challenge seriously under the First Amendment.").

8. Professional-client advice is typically distinguished from communications that seek to convey a commercial message or to solicit clients. Commercial advertising regulations are generally reviewed under the commercial speech doctrine. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–66 (1980) (announcing First Amendment standard to be applied to commercial speech regulations).

9. The law also prohibits "harassment" of patients regarding firearms possession, "discrimination" against patients as a result of firearms possession, and record-keeping with regard to patients' firearms possession. See discussion *infra* Section I.B.

10. See *Wollschlaeger v. Governor of Fla. (Wollschlaeger I)*, 760 F.3d 1195, 1220 (11th Cir. 2014), *vacated and superseded on reh'g*, *Wollschlaeger v. Governor of Fla. (Wollschlaeger II)*, 797 F.3d 859 (11th Cir. 2015), *vacated and superseded on reh'g*, *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, No. 12-14009, 2015 WL 8639875 (11th Cir. Dec. 14, 2015).

therapies—talk-based treatments that purport to “cure” homosexuality and other non-heterosexual orientations—to minor patients.¹¹ Over a few dissents, courts have upheld these bans too, either as regulations of professional conduct not subject to First Amendment scrutiny or as regulations of “professional speech” subject to a diminished level of scrutiny.¹²

Finally, a number of states have enacted laws that require physicians to disclose detailed information to female patients in the context of abortion consultations.¹³ Some of these laws require that doctors convey state-prescribed information regarding the fetus and view ultrasound images—even if patients refuse to look or listen to what their physicians have to say.¹⁴ Appeals courts have reached different conclusions regarding the constitutionality of the abortion compelled disclosure laws, with many upholding them under minimal or intermediate scrutiny. In a recent case, the Fourth Circuit, departing from Fifth and Eighth Circuit decisions, invalidated North Carolina’s abortion display and description requirement as a content-based regulation of speech.¹⁵

Inquiry restrictions, treatment bans, and compulsory disclosure laws highlight a number of doctrines and principles relating to state regulation of professional-client interactions. Among other uncertainties, it is unclear whether there is a category of “professional speech” that is subject to minimal or no First Amendment scrutiny, whether interactions between clients and professionals are properly considered conduct rather than speech, and what standard of review ought to apply to regulation of professional-client communications.¹⁶ Important theoretical questions also remain unanswered. Is protection of professional-client speech justified on the basis of collective interests in self-government, or the search for truth? Is it a protected aspect

11. See discussion *infra* Section I.C.

12. See *King v. Governor of N.J.*, 767 F.3d 216, 240 (3d Cir. 2014) (upholding New Jersey’s SOCE ban as to minor patients under intermediate scrutiny standard); *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2013) (upholding California’s SOCE ban as to minor patients); see also *Doe ex rel. Doe v. Governor of N.J.*, 783 F.3d 150, 156 (3d Cir. 2015) (rejecting argument that New Jersey’s SOCE ban as to minors violated minor patients’ right to receive information). *But see Pickup*, 740 F.3d at 1215 (O’Scannlain, dissenting from the denial of rehearing en banc) (arguing that in upholding the SOCE ban, the court has insulated the regulation of “politically unpopular expression” from First Amendment scrutiny).

13. See discussion *infra* Section I.D.

14. See *Corbin*, *supra* note 3, at 1324–28 (discussing mandatory abortion disclosure laws).

15. See *Stuart v. Camnitz*, 774 F.3d 238, 256 (4th Cir. 2014) (invalidating North Carolina ultrasound narration law on compulsory speech grounds).

16. See *Halberstam*, *supra* note 3, at 772 (“Current First Amendment analysis lacks a coherent view of speech in the professions” and lacks a “paradigm for the First Amendment rights of attorneys, physicians, or financial advisers when they communicate with their clients”).

of the professional's liberty, the patient's autonomy, or both? Or do we need a separate and distinct theoretical justification for protecting professional expression?

This Article does not attempt to provide an overarching approach or theory regarding professional speech, or answers to all of the above questions.¹⁷ Rather, using the three examples, it focuses on a largely overlooked but critical concern regarding state regulation of professional-client interactions. States are using professional speech regulations to influence, alter, or even prevent conversations about or concerning constitutional rights. All three of the examples discussed in this Article intersect with and implicate fundamental non-expressive constitutional rights—namely, the Second Amendment right to bear arms, equality, and the right to abortion. This intersection raises some distinctive and significant constitutional concerns. Recently enacted professional speech regulations do not merely interfere with the transmission and receipt of expert knowledge, transgress patients' and professionals' rights to receive or impart information about medical care, or implicate the activities of “knowledge communities”—some of the concerns that have already been expressed by scholars.¹⁸ They are troublesome for a related but distinctive reason. These regulations suppress, alter, or dictate professional rights speech—professional-client communications about, concerning, or relating to the recognition, scope, or exercise of constitutional rights.¹⁹

The intersection between professional speech and constitutional rights distinguishes professional rights speech regulations from ordinary ethical, standard of care, and licensure requirements. Unlike professional rights speech regulations, these sorts of restrictions do not raise significant free speech and other constitutional concerns. Recognition of the constitutional dimension of some professional-client interactions also undermines the formal distinction between private and public expression that the Supreme Court, some lower courts, and some commentators have suggested distinguishes “professional” from other kinds of speech.²⁰ Professional-client conversations about or concerning constitutional rights are neither wholly private, nor part of a general public discourse. They are a special subset of professional-client communications that relate to constitutional rights.

17. For a recent attempt to provide a general theory of professional speech, see Haupt, *supra* note 3.

18. See generally POST, JURISPRUDENCE, *supra* note 3 (focusing on transmission of information from expert to client); Haupt, *supra* note 3 (focusing on expertise of “knowledge communities”).

19. For a broader discussion of state regulation of speech about or concerning constitutional rights, see generally Zick, *supra* note 1.

20. See *infra* Section III.C.

In response to the argument that professionals are licensed by the state and professional speech is thus entitled to minimal or less than full First Amendment protection, the Article contends that the fact that dialogue participants are professionals and their clients does not diminish the constitutional concerns. Indeed, it highlights the fact that professionals are frequently involved in educating, facilitating, and mediating the enjoyment and exercise of clients' constitutional rights. The increasingly political resort to professional speech regulations suggests that the relationship between the state and professionals is undergoing significant changes, which may necessitate additional limits, including meaningful First Amendment constraints, on state authority regarding professional communications.

In addition to exposing the constitutional dimension of professional-client interactions, the examples discussed in the Article also highlight a number of other important gaps and conflicts in recent judicial decisions and the professional speech literature. Courts and commentators have generally paid inadequate attention to, or even misapplied, the First Amendment's speech-conduct distinction, ignored the negative effects that recently enacted regulations will have on professional independence and judgment, and failed to consider their distinctly political purposes. These considerations also counsel in favor of skepticism regarding, and heightened judicial review of, professional rights speech regulations. In sum, professional speech regulations that dictate or suppress content and impact conversations about or concerning constitutional rights merit the highest scrutiny.²¹

Part I of the Article provides a brief overview of the incomplete professional speech doctrine, and situates the three recent examples of professional speech regulation within that doctrinal framework. Part II turns to the distinctive constitutional issues raised by recent professional speech regulations. Focusing in particular on the functions of professionals as they relate to constitutional rights, it argues that regulations of professional rights speech raise both expressive and non-expressive constitutional concerns. As content-based regulations of speech about or concerning constitutional rights, professional speech laws merit strict scrutiny. Finally, Part III critically examines professional rights speech regulations in broader terms. It uses the examples to question some of the premises concerning professionals in recent judicial decisions, re-examine the speech-conduct distinction as it relates to professional communications, analyze the purported distinction between public and private professional speech, and raise concerns relating to professional independence and judgment.

21. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015) (holding that regulations based on subject matter and viewpoint are subject to strict scrutiny and presumptively unconstitutional).

I. INQUIRY RESTRICTIONS, THERAPY BANS, AND COMPULSORY
DISCLOSURES

The Supreme Court has provided little guidance with regard to the relationship between the First Amendment's expressive guarantees and professional speech. Lower courts have been left to divine a doctrine from concurrences, brief snippets in plurality opinions, and precedents in which professional speech was regulated but no doctrinal framework materialized. Recent regulations of professional-client communications highlight the need for a more coherent doctrinal and theoretical approach, as they extend well beyond the state's authority to impose ethical, evidentiary, or malpractice standards. Part I begins with a brief overview of the Supreme Court's unfinished doctrine of professional speech. It then discusses judicial review of laws prohibiting firearms inquiries by physicians, banning so-called "reparative" psychotherapies for gay minors, and compelling detailed abortion disclosures by physicians.

A. *The Incomplete Doctrine of Professional Speech*

As much as the Supreme Court has engaged with the Free Speech Clause over the years, it has said remarkably little about the regulation of professional communications. The Court's first encounter with professional speech arose in *Thomas v. Collins*,²² a case involving state power to enforce a professional registration requirement against a union organizer. The majority did not address the question whether the First Amendment places any limits on state registration or licensure of the professions. In a concurrence, Justice Jackson opined that the state could punish an individual for engaging in the unlicensed practice of medicine or another profession, but could not punish anyone for publicly advocating for or against any particular school of medical thought.²³ *Thomas* thus suggested that states could exercise regulatory power with regard to the licensed professions, consistent with the Free Speech Clause. However, Justice Jackson's concurrence indicated that the government's power to regulate public debate regarding matters within professional fields of knowledge was subject to some limits.

In *Lowe v. SEC*, Justice White elaborated on this basic distinction between private and public expression, in what has become an influential concurrence.²⁴ In *Lowe*, the Court held that the federal government could impose a registration requirement on professionals who rendered

22. 323 U.S. 516 (1945).

23. *Id.* at 544–45 (Jackson, J., concurring).

24. 472 U.S. 181, 228 (1985) (White, J., concurring).

personalized advice to particular clients regarding securities investments. However, in part owing to free speech concerns, the majority interpreted the law such that the registration requirement was not applicable to the publisher of an impersonal investment letter.²⁵ Justice White's concurrence relied more explicitly on First Amendment concerns. In an oft-cited passage, he wrote:

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."²⁶

Justice White's concurrence advances the consideration of professional speech in four potentially important respects. First, it provides a general definition of professional speech—i.e., "takes the affairs of a client personally in hand." Second, the concurrence notes that some professional speech—speech "incidental to the regulable transaction"—is itself "incidental to the conduct of the profession" and thus presumably not covered by the Free Speech Clause.²⁷ Third, Justice White observes that "generally applicable licensing provisions limiting the class of persons who may practice the profession" are not subject to First Amendment objection.²⁸ Fourth, following Justice Jackson's concurrence in *Thomas*, the concurrence identifies a private-public distinction that distinguishes between speech communicated as a professional and speech communicated by a professional as a citizen. As we will see, Justice White's *Lowe* concurrence has played a significant role in lower courts' review of professional speech regulations.²⁹

25. *Id.* at 208.

26. *Id.* at 232.

27. *Id.*

28. *Id.*

29. See discussion *infra* Section I.B.

Another fragment of the Supreme Court's approach to professional speech appears in the Joint Opinion filed by three Justices in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³⁰ In *Casey*, the Court upheld a state law that required physicians to disclose to female patients seeking an abortion the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child.³¹ After rejecting a due process challenge to the disclosure provision, the Joint Opinion briefly addressed the physicians' First Amendment claim:

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard* . . . , but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe* We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.³²

Casey did not establish any specific standard of review for professional speech regulations. However, some lower courts have interpreted the Joint Opinion to mean that the state has broad authority to mandate truthful and non-misleading communications by physicians regarding abortion and its effects.³³

In a related context the Court raised, but ultimately avoided, questions concerning the state's ability as subsidizer or speaker to dictate or compel professional abortion speech. In *Rust v. Sullivan*,³⁴ which was decided prior to *Casey*, the Court rejected free speech challenges to a federal regulation that prohibited physicians working at certain federally funded projects from advocating or advising about abortion as a method of family planning.³⁵ The Court noted that even in the context of public subsidies, the government's power to compel or prohibit physician communications might be limited.³⁶

However, the *Rust* Court ultimately concluded that the regulations "d[id] not significantly impinge upon the doctor-patient relationship."³⁷ The Court reasoned that the physician was not required to represent the government's view regarding abortion as his own, and the professional relationship at the

30. 505 U.S. 833 (1992).

31. *Id.* at 884 (joint opinion).

32. *Id.*

33. See Corbin, *supra* note 3, at 1324–28 (discussing mandatory abortion disclosure laws).

34. 500 U.S. 173 (1991).

35. *Id.* at 196–99.

36. *Id.* at 200.

37. *Id.*

funded projects was not “sufficiently all encompassing” in that it did not include post-conception medical care.³⁸ *Rust* indicates that governments have substantial authority to insist on speech conditions when they fund family planning activities, and are not generally restrained by the First Amendment when they seek to communicate their own messages about abortion. However, even when it funds projects or programs, *Rust* observes that the government may not fundamentally alter the physician-patient relationship by dictating or restricting professional speech.³⁹

The Supreme Court has decided three recent cases involving professional speech, each of which potentially adds to the development of the professional speech doctrine. In *Legal Services Corp. v. Velazquez*,⁴⁰ the Court invalidated a federal funding condition that prohibited fund recipients from providing legal advice that concerned efforts to amend or otherwise challenge existing welfare laws.⁴¹ The Court observed that the funding condition was not designed to communicate any governmental message, and that it “prohibit[ed] speech and expression upon which courts must depend for the proper exercise of the judicial power.”⁴² Thus, unlike the spending condition in *Rust*, the funding condition in *Velazquez* significantly impinged on the relationship between lawyers and their clients as well as the relationship between lawyers and the courts. *Velazquez* did not address the subject of “professional speech” directly. The decision did not establish any First Amendment standard of review for professional speech regulations.

In *Milavetz v. United States*,⁴³ the Court upheld a federal law that prohibited bankruptcy lawyers from advising their clients to incur more debt in contemplation of a bankruptcy filing.⁴⁴ The Court concluded that the law was properly considered a regulation of abusive and unethical conduct, rather than protected expression.⁴⁵ *Milavetz* suggests that professional standards of care can provide at least partial guidance concerning the proper scope of professional speech regulations. Again, however, the Court did not elaborate on the free speech implications of professional speech regulations.

Finally, in *Holder v. Humanitarian Law Project*,⁴⁶ the Court upheld application of a federal law barring the provision of material support to

38. *Id.*

39. See Halberstam, *supra* note 3, at 774–75 (discussing *Rust*’s implications for professional speech); Haupt, *supra* note 3, at 20–21 (same).

40. 531 U.S. 533 (2001).

41. *Id.* at 536–37.

42. *Id.* at 545.

43. 559 U.S. 229 (2010).

44. *Id.* at 244.

45. *Id.* at 244–46.

46. 561 U.S. 1 (2010).

foreign terrorist groups to professionals who sought to provide legal advice to members of the designated groups. Notably, the Court rejected the government's argument that the provision of legal advice was a form of conduct not entitled to First Amendment coverage.⁴⁷ However, the Court ultimately upheld the content-based law as a narrowly tailored measure supporting compelling national security and foreign relations interests.⁴⁸ *Humanitarian Law Project* suggests that the provision of expert professional advice cannot be categorically characterized as conduct outside the coverage of the First Amendment. However, it did not establish any doctrinal framework for the regulation of professional speech.

These various concurrences, plurality opinions, and recent decisions provide limited guidance to legislatures, courts, and professionals regarding governmental authority to prohibit or compel professional-client communications. In general, they establish that government can sometimes treat professional advice communicated within the professional-client relationship differently from speech that is part of public discourse. Thus, a physician advising a patient regarding possible medical treatments would presumably be engaged in professional speech subject to state regulation, while an attorney writing a letter to the editor of a local newspaper regarding limits on punitive damages would be participating in public discourse covered by the Free Speech Clause. However, beyond this very simplistic private-public speech dichotomy, the specific doctrinal contours regarding professional speech remain remarkably unclear. Among other things, the specific boundaries of the state's licensure authority, the relationship between protected professional expression and unprotected conduct, and the standard of First Amendment scrutiny that applies to professional speech regulations are undecided or under-developed.

In the absence of further guidance from the Supreme Court, lower courts have tried to extract a doctrine of professional speech from existing bits and pieces.⁴⁹ The three examples discussed below—*inquiry bans*, *therapy bans*, and *compulsory disclosures*—provide a sense of the difficulties, inconsistencies, and conflicts associated with this effort.

47. *Id.* at 26.

48. *Id.* at 38–39.

49. *See infra* Sections I.B–D; *see also* Kry, *supra* note 3, at 913–14, 929–46 (discussing application of this approach to cases involving computer software and the unauthorized practice of law).

B. Firearms Inquiry Restrictions

In 2011, Florida enacted the Firearm Owners' Privacy Act.⁵⁰ The Act was passed, at the urging of the National Rifle Association ("NRA"), after some Floridians complained that their physicians had engaged in "political" inquiries regarding arms possession. The Act prohibits doctors from asking patients about gun ownership unless they consider the information to be "relevant to the patient's medical care or safety, or the safety of others."⁵¹ The Act also prohibits placing such information in medical records when the physician knows such information is "not relevant to the patient's medical care or safety, or the safety of others."⁵² Finally, the law provides that physicians "may not discriminate" against gun owners and "should refrain from unnecessarily harassing" them during an examination, although it protects the physician's right to choose his or her patients.⁵³ Violation of any aspect of the law—the inquiry ban, medical records provision, or discrimination/harassment provision—can result in a \$10,000 fine and loss of a medical license.⁵⁴

A group of physicians challenged the constitutionality of the law, arguing that it was common practice in the medical field to ask about gun possession in oral communications and on safety questionnaires distributed to patients regarding their home environment.⁵⁵ A district court invalidated the law on free speech grounds.⁵⁶ In three separate opinions, a panel of the Eleventh Circuit reversed.

In *Wollschlaeger v. Governor of Florida (Wollschlaeger I)*, the panel initially held that the Florida Act was "a valid regulation of professional conduct that has only an 'incidental effect on [physicians'] speech."⁵⁷ In a lengthy dissent, Judge Wilson rejected the majority's argument that the Act was analogous to the general medical malpractice regime, which regulates courses of treatment.⁵⁸ Rather, he characterized the Act as a viewpoint-discriminatory measure that sought "to silence firearm-safety messages that were perceived as 'political attacks' and as part of a 'political agenda' *against*

50. Firearm Owners' Privacy Act, ch. 2011-112, 2011 Fla. Laws 1776 (2011) (codified at FLA. STAT. §§ 381.026, 395.1055, 456.072, 790.338 (2011)).

51. *Id.* § 790.338(2).

52. *Id.* § 790.338(1).

53. *Id.* § 790.338(5)–(6).

54. *Id.* § 456.072(2)(b), (d).

55. *Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251, 1267 (S.D. Fla. 2012).

56. *Id.*

57. *Wollschlaeger v. Governor of Fla. (Wollschlaeger I)*, 760 F.3d 1195, 1217 (11th Cir. 2014) (emphasis added).

58. *Id.* at 1250–51 (Wilson, J., dissenting).

firearm ownership.”⁵⁹ With regard to Florida’s purported interest in protecting gun-owners’ Second Amendment rights, Judge Wilson wrote: “That we have a right to do something does not mean we have a right to be free from questioning about that right or from suggestions of other people . . . who may tell us that exercising a particular right in a particular way is a bad idea.”⁶⁰ “The Second Amendment,” he wrote, “does not include a right to be free from private persuasion.”⁶¹

A year later, in *Wollschlaeger II*, the panel vacated its initial opinion.⁶² The court first determined that the Florida Act’s inquiry restriction, record-keeping, and harassment provisions regulated speech, rather than conduct.⁶³ It then derived a “framework” under which physician communications were subject to full or lesser First Amendment scrutiny based on whether the speech was “in furtherance of the practice of medicine” and took place “within a fiduciary relationship.”⁶⁴ Under this “two-dimensional model,” a physician’s speech to a crowd at a rally is fully protected, while her communications relating to treatment in the examining room are subject to less than full protection.⁶⁵ Applying a form of intermediate scrutiny, the panel held that the Florida Act was tailored to directly advance the state’s interests in safeguarding the privacy of patients and regulating the practice of medicine.⁶⁶ Judge Wilson again wrote a lengthy dissent, in which he argued that the Florida Act was an invalid viewpoint-based regulation of speech on a matter of public concern—firearms safety.⁶⁷ He again rejected the majority’s characterization of the law as a regulation of speech within a fiduciary professional relationship, akin to a licensing or malpractice scheme.⁶⁸ Finally, Judge Wilson again rejected Florida’s contention that the law served a substantial interest in protecting patients from conversations about firearms possession.⁶⁹

Remarkably, fewer than six months later, the same Eleventh Circuit panel issued yet another opinion. In *Wollschlaeger III*, the panel repeated its conclusions that the inquiry, record-keeping, and harassment provisions of

59. *Id.* at 1239.

60. *Id.* at 1263.

61. *Id.*

62. *Wollschlaeger v. Governor of Fla. (Wollschlaeger II)*, 797 F.3d 859, 868 (11th Cir. 2014).

63. *Id.* at 884–86.

64. *Id.* at 888.

65. *Id.* at 889.

66. *Id.* at 897–900.

67. *Id.* at 908 (Wilson, J., dissenting).

68. *Id.* at 911–12. *See also id.* at 918–19 (comparing the Florida Act to medical malpractice and other rules that incidentally burden speech).

69. *Id.* at 926.

the Florida Act regulated speech such that First Amendment scrutiny was required.⁷⁰ The panel repeated its two-dimensional model—supplemented this time with a grid purporting to show that physician communications made “in furtherance of the practice of medicine” and within a professional-client relationship constitute professional speech, which is subject to a lesser level of First Amendment scrutiny.⁷¹ However, the court held that the Florida Act satisfied even strict scrutiny.⁷² In its third opinion, the majority elaborated significantly on the state’s compelling interests. It chiefly focused on the protection of Second Amendment rights, and privacy in terms of the exercise of the right to bear arms.⁷³ The court concluded that the Act “protects the right to keep and bear arms by protecting patients from irrelevant questioning about guns that could dissuade them from exercising their constitutionally guaranteed rights.”⁷⁴ It also concluded that the Florida law was tailored to the compelling interest in treating the privacy of firearms ownership as “sacrosanct” and acting to protect such privacy.⁷⁵ Judge Wilson again filed a dissent, but declined to respond to what he called “the Majority’s evolving rationale.”⁷⁶

The *Wollschlaeger* trilogy demonstrates both the uncertainty of the doctrine of professional speech and the considerable confusion in the lower courts regarding the appropriate level of scrutiny to apply to laws like the Florida Act. As the court ultimately acknowledged, such laws regulate speech, not conduct. Moreover, they regulate a constitutional dimension of the professional-client relationship. In the end, the majority concluded that the state had the power to protect firearms owners from physician inquiries that might dissuade them from owning arms. Judge Wilson’s dissents contended that the First Amendment does not permit the state to shield audiences from private speech about or concerning the right to bear arms.

C. *Reparative Therapy Bans*

California, New Jersey, and a few other jurisdictions have recently enacted treatment bans in the context of state regulation of licensed psychotherapists.

70. *Wollschlaeger v. Governor of Fla.* (*Wollschlaeger III*), No. 12-14009, 2015 WL 8639875, at *13–15 (11th Cir. Dec. 14, 2015).

71. *Id.* at *20–21, *20 n.15; *see also id.* at *23 (“When the State seeks to regulate speech by professionals in a context in which the State’s interest in regulating for the protection of the public is more deeply rooted, a lesser level of scrutiny applies.”).

72. *See id.* at *19 (“We ultimately hold that the Act satisfies even strict scrutiny.”).

73. *See id.* at *24–31 (discussing compelling interests).

74. *Id.* at *25.

75. *Id.* at *26.

76. *Id.* at *32 (Wilson, J., dissenting).

These states have enacted laws that ban licensed psychotherapists from engaging in “reparative” talk therapies with minor patients.⁷⁷

Professional associations and societies contend that Sexual Orientation Change Efforts (“SOCE”), as the therapies are sometimes called, are ineffectual and actually harm patients.⁷⁸ Older SOCE therapies were generally aversive, involving treatments such as inducing nausea or vomiting.⁷⁹ Newer, non-aversive treatments attempt “to change gay men’s and lesbians’ thought patterns by reframing desires, redirecting thoughts, or using hypnosis, with the goal of changing sexual arousal, behavior, and orientation.”⁸⁰ As practitioners have described the approach, “counselors may begin a session by inquiring into potential ‘root causes’ of homosexual behavior, such as childhood sexual trauma or other developmental issues, such as a distant relationship with the same-sex parent.”⁸¹ Counselors might then “attempt to effect sexual orientation change by discussing ‘traditional, gender-appropriate behaviors and characteristics’” and how the client can foster them.⁸²

California’s SOCE ban prohibits licensed medical professionals from engaging in any practices that seek to change a minor’s sexual orientation.⁸³ Use of the prohibited treatments constitutes “unprofessional conduct” and could result in professional discipline by the licensing entity.⁸⁴ The ban does not extend to efforts to “provide acceptance, support, and understanding of clients or the facilitation of clients’ coping, social support, and identity exploration and development” and “do[es] not seek to change sexual orientation.”⁸⁵ The SOCE ban also does not prohibit licensed medical professionals from expressing their views concerning reparative therapies to minor patients, from speaking about SOCE outside the therapist-patient relationship, or from referring minor patients to unlicensed providers who could perform reparative therapies.⁸⁶

77. See CAL. BUS. & PROF. CODE §§ 865(b)(1)–865.1 (West 2012); N.J. STAT. ANN. §§ 45:1-54, 55 (West 2013); see also Adam Serwer, *Efforts to Ban “Gay Conversion” Therapy Stall in the States*, MSNBC (Aug. 8, 2014, 4:42 PM), <http://www.msnbc.com/msnbc/ex-gay-therapy-bans-stall-the-states> (reporting on legislative activity on the SOCE issue in various states).

78. See *Pickup v. Brown*, 740 F.3d 1208, 1223–24 (9th Cir. 2013) (discussing opinions of medical and psychological community).

79. See *id.* at 1222.

80. JUDITH M. GLASSGOLD ET AL., AM. PSYCHOLOGICAL ASS’N, *APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION* 22 (2009).

81. *King v. Governor of N.J.*, 767 F.3d 216, 221 (3d Cir. 2014).

82. *Id.*

83. CAL. BUS. & PROF. CODE §§ 865(b)(1)–865.1 (West 2012).

84. *Id.* § 865.2.

85. *Id.* § 865(b)(2)(A)–(B).

86. *Pickup v. Brown*, 740 F.3d 1208, 1223 (9th Cir. 2013).

Therapists using “non-aversive” forms of SOCE challenged the California ban on First Amendment grounds, claiming that it violated their free speech rights to communicate with minor patients.⁸⁷ In *Pickup v. Brown*, a panel of Ninth Circuit judges rejected the free speech claim.⁸⁸ The court distilled from Supreme Court and circuit precedents a framework in which the state’s power to regulate speech about therapies was more limited than its power to restrict the therapies themselves.⁸⁹ As to whether SOCE therapies involved speech or conduct, the court posited a “continuum,” with public dialogue at one end, professional advice in the context of a patient-client relationship at the midpoint, and professional conduct at the opposite end.⁹⁰ The court located SOCE at the conduct end of the continuum, where the “state’s power is great, even though such regulation may have an incidental effect on speech.”⁹¹ It emphasized that the mere fact that the banned course of treatment was carried out through speech did not turn the ban into a regulation of speech.⁹² In contrast to the speech at issue in *Humanitarian Law Project*, the court said, SOCE is a form of conduct with *no* expressive element.⁹³ It concluded: “Pursuant to its police power, California has authority to regulate licensed mental health providers’ administration of therapies that the legislature has deemed harmful.”⁹⁴

The court reasoned that since the California law did not prohibit professionals from expressing their views regarding SOCE or even recommending it to some patients, the law only incidentally burdened speech and was subject to review only for rationality.⁹⁵ Although it acknowledged that studies of SOCE had “methodological problems,” the court concluded that “anecdotal reports of harm raise serious concerns about the safety of SOCE.”⁹⁶ The court held that these concerns, along with the opinions of professional organizations that SOCE has not been shown to be effective, were sufficient to justify the ban.⁹⁷

Some Ninth Circuit judges thought the First Amendment claim had substantially more merit. Three judges, dissenting from a denial of rehearing *en banc*, argued that California’s SOCE ban is “a new and powerful tool to

87. *Id.* at 1225.

88. *Id.*

89. *Id.* at 1227.

90. *See id.* at 1227–29 (describing continuum).

91. *Id.* at 1229.

92. *Id.*

93. *Id.* at 1230.

94. *Id.* at 1229.

95. *Id.* at 1231 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)).

96. *Id.* at 1224.

97. *Id.* at 1232.

silence expression based on a political or moral judgment about the content and purpose of the communications.”⁹⁸ The dissenters relied heavily on *Humanitarian Law Project*, which they said rejected the speech-conduct “labeling game” engaged in by the panel.⁹⁹ Further, they contended that “[t]he Federal courts have never recognized a freestanding exception to the First Amendment for state professional regulations.”¹⁰⁰ Unlike a regulation concerning prescription of banned substances, which simply refuses legal effect to the written words on the prescription pad, the dissenters observed that the California law “prohibits the doctor from speaking to his patient with certain words and in a certain way.”¹⁰¹

In *King v. Christie*,¹⁰² the Third Circuit upheld New Jersey’s SOCE ban. The language of the New Jersey law is identical in all relevant respects to the California SOCE ban, and a violation of the ban may result in professional discipline.¹⁰³ In passing the law, the New Jersey legislature made findings emphasizing that being lesbian, gay, or bisexual is not a disease, and cited reports from mental health organizations regarding the harms associated with SOCE therapy.¹⁰⁴

Parting company with the district court and the Ninth Circuit’s decision in *Pickup*, the Third Circuit held that SOCE therapy is speech, not conduct, and that as such it “enjoys some degree of protection under the First Amendment.”¹⁰⁵ The court relied primarily on *Humanitarian Law Project* for the proposition that the provision of professional advice does not constitute pure conduct.¹⁰⁶ Owing to the fact that the speech is communicated “within the confines of a professional relationship,” however, the court concluded that free speech protection was “diminished.”¹⁰⁷ It read Justice Jackson’s concurrence in *Thomas*, Justice White’s *Lowe* concurrence, and *Casey*’s Joint Opinion as establishing broader state authority to regulate the professions in order to ensure their preservation and characteristics such as patient trust and confidence.¹⁰⁸ While the function of professional speech did not render it

98. *Id.* at 1216 (O’Scannlain, J., dissenting) (dissenting from the denial of rehearing en banc, joined by Bea and Ikuta, Circuit Judges).

99. *Id.* at 1217–18.

100. *Id.* at 1218.

101. *Id.* at 1220.

102. 767 F.3d 216 (3d Cir. 2014).

103. Compare N.J. STAT. ANN. §§ 45:1-55, 45:1-21(h) (West 2013), with CAL. BUS. & PROF. CODE §§ 865(b)(1)–865.1, 865.2 (West 2012).

104. See *id.* § 45:1-54.

105. *King*, 767 F.3d at 224.

106. See *id.* at 225 (“[T]he Supreme Court rejected this very proposition in [*Holder v. Humanitarian Law Project*, 561 U.S. 1, 26 (2010)].”).

107. *Id.* at 224.

108. See *id.* at 230–32 (discussing Supreme Court opinions and lower court applications).

conduct outside the First Amendment's coverage, the court concluded that "it does place it within a recognized *category* of speech that is not entitled to the full protection of the First Amendment."¹⁰⁹

In fashioning its standard of "diminished" protection, the court drew an analogy to the commercial speech doctrine.¹¹⁰ Under that doctrine, the Supreme Court has applied intermediate scrutiny to regulations of speech that proposes a commercial transaction.¹¹¹ Emphasizing the "informational function" of professional speech and the history of state regulation of professional-client communications, the Third Circuit concluded that "professional speech should receive the same level of First Amendment protection as that afforded commercial speech."¹¹² Accordingly, it held, the SOCE ban was permissible only if it directly advances the state's substantial interest in protecting minor clients and is not more extensive than necessary to serve that purpose.¹¹³

The court emphasized that this diminished level of scrutiny only applied to state regulations "enacted pursuant to the State's interest in protecting its citizens from ineffective or harmful professional services."¹¹⁴ By contrast, the court wrote, regulations of professionals' speech that were not related to state licensure may be subject to a higher level of scrutiny.¹¹⁵ It distinguished *Casey* on the ground that the provision under review in that case compelled truthful and non-misleading information; regulations of this sort, said the court, were subject to more deferential review under the commercial speech doctrine.¹¹⁶ Further, the court worried that under rationality review states "could too easily suppress disfavored ideas under the guise of professional regulation."¹¹⁷

On the other hand, the court rejected plaintiffs' contention that strict scrutiny applied to the SOCE ban. Although it acknowledged that the ban was content-based, the court concluded that it did not discriminate "in an impermissible manner" because the basis for the SOCE ban was tailored to

109. *Id.* at 233 (emphasis added).

110. *Id.* at 234–35.

111. *See* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980) (holding that commercial speech enjoys only diminished protection owing in part to special concerns such as consumer fraud); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (holding that commercial speech enjoys some First Amendment protection).

112. *King*, 767 F.3d at 234–35.

113. *Id.* at 235 (citing *Cent. Hudson*, 447 U.S. at 566).

114. *Id.*

115. *See id.* (discussing the regulations in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8 (2010) and *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536 (2001)).

116. *Id.* at 236.

117. *Id.*

concerns about client harm.¹¹⁸ Finally, the court rejected the argument that the ban discriminated based on viewpoint because the law allowed medical professionals to express their views about SOCE to anyone, including their minor patients.¹¹⁹ The SOCE ban, said the court, only prevented plaintiffs from expressing this viewpoint “in a very specific way—by actually rendering the professional services that they believe to be effective and beneficial.”¹²⁰

Applying the intermediate scrutiny standard, the court concluded that protection of minor patients was undoubtedly a substantial state interest.¹²¹ It also concluded that the legislature, through its findings and record, had demonstrated that the SOCE ban would directly advance this interest.¹²² This was so, the court said, even though the empirical evidence regarding SOCE’s harmful effects “falls short of the demanding standards imposed by the scientific community.”¹²³ The court stated that the legislature’s conclusion was not “unreasonable” under the circumstances, and that it did not have to “wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm.”¹²⁴ Last, the court concluded that the SOCE ban was no more extensive than necessary to protect against the harms associated with reparative therapies.¹²⁵

Like the three Eleventh Circuit opinions upholding the Florida firearms inquiry and record-keeping ban, the SOCE cases highlight the considerable confusion regarding the appropriate level of First Amendment protection for professional speech. The two federal courts of appeals that have considered SOCE bans thus far came to different conclusions regarding (1) whether talk therapy is speech or conduct, (2) the standard of review to apply to professional speech regulations, and (3) the scope of states’ authority to regulate professional-client interactions pursuant to their licensing power. The incomplete doctrine of professional speech does not provide clear answers concerning any of these issues.

118. *Id.* at 237.

119. *Id.*

120. *Id.*

121. *Id.* at 237–38.

122. *Id.* at 238–39.

123. *Id.* at 239.

124. *Id.*

125. *Id.* at 240.

D. Compulsory Abortion-Related Disclosures

States have long compelled professionals to make certain disclosures to their clients and patients, as a matter of both common and statutory law. This has traditionally been considered part of a patient's "informed consent" to care, treatment, or representation.¹²⁶

Some of the most controversial compelled disclosure requirements have concerned the subject of abortion. Shortly after *Roe v. Wade* recognized a constitutional right to procure an abortion,¹²⁷ the Supreme Court clarified that state and federal governments were not required to fund or otherwise support access to abortion services.¹²⁸ The Court also confirmed that governments were entitled to make a "value judgment," through the allocation of funds or other means, that childbirth was preferable to abortion.¹²⁹ Later, in *Casey*, the Court established that government is permitted to seek to *persuade* women not to exercise their constitutional right to choose to terminate a pregnancy, so long as it does not *coerce* women or otherwise unduly interfere with the abortion decision.¹³⁰

Applying this framework in *Casey*, the Court upheld a Pennsylvania requirement that compelled physicians, within twenty-four hours of performing an abortion, to "inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.'"¹³¹ The Court reasoned that the state was entitled "to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion."¹³² In a subsequent case involving late-term abortions, the Court emphasized that the government was entitled through laws and regulations to express "respect for the dignity of human life" and to "use its voice and its

126. See, e.g., Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1599, 1602–04 (2008) (discussing informed consent requirement under common and statutory law).

127. 410 U.S. 113, 164–65 (1973).

128. See *Harris v. McRae*, 448 U.S. 297, 315–17 (1980) (rejecting challenges to the Hyde Amendment, which barred payments even for most medically necessary abortions); *Maher v. Roe*, 432 U.S. 464, 480 (1977) (upholding denial of Medicaid funds for abortion services).

129. *Maher*, 432 U.S. at 474.

130. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877–78 (1992).

131. *Id.* at 881 (quoting 18 PA. CONS. STAT. § 3205(a)(1)(ii) (1990)). The provision allowed the physician to decline to provide the disclosures if he determined they would be harmful to the patient. *Id.* at 884–85.

132. *Id.* at 883.

regulatory authority to show its profound respect for the life within the woman.”¹³³

Under *Casey*'s framework, with regard to the pregnant woman's decision whether to bear a child, the government is permitted to (1) take steps “to ensure that this choice is thoughtful and informed;” (2) “enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term;” and (3) enact a “reasonable framework for a woman to make a decision that has such profound and lasting meaning.”¹³⁴ As one commentator has observed, *Casey* sanctioned a framework in which the state could “structure the woman's decision-making process” and “open up the expressive channels of speech to the pregnant woman while she is engaged in deliberation about her choice.”¹³⁵ The Court was essentially “granting leeway to the government to voice its own opposition to abortion.”¹³⁶

As discussed earlier, the *Casey* opinion rejected, in a brief paragraph, the physicians' claim that the informational requirements compelled speech in violation of the First Amendment.¹³⁷ The Court concluded that the state had the power to compel professional speech pursuant to its authority to license the practice of medicine.¹³⁸ Since *Casey*, many legislatures have enacted measures that structure conversations between women and their physicians regarding the subject of abortion by compelling disclosures.¹³⁹

Compelled abortion disclosure regulations differ from the first two examples of professional speech regulation in certain respects. Most obviously, in contrast to inquiry and therapy bans, abortion informed consent requirements compel the communication of specific information. Thus, these laws implicate First Amendment principles and doctrines relating to the right *not to speak*.¹⁴⁰ Further, unlike the inquiry and therapy bans, which are quite recent, abortion informed consent requirements are part of a longstanding relationship among informed consent, freedom of speech, and the right to

133. *Gonzales v. Carhart*, 550 U.S. 124, 127–28 (2007).

134. *Casey*, 550 U.S. at 872.

135. Goldstein, *supra* note 3, at 802.

136. *Id.* at 791.

137. *Casey*, 550 U.S. at 884.

138. *Id.* (rejecting compelled speech claim).

139. For commentary on compulsory abortion speech, see generally Corbin, *supra* note 3; Keighley, *supra* note 3; Post, *Informed Consent*, *supra* note 3; and Sanger, *supra* note 3.

140. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (no government official may “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein”). See also Corbin, *supra* note 3, at 1282–91 (discussing compelled speech doctrine in context of compulsory abortion disclosures).

obtain an abortion. Abortion speech regulations proliferated in the 1990s after *Casey*, which indicated that neither the Due Process Clause nor the First Amendment generally prohibited their enforcement.¹⁴¹

State abortion-related compelled disclosures take different forms. Some laws impose detailed scripts on physicians. For example, South Dakota law requires that abortion providers tell patients that abortion will “terminate the life of a whole, separate, unique, living human being” and that “the pregnant woman has an existing relationship with that unborn human being.”¹⁴² The doctor must also explain “all known medical risks” of abortion, including the “increased risk of suicide ideation and suicide.”¹⁴³ Rejecting First Amendment compelled speech claims, federal courts have upheld both the “human being” and suicide advisory scripts as valid informed consent provisions.¹⁴⁴

Other state laws, sometimes referred to as “speech and display,” require that an ultrasound be displayed to the woman and that doctors provide a detailed description of the image (including information about limbs, vital organs, position in the uterus, etc.).¹⁴⁵ Women can sometimes refuse to view the sonogram itself, but they must generally be informed of the sonogram results and must sign an informed consent form certifying that they have received the information. The speech and display laws are an outgrowth of *Casey*’s structured discourse framework, in which the state is empowered to provide truthful and non-misleading information in an effort to persuade women not to choose abortion.¹⁴⁶

Federal courts have generally upheld compulsory disclosure requirements, largely on the basis of *Casey*’s determination that truthful and non-misleading disclosure provisions are valid under informed consent principles.¹⁴⁷ The

141. See Zick, *supra* note 1, at 36–38 (discussing the relationship between compelled abortion disclosures and the right to abortion).

142. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b)–(c) (2015).

143. *Id.* § 34-23A-10.1(1)(e)(ii) (2015).

144. See Planned Parenthood Minn., N.D., S.D. v. Rounds (*Rounds II*), 686 F.3d 889, 906 (8th Cir. 2012) (en banc); Planned Parenthood Minn., N.D., S.D. v. Rounds (*Rounds I*), 530 F.3d 724, 738 (8th Cir. 2008) (en banc) (vacating preliminary injunction); Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health, 794 F. Supp. 2d 892, 916, 918 (S.D. Ind. 2011) (upholding requirement that physicians inform abortion patients that “human physical life begins when a human ovum is fertilized by a human sperm”) (quoting IND. CODE § 16-34-2-1.1(a)(1)(E) (2011)).

145. See, e.g., LA. REV. STAT. ANN. § 40:1061.10(D)(2)(a) (2015); N.C. GEN. STAT. ANN. § 90-21.85(a)(2), (a)(4) (West 2011); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4)(C)–(D) (West 2015).

146. See Post, *Informed Consent*, *supra* note 3, at 945–46.

147. See, e.g., Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 577 (5th Cir. 2012) (rejecting compelled speech claim brought by physicians); *Rounds I*, 530 F.3d at

decisions have not comprehensively considered the First Amendment free speech implications of compulsory abortion disclosures. Rather, they have treated compulsory abortion disclosures as a legitimate means of requiring disclosure of truthful, non-misleading information about abortion.¹⁴⁸ However, as some commentators have observed, the state script and display laws go beyond ordinary informed consent requirements by requiring communication of false and misleading,¹⁴⁹ and in some cases ideological, statements regarding abortion.¹⁵⁰ Some have complained that courts are applying an “abortion exception” to compulsory speech doctrine.¹⁵¹

A few federal courts have invalidated compulsory abortion disclosures on free speech grounds.¹⁵² Recently, in *Stuart v. Camnitz*, the Fourth Circuit invalidated provisions of North Carolina’s compulsory abortion disclosure law. The law requires physicians to perform an ultrasound, display a sonogram, and describe the fetus in detail to a woman seeking an abortion in the state.¹⁵³ Under the law, the sonogram display and fetal description, which the law described as the “Display of Real-Time View Requirement,” must take place even if the woman actively seeks to avert her eyes or refuses to listen.¹⁵⁴ These disclosures were in addition to a comprehensive series of informed consent abortion disclosures already required under North Carolina law.¹⁵⁵

The Fourth Circuit held that the Display of Real-Time View Requirement “is quintessential compelled speech” because it “forces physicians to say things they otherwise would not say.”¹⁵⁶ Moreover, the court held, “the statement compelled here is ideological” in the sense that it “explicitly promotes a pro-life message by demanding the provision of facts that all fall on one side of the abortion debate—and does so shortly before the time of

737–38 (rejecting compelled speech claim brought by physicians). *See generally* the discussion in Corbin, *supra* note 3, at 1324–38.

148. *Lakey*, 667 F.3d at 575–76; *Rounds I*, 530 F.3d at 738.

149. For instance, the statement that abortion is associated with an increased risk of suicide has been characterized as misleading. *See, e.g.*, Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2415–16 (2014).

150. *See Corbin*, *supra* note 3, at 1329–34. *See generally* Post, *Informed Consent*, *supra* note 3; Sanger, *supra* note 3.

151. Corbin, *supra* note 3, at 1289–90.

152. *See Stuart v. Camnitz*, 774 F.3d 238, 256 (4th Cir. 2014) (invalidating North Carolina ultrasound narration law on compulsory speech grounds).

153. *See id.* at 243 (describing requirements under North Carolina’s “Woman’s Right to Know Act”).

154. N.C. GEN. STAT. ANN. § 90-21.85(a) (West 2011).

155. *See Camnitz*, 774 F.3d at 243 (describing additional informed consent disclosure provisions).

156. *Id.* at 246.

decision when the intended recipient is most vulnerable.”¹⁵⁷ To the contention that physicians were not required to follow any particular script and could express their own views regarding abortion, the court responded: “That the doctor may supplement the compelled speech with his own perspective does not cure the coercion—the government’s message still must be delivered (though not necessarily received).”¹⁵⁸

Canvassing the various free speech standards of review, ranging from minimal rationality for professional conduct to strict scrutiny, the Fourth Circuit settled on “heightened intermediate scrutiny.”¹⁵⁹ This demanding standard was appropriate, the court said, because the state was regulating not just what physicians did in the context of a professional relationship but also what they said.¹⁶⁰ It specifically rejected the argument that the single paragraph in *Casey* established a rational basis standard for all abortion-related physician speech.¹⁶¹ The court invalidated the display and description requirement, concluding that it burdened physician speech in a broad and unprecedented manner “while simultaneously threatening harm to the patient’s psychological health, interfering with the physician’s professional judgment, and compromising the doctor-patient relationship.”¹⁶²

II. PROFESSIONAL SPEECH AND CONSTITUTIONAL RIGHTS

In previous work, I have argued that regulations of rights speech—communications about or concerning the recognition, scope, or exercise of constitutional rights—are suspect under the First Amendment.¹⁶³ Rights speech regulations are prevalent. They impact speech across a range of contexts, and with respect to a variety of constitutional rights.¹⁶⁴ Sometimes, as in the examples discussed in this Article, the regulation of professional-client communications implicates rights speech concerns. This Part provides rights-speech-based reasons to be skeptical of regulations like physician inquiry bans, therapy bans, and compulsory disclosures. Restrictions on what I will call “professional rights speech” affect much more than professional advice regarding specific treatments, conditions, or problems. They affect the free flow of information about constitutional and legal rights. They also

157. *Id.*

158. *Id.*

159. *Id.* at 248.

160. *Id.*

161. *Id.* at 249.

162. *Id.* at 250.

163. See generally Zick, *supra* note 1.

164. See *id.* at 6–34 (discussing a variety of regulations of speech concerning abortion and the right to bear arms).

implicate important, but often overlooked, professional functions relating to the enforcement of those rights. The fact that the speakers and listeners are professionals and clients does not diminish these concerns, or give states greater discretion to regulate communications that bear on constitutional concerns. To the contrary, laws and regulations that suppress or compel professional rights speech based explicitly on content raise distinctive constitutional concerns and warrant strict judicial scrutiny.

A. Professionals, Speech, and State Licensure

When considering whether any First Amendment coverage or protection ought to exist in the professional setting, we must begin with a fundamental concept of the professional-client relationship itself. Professional speech regulations implicate and affect special relationships and interests. In this sense, they are not like ordinary speech regulations. Rather, they are analogous to restrictions on student speech, or public employee speech. They regulate a special kind of relationship and operate in a distinctive sphere.

Professionals¹⁶⁵ advise clients with regard to various medical, legal, therapeutic, or related concerns within the professional's field of expertise. They do so in the context of a relationship that is defined, or circumscribed, by professional standards and that is generally characterized by information asymmetries.¹⁶⁶ Professionals provide advice based upon their expertise in a particular discipline. They deliver advice in a wide variety of ways, many of which are communicative. For example, professionals prescribe medications, file briefs, perform accounting functions, and provide family therapies. They interview clients, take their histories, write advisory opinions, and dispense all manner of expert advice. Although generalizing across the range of disciplines is typically difficult, it is safe to say that professionals engage in significant communicative activities in the context of their defined professional relationships.

165. Here and throughout, I am referring primarily to the sort of "knowledge communities" identified by Haupt, *supra* note 3, and others who have examined professional speech. In general, these are the medical, psychological, legal, and scientific professions. Other disciplines, including accounting and education, may also fall into this sphere. Typically, where a professional dispenses, and a client relies upon, a special body of knowledge or expertise, we may label the relationship "professional." Whether regulations of other licensed professionals, including tour guides and nail technicians, implicate the professional speech doctrine is beyond the scope of this discussion. For purpose of this Article, at least, the discussion will focus on the learned professions.

166. See Halberstam, *supra* note 3, at 846 (characterizing professional speech as "an important, albeit bounded, communicative realm that is worthy of constitutional protection").

Through the enforcement of professional standards, the state pursues undoubtedly important interests. These include protecting clients from professional overreaching, fraud, and other harms. In important respects, the limits of governmental authority in this context are principally defined by interests in fostering and facilitating safe professional-client interactions, in the context of informational and power asymmetries, and in ensuring that experts provide accurate and truthful information to their clients.¹⁶⁷

In defending recent professional speech regulations, states have relied heavily on their power to license professionals. State licensure limits access to the profession to those who satisfy the knowledge and other expertise requirements of the discipline. Licensure also facilitates state oversight and a degree of control, again for the primary purpose of ensuring that professionals have the requisite expertise and do not engage in harmful practices.

However, professional licensure does not eliminate any and all First Amendment concerns regarding professional-client communications.¹⁶⁸ Thus, for example, public school teachers are licensed by the state, but not all of their speech automatically falls outside the boundaries of the Free Speech Clause as a consequence of licensure.¹⁶⁹ Some government contractors are also licensed by the state, yet they too retain some First Amendment rights.¹⁷⁰ If licensure itself eliminated First Amendment coverage, states would be able to suppress or disturb the free flow of information about a host of matters of public concern—including constitutional and legal rights. Fundamental First Amendment doctrines and values firmly reject this result.

State licensure principally regulates the act of *joining* a profession. It does not, by itself, justify any and all state restrictions on communications between licensed professionals and the public, or licensed professionals and their individual clients. This Article specifically contends that the exercise of state licensure power in the context of some professional-client interactions raises significant constitutional concerns. This is especially, but not only, the case

167. See, e.g., Post, JURISPRUDENCE, *supra* note 3, at 48 (“[W]e should expect to see First Amendment coverage triggered whenever government seeks . . . to disrupt the communication of accurate expert knowledge.”); Halberstam, *supra* note 3, at 845–46 (stating the permissible scope of regulation of professional speech “must be determined [by] the nature of the underlying relationship”); Haupt, *supra* note 3, at 37–41 (arguing that the scope of protection for professional speech is defined by the state of the art in the “knowledge communit[y]”).

168. See, e.g., *Thomas v. Collins*, 323 U.S. 516, 531 (1945) (“[T]he rights of free speech and a free press are not confined to any field of human interest.”).

169. See *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (holding that public school teacher did not relinquish First Amendment free speech rights by virtue of his employment by the school district).

170. Cf. *Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 684–85 (1996) (holding that public contractors retained First Amendment rights against retaliatory action).

where states regulate communications that concern fundamental constitutional rights.

B. Professionals and Rights

Most professional-client interactions focus on addressing the particular conditions or problems of the clients who seek treatment or representation. This does not mean that the information disseminated and shared during these interactions has no *public* value. To the contrary, as the examples in Part I all show, the supposed distinction between public and private communications flagged by Justice White in *Lowe* and relied on by some lower courts ignores an important connection between professional communications and discourse on matters of public concern.¹⁷¹

Far more often than is typically acknowledged, professional-client interactions address issues relating to constitutional and other legal rights. Licensed professionals play an important role in ensuring the free flow of accurate information about constitutional rights. They educate clients with respect to the scope and exercise of rights. Their advice may provoke political activism with respect to rights.¹⁷² More generally, professionals facilitate the exercise of a wide variety of rights. Thus, restrictions on professional communications may affect far more than the provision of professional advice regarding a client's personal concerns. Some restrictions may impact discussions and decisions regarding the exercise of civil and constitutional rights relating to matters such as reproductive rights and racial equality.

In certain contexts, the connection between professional speech and constitutional rights is very close. For example, as Kathleen Sullivan has observed, lawyers are frequently “vindicators of constitutional rights against the state.”¹⁷³ Lawyers' advice and other professional activities can have a profound impact on the scope and enjoyment of constitutional rights for individual clients and the public at large. Through their expressive activities, including the advice they provide to individual clients, lawyers frequently seek to check governmental power and protect the constitutional rights of clients.

Supreme Court precedents expressly acknowledge the important intersection between the speech of legal professionals and constitutional rights. Thus, the Court has invalidated restrictions on lawyers' solicitation of

171. See discussion *infra* Section III.C.

172. Cf. *Conant v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002) (observing that if physicians and patients were permitted to discuss a ban on medical marijuana, “the patient upon receiving the recommendation could petition the government to change the law”).

173. Sullivan, *supra* note 3, at 571.

clients for lawsuits alleging violations of constitutional rights.¹⁷⁴ The Court's precedents have also treated litigation on behalf of constitutional equality as a form of political expression and association.¹⁷⁵ The connection between lawyers' expression and constitutional rights also explains why the Court has jealously guarded lawyers' ability to defend their clients in the press.¹⁷⁶ Indeed, even when governments subsidize legal representation and advice, the Court has held that they may not deny funding in a manner that fundamentally alters the adversary system or denies courts critically important information.¹⁷⁷

Of course, lawyers are natural and even quintessential state adversaries. The connection between their speech and constitutional rights is bound to be somewhat closer than is the case with other professionals. Physicians and psychotherapists, not to mention marriage counselors and other professionals, are not typically involved in direct conflicts with the state on their clients' behalf.

However, a surprising number of non-legal professionals perform important functions relating to their clients' constitutional rights. For instance, physicians have historically clashed with the state over the provision of medical advice to their patients regarding reproductive rights.¹⁷⁸ Indeed, the dissenting opinions in early Supreme Court cases establishing a constitutional right to contraception were among the first to raise what we now refer to as "professional speech" concerns.¹⁷⁹ In those cases, medical professionals challenged legal restrictions on the dissemination of truthful information regarding contraceptive devices and services to their patients. The banned information related specifically to products, devices, and procedures that affected the exercise of fundamental constitutional rights, including the right to use contraception and to procure an abortion.

More recently, physicians have been on the front lines in challenges to state laws prohibiting withdrawal of life-sustaining treatment and physician-

174. *Compare In re Primus*, 436 U.S. 412, 412 (1978) (invalidating state anti-solicitation rule as applied to an ACLU attorney seeking to represent a woman in a forced sterilization case), *with Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978) (upholding state anti-solicitation rule as applied to a lawyer who sought to represent clients injured in an auto accident).

175. *See NAACP v. Button*, 371 U.S. 415, 428–29 (1963) (invalidating Virginia law that restricted solicitation of clients for purposes of challenging racial segregation in public schools).

176. *See Gentile v. State Bar*, 501 U.S. 1030, 1034 (1991) (describing lawyer's press conference statements as "classic political speech . . . critical of the government and its officials").

177. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (invalidating federal restrictions on welfare litigation).

178. *See Zick*, *supra* note 1, at 7–9 (discussing physician speech and contraceptive rights).

179. *See Halberstam*, *supra* note 3, at 835–36 (discussing early cases).

assisted suicide.¹⁸⁰ The laws implicate constitutional rights pertaining to end-of-life decision-making. Unlike the examples discussed in Part I, state restrictions in cases affecting death-related rights do not target speech explicitly. However, these laws can affect the provision of medical advice regarding end-of-life treatment. They may inhibit conversations about public policies, or deter actions that could one day alter interpretations of constitutional rights relating to death.

Lawyers and physicians are not the only licensed professionals whose communications with clients intersect with or impact constitutional rights. Marriage counselors, family counselors, social workers, nurses, teachers, mental health counselors, and child care providers all may find themselves situated at this critical intersection. Even licensed firearms dealers, who do not enter the same kind of professional relationship as other licensed entities or persons, may be subject to future laws implicating their customers' constitutional rights.¹⁸¹

In sum, licensed professionals are not infrequently involved in vindicating, facilitating, or mediating the constitutional rights of their clients and patients. If the state can regulate professional speech pursuant to its power to license, it may have a significant impact on communications relating to the exercise and enjoyment of constitutional rights, and perhaps even the actual exercise and enjoyment of those rights. As the next Section argues, state regulation at the intersection of professional rights speech and constitutional rights poses unique dangers to both expressive and non-expressive rights.

C. *Licensing Professional Rights Speech*

Legal commentators have observed that professional speech is not always or solely concerned with the provision of private advice on matters of personal concern.¹⁸² Even during seemingly routine, one-to-one interactions in a professional's office, professional speech can relate to matters of public concern that are within the coverage and protection of the Free Speech Clause.

180. See *Washington v. Glucksberg*, 521 U.S. 702, 719–28 (1997) (refusing to recognize a fundamental right to suicide, or the assistance of a physician in committing suicide); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280–85 (1990) (recognizing liberty interest of competent person to refuse life-sustaining nutrition and hydration).

181. See *Zick*, *supra* note 1, at 52 (discussing a hypothetical compulsory arms dealer disclosure law).

182. See discussion *infra* Section III.C.

The degree to which this connection exists varies with the nature of the professional-client consultation. Clients sometimes seek out professionals for the specific purpose of discussing constitutional and other legal rights. They may also discuss problems, procedures, or practices that directly or indirectly relate to, or concern, the exercise of constitutional rights. Thus, state regulation of professional communications may preclude or compel conversations that relate to constitutional rights. The first kind of interaction, where a client seeks advice relating to these and other rights, is most commonly associated with legal professionals. The examples discussed in this Article tend to fall into the other two, more general, categories of constitutional discourse.

Regarding the examples discussed in this Article, labeling professional advice and other communications “private” versus “public” fails to capture the essence of the professional-client interaction. This is also true of the notion, articulated by some courts, that there is a “spectrum” of professional speech that includes, at one end, one-to-one speech about private client concerns, and at the other end public statements by professionals about matters of public concern.¹⁸³ In *Wollschlaeger III*, which upheld Florida’s firearms privacy law, the court concluded that when a physician “speaks to a patient in furtherance of the practice of medicine” within the confines of the physician-patient relationship, the communication is “professional speech” and not fully protected under the First Amendment.¹⁸⁴

These approaches are substantially under-inclusive, in particular where professional rights speech is concerned. In some instances, professionals and clients are engaged in a form of constitutional discourse. Some of the one-to-one speech that occurs in professional offices relates directly or indirectly to the character or exercise of constitutional and legal rights. Matters of critical public concern, such as the exercise of constitutional rights and their appropriate scope, also occur in examining rooms and professional offices. This is not the primary purpose of such locations or interactions, to be sure, but it can be part of the flow of information between professional and client.

Again, this is easiest to imagine in the case of attorney-client interactions. Whether a legal professional advises her clients regarding civil rights lawsuits against the government in a public gymnasium, or does so within the four

183. See, e.g., *Wollschlaeger v. Governor of Fla. (Wollschlaeger I)*, 760 F.3d 1195, 1218 (11th Cir. 2014) (contending that a professional’s speech rights “approach a nadir . . . when the professional speaks privately, in the course of exercising his or her professional judgment, to a person receiving the professional’s services[,]” but reach their apex when the professional engages in public speech).

184. *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, No. 12-14009, 2015 WL 8639875, at *20–21 (11th Cir. Dec. 14, 2015).

walls of her downtown office, surely does not dictate whether the First Amendment is implicated in the exchange. Indeed, if the public-private distinction did the work some courts have ascribed to it in professional settings, a lawyer writing a brief at his desk might be engaged in wholly uncovered and unprotected *private* speech, while a lawyer filing that same brief in court would presumably be engaged in covered and protected *public* speech (assuming the filing itself is not considered conduct, rather than speech).¹⁸⁵

Recent professional speech regulations, including those discussed in Part I, help us to understand that it is not the location or even the character of the interaction that is critical but rather the professional function that is affected by communication-specific mandates. Professionals are not just expert automatons who dispense technical advice, medicines, and cold facts. They engage with clients and patients on a variety of subjects, including matters relating to their constitutional and legal interests. This is not to suggest that lawyer and client, or doctor and patient, are engaged in seminar-like discussions of constitutional principles. However, they do engage in dialogues that touch on, concern, or implicate constitutional and legal rights. Allowing the state, through its licensing authority, to regulate all aspects of professional-client relationships so long as they take the form of “direct, personalized speech with clients”¹⁸⁶ threatens a substantial amount of expression that relates to patients’ and clients’ constitutional and legal rights.

Moreover, treating all professional speech and activities as mere conduct, or as subject to any reasonable state regulations as part of a course of conduct (as some courts have concluded), undermines the distinctive constitutional functions of some professional expression.¹⁸⁷ Under this approach, even a lawyer’s questions, legal filings, or other communications on behalf of clients would constitute a course of conduct or representation not covered by the Free Speech Clause. But surely the state cannot prohibit lawyers from interviewing their clients about constitutional violations, or ban them from filing certain specified constitutional or legal claims.¹⁸⁸ Nor, presumably, can the state *compel* lawyers to communicate specific scripts of information to their clients about the burdens associated with filing civil rights lawsuits, or the possible negative effects such litigation may produce. Such regulations

185. See discussion *infra* Section III.A.

186. *Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985) (White, J., concurring in the result).

187. See, e.g., *Wollschlaeger v. Governor of Fla.* (*Wollschlaeger I*), 760 F.3d 1195, 1224 (11th Cir. 2014) (observing that “[a] physician’s inquiry about the presence of firearms in a patient’s home may be viewed as the opening salvo in an attempt to treat any issues raised by the presence of those firearms”).

188. Cf. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536–37 (2001) (invalidating a spending condition that prohibited fund recipients from filing challenges to federal welfare laws).

would undermine the independence of legal professionals. Indeed, it would effectively render them agents of the state. Such regulations would so fundamentally alter the functioning of the legal profession that courts would almost certainly invalidate them on First Amendment grounds.

Again, although the legal profession highlights the constitutional and free speech concerns, they extend to other professional-client communications. Under the approach to professional speech adopted by some lower courts, legislatures would have broad authority to restrict or structure conversations relating to a wide variety of constitutional rights.¹⁸⁹ Consider the following examples, only some of which are hypothetical:

- A law prohibiting licensed marriage counselors from advising clients not to enter interracial marriages.¹⁹⁰
- A law banning licensed family counselors from advising clients that interracial adoption may not be in the best interests of the child.¹⁹¹
- A law barring physicians from discussing the availability of abortion, or the pros and cons of procuring an abortion, with their patients.
- A law prohibiting physicians or psychotherapists from engaging in certain kinds of treatments relating to gender dysphoria.
- A law compelling physicians to inform their clients that certain abortion procedures can be “reversed.”¹⁹²
- A law prohibiting physicians from expressing the view that marijuana use is medically beneficial for some patients, and thus ought to be protected under state or federal constitutional law.¹⁹³
- A law barring lawyers from discussing the safety and legal implications of the purchase and possession of firearms for clients’ self-defense.

189. See, e.g., *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, No. 12-14009, 2015 WL 8639875, at *20 (11th Cir. Dec. 14, 2015) (adopting a distinction between speech by a professional to an individual client and professional communications uttered “to a crowd at a rally”).

190. See Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation–Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1344 (2005) (discussing example).

191. *Id.* (discussing example).

192. Arkansas and Arizona have recently enacted such laws. See Sandhya Somashekhar, *In Arizona, Arkansas, Women Must be Told That Abortion can be ‘Reversed’*, WASH. POST, (Apr. 7, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/04/07/arizona-arkansas-tell-women-drug-induced-abortion-can-be-reversed>.

193. See *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (invalidating portion of policy that prohibited physicians from recommending marijuana to their patients).

- A law prohibiting physicians from asking patients any questions relating to their end-of-life plans.
- A law compelling physicians to present specific information to patients for the purpose of persuading them not to refuse life-sustaining nutrition or hydration (a right the Court has assumed competent adults possess).¹⁹⁴

Under the view, expressed by Justice White in his *Lowe* concurrence and adopted by some lower courts, that the state can regulate professional speech any time a professional is “exercis[ing] judgment on behalf of the client in the light of the client’s individual needs and circumstances,”¹⁹⁵ these laws might all be considered valid regulations. None would necessarily be subject to any meaningful First Amendment scrutiny, despite the obvious fact that each restricts, *based on subject matter or viewpoint*, a conversation about or concerning a specific or general constitutional right.¹⁹⁶

In some of the above examples, marriage counselors, physicians, lawyers, and others would be barred from engaging in a dialogue with their clients that touches on rights to marriage, abortion, marijuana use, contraception, gender identity, and the right to bear arms. Yet under the view adopted by some courts, all of these conversations would be considered discourse on “private” matters within the confines of a professional-client relationship. Questions or statements regarding the recognition or exercise of constitutional rights could readily be cast, as one court put it, as “opening salvo[s]” in the course of professional treatment or representation.¹⁹⁷

To be sure, one might argue that some of the laws described above relate not to the exercise of professional judgment “tailored to the patient’s individual circumstances,” but rather to the professionals’ *opinions* on matters outside or beyond the scope of the professional relationship.¹⁹⁸ Thus, the laws might be deemed on that basis to reside beyond the state’s licensing and regulatory powers. However, there are a number of problems with this argument.

First, as already discussed, it ignores the constitutional functions professionals perform on behalf of clients and patients, as well as the sometimes close connection between professional advice and the exercise of constitutional rights. Separating professional opinions about rights from

194. See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 280–85 (1990) (recognizing a due process liberty interest of competent person to refuse life-sustaining nutrition and hydration).

195. *Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985) (White, J., concurring).

196. See *Reed*, 135 S. Ct. at 2227 (holding that regulations that “appl[y] to particular speech because of the topic discussed or the idea or message expressed” are subject to strict scrutiny).

197. *Wollschlaeger v. Governor of Fla. (Wollschlaeger I)*, 760 F.3d 1195, 1224 (11th Cir. 2014).

198. *Id.* at 1221.

professional advice regarding their effective exercise is not a simple matter. Second, the response seems to abandon the private office/public forum distinction, which in its extreme form posits that *all* communications that occur within the examination room or office are subject to state regulation with minimal or no First Amendment scrutiny. As the Eleventh Circuit opined in its first opinion upholding Florida's firearms law, "the privacy of a physician's examination room is not an appropriate forum for unrestricted debate on [public] matters."¹⁹⁹ Third, and relatedly, providing free speech protection for at least some professional rights speech would require that courts acknowledge it is sometimes "appropriate" for professionals and clients to discuss matters of public concern in examining rooms, conference rooms, and professional offices. Fourth, the argument is inconsistent with the "opening salvo" principle, under which regulated or compelled statements are treated as a mere prelude to a course of treatment or representation within the regulated course of conduct.²⁰⁰

As the examples and discussion suggest, the state could not only prohibit but also *compel* statements relating to or concerning constitutional rights. For example, legislatures could require marriage counselors to extol the benefits of interracial marriage. Laws could compel physicians to condemn the right to possess and use marijuana, or present the state's views regarding the sanctity of life in connection with end-of-life decisions, or restrict discussions that might lead to gender-reassignment. The state could compel physicians to discuss certain forms of contraception with their patients, or require physicians to persuade women to *obtain* abortions. Insofar as state power is concerned, under the most permissive readings of precedents such as *Casey* and *Lowe*, these laws would at least stand a reasonable chance of withstanding free speech challenges by professionals and patients.

To be sure, at least one prominent free speech commentator's *intuition* tells him that some of the above laws implicate and perhaps even violate the First Amendment.²⁰¹ However, until a legislature passes such a law and a court reviews it, we will not know for certain. The unfinished doctrine of professional speech leaves plenty of room for argument. Some of the hypothetical laws in this discussion may seem rather fanciful or farfetched. Then again, not too long ago, a hypothetical law prohibiting primary care

199. *Id.*

200. *Id.* at 1224.

201. See Volokh, *supra* note 190, at 1344 ("I'm fairly certain that doctors at least have the constitutional right to inform their patients of the medical benefits of marijuana, and to urge the patients to lobby their legislators to enact a medical marijuana exception. . . . Likewise, I doubt that it would be constitutional for the government to . . . ban [] counselors from advocating (or condemning) interracial marriages or adoptions.").

physicians from asking their patients questions about firearms possession in the home might have warranted the same skeptical reaction. We need not resort to hypothetical enactments. Recent laws regulating professional speech concerning Second Amendment rights, abortion, and equality raise serious free speech concerns.

Viewing these regulations as restricting professional rights speech supports the intuition that such laws implicate, and indeed may violate, the Free Speech Clause. Recognizing that some professional speech regulations affect constitutional and other legal rights complicates the lines courts have been drawing between speech and conduct, and between public and private speech. Recent professional speech regulations have highlighted another dimension of the state's power to license and regulate professionals. In that dimension, professional regulations implicate patients' rights to learn about constitutional rights and professionals' ability to convey information relating to those rights.

D. *Constitutional Discourse: Arms, Abortion, and Equality*

As I have argued elsewhere, when speech restrictions concern or touch upon the subject of constitutional rights, heightened First Amendment scrutiny is justified for two general reasons.²⁰² First, governmental efforts to regulate or structure professional-client conversations relating to individual rights implicate core free speech concerns.²⁰³ They are, and ought to be treated as, efforts to regulate political speech.²⁰⁴ Indeed, as the examples in Part I demonstrate, in many cases they are content-based regulations of political speech.

As the Supreme Court recently emphasized in *Reed v. Town of Gilbert*, regulations that target or compel speech based on its subject matter or viewpoint are subject to strict scrutiny.²⁰⁵ In *Reed*, a town had subjected directional, political, and other signs to different standards based on their content.²⁰⁶ The Court held that the signage ordinance was content-based because the standard to be applied to any sign “depend[ed] entirely on the communicative content of the sign.”²⁰⁷

202. See Zick, *supra* note 1, at 41–55.

203. See *id.* at 44–50 (discussing expressive values harmed by rights speech regulations).

204. See *id.* at 4 (arguing that rights speech “goes to the heart of democratic self-governance in the sense that it implicates the content and scope of limits on state power”).

205. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

206. *Id.* at 2224–25.

207. *Id.* at 2227.

The holding and rationale of *Reed* strongly suggest that the laws discussed in Part I are content-based and ought to be treated as such. The laws under consideration restrict or compel the dissemination of information about matters of public concern, including firearms, abortion, marriage, and contraception. They restrict the dissemination of information, or compel its disclosure, in part of the political speech marketplace. Like the broader category of rights speech, professional rights speech is deserving of the highest level of First Amendment protection. When states suppress, dictate, or compel communications based on their content, their laws are subject to strict scrutiny. If this is true with regard to directional and other temporary signs, it surely must also be true with regard to content relating to substantive rights. As the discussion in the preceding Section and in Part III show, the fact that the speakers and audiences are professionals and their clients does not permit the state to evade heightened First Amendment scrutiny.

Second, rights speech regulations also implicate non-expressive constitutional rights.²⁰⁸ In some cases, most clearly in the abortion context, they can effectively undermine or interfere with the exercise of constitutional rights.²⁰⁹ Regulations of rights speech can also be used by the state to favor or diminish constitutional rights.²¹⁰ By regulating private speech, in this case professional-client communications, the state can effectively favor or disfavor certain rights over others. The state can engage in governmental rights speech and propound its own views with respect to constitutional rights. However, it is not allowed to diminish or disfavor constitutional rights through the regulation of private expression.²¹¹

Professional rights speech regulations raise democratic process concerns. Although they may present as regulations of professional conduct or treatment, they operate as restrictions on the private exercise of expressive or non-expressive constitutional rights. Even where, as in the arms context, the state purports to be protecting Second Amendment rights, it is doing so in a way that places a regulatory thumb on the scale of the non-expressive right.²¹² The state may achieve added protection for the right to bear arms, but it does so at the expense of the free flow of information. In this context, as in others, the Free Speech Clause ensures that the flow of information about rights is

208. See Zick, *supra* note 1, at 52–55 (discussing non-expressive harms caused by rights speech regulations).

209. *Id.* at 52.

210. *Id.* at 53–54 (discussing de facto ranking of rights by the state, rather than by the people).

211. See *id.* (discussing harms to the democratic process caused by some rights speech regulations).

212. See *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, No. 12-14009, 2015 WL 8639875, at *27 (11th Cir. Dec. 14, 2015) (balancing free speech rights of physicians and patients against Second Amendment right to bear arms and privacy with respect to arms possession).

uninhibited and robust. It precludes the state from imposing its own view of constitutional rights under the guise of exercising regulatory authority with regard to professional services.

Let us return briefly to the examples discussed in Part I, in order to consider the expressive and non-expressive harms associated with professional rights speech regulations. Commentators have focused on concerns such as the dissemination of expert knowledge, patients' access to information, or the interests of professional knowledge communities.²¹³ These are important concerns. However, as noted, states are regulating not merely the dissemination of clinical advice and medical treatments, but important dialogue about or concerning constitutional rights. In this sense, professional rights speech regulations are a far cry from typical licensing requirements. Regulations that forbid, alter, or compel communications relating to constitutional rights raise a distinctive set of constitutional concerns.

Florida's firearms privacy law expressly forbids specific inquiries on identified topics that the state claims relate solely to the practice of medicine. However, the purpose of the detailed proscriptions on physician inquiries, record-keeping, and harassment is to prevent doctors from engaging in what some legislators—and, apparently, the NRA—believed to be politically charged attacks on patients' Second Amendment rights.²¹⁴ In essence, the state disagreed with the content of physicians' inquiries about firearms, thought such inquiries might be working to dissuade at least some patients from having firearms in their homes, and acted to censor professional communications regarding firearms possession.²¹⁵

The First Amendment does not permit the state to suppress information on the ground that it might be "too persuasive."²¹⁶ This is true whether the speech is delivered on a street corner or in a physician's office. The underlying subject matter of the Florida inquiry ban relates to the exercise of a constitutional right. That the law regulates communications on a matter of important public concern is reason enough to subject it to skeptical First Amendment review. However, the law suffers from an additional infirmity.

213. See generally Haupt, *supra* note 3 (focusing on expertise of "knowledge communities"); POST, JURISPRUDENCE, *supra* note 3 (focusing on transmission of information from expert to client).

214. See *Wollschlaeger v. Governor of Fla. (Wollschlaeger II)*, 797 F.3d 859, 901–02 (11th Cir. 2014) (Wilson, J. dissenting) (describing the legislative history that led to the Florida Act).

215. See *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, No. 12-14009, 2015 WL 8639875, at *25 (11th Cir. Dec. 14, 2015) ("The Act protects the right to keep and bear arms by protecting patients from irrelevant questioning about guns that could dissuade them from exercising their constitutionally guaranteed rights").

216. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011).

As noted, it seeks to impose the state's views regarding the Second Amendment and firearms possession, through a form of professional censorship. Thus, it is both subject-matter and viewpoint-discriminatory. Such laws merit the strict scrutiny reserved for laws that single out political expression.²¹⁷

Florida defended the law, in part, as a regulation of professional practices. However, as the Eleventh Circuit's third opinion on the law made clear, what it actually regulates is a conversation relating to the right to bear arms. In upholding the law, the court relied heavily on Florida's interest in ensuring that the exercise of Second Amendment rights was not chilled by physician inquiries about arms possession or statements about the safety of having arms in the home.²¹⁸ Viewed in this light, the Florida Act regulates a topic of important public concern – firearms safety.²¹⁹ It also seeks to protect the state's own viewpoint regarding the importance or sanctity of the right to bear arms. Note that doctors and patients are not engaged in some deep political discourse regarding Second Amendment rights during patient intake questioning or other aspects of the examination. They well could be, and the state ought not to interfere with such conversations if and when they occur. However, even assuming the questioning is merely routine, it relates to the safety implications of possessing firearms in one's home.

When states regulate speech on a matter of such clear and critical public concern, their laws ought to be subject to strict scrutiny. Government regulation of a conversation between one person and another that relates to a constitutional right are inherently suspect. The fact that a patient might be convinced, even as a result of routine inquiries by a physician, to refrain from exercising Second Amendment rights or to exercise them with greater care is a justification for *protecting*, rather than suppressing, the inquiry. The patient may hear and consider the inquiry, but not consider it relevant or important enough to merit any change in behavior. The decision is the patient's, and neither the state nor physicians ought to engage in coercive measures to override the choice. However, whatever the decision, it ought to be based on all available information—including information disseminated by professionals, who certainly occupy a position that allows them to provide

217. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (subjecting state law prohibiting offensive flag-burning to strict scrutiny).

218. See *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, No. 12-14009, 2015 WL 8639875, at *24–25 (11th Cir. Dec. 14, 2015) (discussing Florida's "compelling" interests in protecting Second Amendment rights and privacy with regard to arms possession).

219. See *D.C. v. Heller*, 554 U.S. 570, 592 (2008) (recognizing Second Amendment right to bear arms). See also *Zick*, *supra* note 1, at 38 ("[D]iscourse regarding Second Amendment rights now focuses primarily on the scope of the right and, in particular, the extent to which its exercise can or ought to be restricted.").

information regarding the safety implications of exercising Second Amendment rights.²²⁰

From this perspective, it is not the state's interference with a "bounded institution," or the legislature's lack of respect for the conclusions of a particular "knowledge community," that makes the Florida law or others suspect under the First Amendment.²²¹ As I argue in Part III, these considerations provide some justification for skeptical review of professional speech regulations.²²² However, professional rights speech regulations are troubling for different reasons. In essence, states are claiming the authority to restrict communications regarding fundamental constitutional rights as an incident to licensure. As I have argued, the logic of this position is that government could prohibit (or compel) almost any speech by a licensed professional that relates to a constitutional right.

Thus, Florida's interference with professional-client discourse about or concerning the exercise of a constitutional right merited the strict scrutiny the Eleventh Circuit ultimately gave it, rather than the rationality review of its first opinion. What is missing from the court's opinions is any recognition that the reason strict scrutiny is appropriate relates to the special content of the conversation Florida regulated. Even though the communication takes place in the context of the physician-patient relationship and relates to medical care, it concerns a matter of pressing concern with regard to public safety. It is not just the physician's right to ask the question that is at stake; patients too have a First Amendment interest in the conversation. As Robert Post has suggested, access to expert knowledge can empower individuals to engage in meaningful public discourse.²²³ Specifically, access to professional knowledge can enable individuals to participate in the formation of public opinion—participation that Post argues is necessary for effective self-government.²²⁴ Access to professional knowledge that relates to the exercise of constitutional rights, including the right to bear arms, is critically important in all of these respects.

For similar reasons, laws compelling physicians to disclose detailed, content-specific information regarding abortion, or to present ideological messages to patients, likewise ought to be treated as suspect under the First

220. *Cf. Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968) ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

221. *See generally* Halberstam, *supra* note 3; Haupt, *supra* note 3.

222. *See infra* Section III.D.

223. POST, JURISPRUDENCE, *supra* note 3, at 33–34.

224. *Id.* at 46.

Amendment.²²⁵ Unlike compelled disclosures relating to breast cancer surgery or certain dangerous medical procedures, compulsory abortion disclosures specifically address the subject matter of a constitutionally protected activity.²²⁶

To be sure, compulsory abortion disclosure laws do not purport to explicitly regulate intellectual or political discourse regarding abortion rights. However, by prescribing the content of what physicians must say about the procedure and its effects, they regulate abortion communications between physicians and their female patients. Like the Florida firearms law, compulsory disclosure laws relate to and can potentially affect the decision whether or not to exercise a constitutional right. Thus, the compelled content may influence patients' opinions regarding the constitutional right to abortion—indeed, that appears to be the point of many compulsory abortion speech laws.

What patients learn in the examining room may also affect discussions about abortion at home, at work, and in other contexts. Thus, it is not merely that the laws compel physician speech that matters to patients in terms of their specific course of treatment. The effects of compulsion on public discourse must also be considered.²²⁷

Of course, states may legitimately compel disclosure of the risks of medical procedures – including abortion. Sometimes they may do so in an effort to dissuade patients from accepting risks the state deems to be unreasonable, as where certain procedures have proven to have high mortality rates. However, persuading patients not to exercise a constitutional right through the mechanism of compelled disclosure is a fundamentally different matter. Laws of this nature, which intersect closely with constitutional rights, regulate an important part of the broader social discourse regarding rights. They raise the specter that the state will smuggle its political views regarding the exercise of constitutional rights into the examining room. The state's intervention occurs at a point where it is critical that factual and other information regarding the right be disseminated, and in a place where a constitutional right likely will or will not be imminently exercised.

The free speech problems with compulsory disclosure laws extend beyond the abortion right example. As discussed, under current approaches to

225. For a general discussion of compelled abortion disclosures and their free speech implications, see Corbin, *supra* note 3.

226. See David Orentlicher, *Abortion and Compelled Physician Speech*, 43 J.L. MED. & ETHICS 9 (2015) (discussing state disclosure requirements relating to electroconvulsive treatment and other medical procedures).

227. See Zick, *supra* note 1, at 47–48 (arguing that “laws that compel physicians to communicate detailed information to their patients about abortion’s negative effects can seriously distort abortion rights discourse”).

professional speech, states would be allowed to compel disclosures regarding a variety of legal and constitutional rights. A law that compelled physicians to discuss contraception with their female patients, toward the end of persuading them to use a particular method thought by the government to be particularly effective, would raise similar concerns. Whether the state seeks to encourage or discourage exercise of the right in question, its intervention in this sphere raises First Amendment and other constitutional concerns.

It is particularly important that meaningful First Amendment scrutiny be applied to these professional-client interactions. The Due Process Clause protects substantive reproductive rights. When the state seeks to compel private speech and persuade patients not to exercise a constitutional right, the First Amendment serves a separate but related function. It ensures that information relating to reproductive rights flows freely, and that the state cannot use professionals to skew conversations regarding exercise of constitutional rights.²²⁸ Thus, in the abortion context, the Due Process Clause's "undue burden" standard ensures that women remain physically and psychologically free to exercise a constitutional choice. The First Amendment free speech limitation ensures that women have all medically necessary information to make the choice, and prevents the state from using the examining room as a forum for its own ideological expression.

Government can certainly require that medically relevant information regarding abortion and other medical procedures be conveyed to patients. The state may even provide that information in the belief that it will persuade a woman not to procure an abortion. However, when it engages in an ideological assault on the constitutional right to abortion, or any other constitutional right, the state is no longer simply ensuring that women's informed consent is obtained. Contrary to the cryptic analysis of free speech in *Casey*, The First Amendment is not merely "implicated"²²⁹ when states pass ideological abortion disclosure laws; it is threatened in unique ways. As the Fourth Circuit recently observed when it invalidated a compelled abortion speech law: "Though states may surely enact legislation to ensure that a woman's choice is informed and thoughtful when she elects to have an abortion, states cannot so compromise physicians' free speech rights, professional judgment, patient autonomy, and other important state interests in the process."²³⁰

228. See Corbin, *supra* note 3, at 1293 ("[T]he free flow of information that results when speech is protected ensures people have access to the full range of ideas and information for their political and personal decision making.").

229. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 838 (1992).

230. *Stuart v. Camnitz*, 774 F.3d 238, 255 (4th Cir. 2014) (emphasis added).

I have saved the discussion of SOCE therapy bans for last, in part because it may be most difficult to justify First Amendment scrutiny for such laws. Some courts have treated SOCE therapy as a form of professional conduct, indistinguishable from prescribing a drug or performing a surgery.²³¹ If they are indeed the functional equivalent of an unlawful prescription, SOCE bans do not implicate the First Amendment's Free Speech Clause. However, as discussed in more detail below, it is difficult to justify the conclusion that specified *talk* therapies, which are arguably barred by the state owing at least in part to their *content* (i.e., what they convey to or about minor homosexuals) lie entirely beyond the First Amendment's reach.²³²

Even assuming that they are within the First Amendment's coverage, however, some might have difficulty viewing psychotherapists as constitutional intermediaries in this particular context. After all, in contrast to lawyers and even some physicians, psychotherapists' speech would seem to have little to do with informing patients about constitutional rights or enhancing their ability to participate in any sort of public opinion-making.

However, in certain respects, SOCE therapy bans function similarly to firearms inquiry bans and compulsory abortion disclosures. On one view, SOCE bans are efforts by states to use their licensing power to reject and suppress an old form of sexual orientation bigotry. The notion that homosexuality is a disease or sickness has a long and troubled connection to the oppression of gay men and lesbians.²³³ Through SOCE bans, states reject this idea as discredited (at least as to minor patients); they effectively ban its promulgation in the context of professional therapy sessions. Viewed from this perspective, SOCE bans constitute state intervention in the debate about the nature of homosexuality—an issue at the heart of both historical and contemporary debates concerning gay equality.

The state is free to counteract and reject anti-gay bigotry in many ways. It may, for example, pass legal employment and other anti-discrimination protections to benefit gay persons. It may provide for marriage equality. It may also express its disapproval of anti-gay ideologies in non-coercive ways, such as through its own speech or through education programs.²³⁴

231. See, e.g., *Pickup v. Brown*, 740 F.3d 1208, 1230 (9th Cir. 2013).

232. See discussion *infra* Section III.A.

233. See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1331 (2000) (noting that anti-gay discourse has changed over the decades, “with social republican arguments superseding medical arguments, which earlier had superseded natural law arguments”).

234. See generally COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY* (2012) (arguing that governments should engage in non-coercive persuasion to convince citizens to adopt liberal positions regarding gay equality and other rights).

However, when the state uses its power over professionals to restrict the provision of expert advice and treatment that directly or indirectly relates to constitutional equality, its regulatory power implicates important free speech concerns. As stated, the Free Speech Clause requires that the state justify any restrictions on ideas or viewpoints contrary to its own under a strict scrutiny standard. The fact that the restrictions in this context take the form of bans on purportedly harmful therapies does not alter this basic principle, or eliminate the need for First Amendment scrutiny of SOCE bans. When the state seeks to influence professional-client interactions that implicate the basis for, recognition of, or exercise of constitutional rights, the First Amendment is clearly implicated.

This is a minority view, insofar as courts and professional speech commentators are concerned. For example, Claudia Haupt's approach would appear to permit SOCE bans without First Amendment scrutiny, so long as they are consistent with the expert views of the "knowledge community."²³⁵ Robert Post's theory of democratic competence appears to reach a similar conclusion, for largely similar reasons.²³⁶ Under a professional rights speech approach, by contrast, the state of expert knowledge regarding the harms associated with SOCE therapies is part of the First Amendment calculus. The state may defend its ban based on those harms. However, it cannot simply decree that talk therapies or other professional communications lie beyond the First Amendment's coverage. It must defend them against free speech challenges, just as Florida must defend its inquiry ban.

In the case of SOCE bans, states appear to have plausible defenses to First Amendment claims. If the therapy is indeed harmful to minor patients, then there is a compelling interest in regulating or even proscribing it. So, too, if the practice is fraudulent, a jury can make that finding under generally applicable consumer protection laws—fraud is not covered by the Free Speech Clause.²³⁷ Further, if the state leaves open channels in which psychotherapists may discuss the merits of SOCE, its appropriateness for some patients, and the therapy's purportedly beneficial effects, then the law may be narrowly tailored to serve the state's interests. What is critical is that these analytical steps be taken, and that meaningful judicial review of professional speech restrictions like SOCE bans take place.

235. See Haupt, *supra* note 3, at 50–51 (discussing SOCE bans).

236. See POST, JURISPRUDENCE, *supra* note 3, at 56–58 (discussing state of the art with regard to expert knowledge).

237. A jury in New Jersey recently found that a religious group that promised clients it could change their sexual orientation committed fraudulent business practices. See Olga Khazan, *The End of Gay Conversion Therapy*, THE ATLANTIC (June 26, 2015), <http://www.theatlantic.com/health/archive/2015/06/the-end-of-gay-conversion-therapy/396953/>.

III. PROFESSIONAL-CLIENT SPEECH: PRINCIPLES, PRESERVATION, AND POLITICS

Part II contended that professional rights speech regulations merit heightened (strict) First Amendment scrutiny for a variety of reasons, including their effect on the constitutional functions served by professionals and the constitutional harms that are associated with regulation of speech about or concerning constitutional rights. One general answer to the arguments in Part II, and indeed the argument relied on by states in defending the professional speech regulations discussed in this Article, is that the ordinary free speech rules simply do not apply to professional-client communications. Owing to the state's licensing authority, this argument maintains, the First Amendment is either not implicated at all or is only minimally implicated. Under this reasoning, professional speech is considered unique because it is mere conduct, involves the flow of private rather than public information, and does not implicate core free speech concerns such as self-government or the search for truth. Part II is a general response to some of these contentions. This Part answers them more directly, and in more specific terms. It questions each of the allegedly distinctive aspects of professional speech and professional speech regulations. In brief, it argues that the mere fact that the parties to the regulated communications are professionals and their clients does not eradicate First Amendment free speech coverage or protection. Although they are extraordinary in certain respects, the examples discussed in Part I help to demonstrate why state licensure of professional-client communications ought generally to be viewed with greater skepticism by courts and scholars.

A. Professional Speech and Professional Conduct

The matter of “professional speech,” or communications between licensed professionals and clients/patients, could be categorically disposed of by concluding, as some courts have, that all professional activities—including those with communicative elements—are forms of conduct and thus not covered (or only minimally covered) by the First Amendment.²³⁸ Note that this conclusion would extend not only to things such as writing prescriptions and filing briefs, but also to the provision of expert advice. Under this view, regulation of any and all communications by professionals to their clients—

238. See, e.g., *Wollschlaeger v. Governor of Fla. (Wollschlaeger I)*, 760 F.3d 1195, 1217–25 (11th Cir. 2014) (relying on the speech/conduct distinction to conclude that firearms inquiry ban did not merit strict scrutiny under First Amendment); *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2013) (concluding that SOCE therapy ban regulated conduct, not speech).

or, at least, any that occur within the office setting—would be considered merely “incidental to the conduct of the profession”²³⁹ and would raise no First Amendment concerns.

In contrast to some courts, professional speech scholars have generally rejected this supposed professional speech-professional conduct distinction.²⁴⁰ However, for the most part, they have not given the speech-conduct distinction adequate consideration.²⁴¹ If recent professional speech regulations—and judicial dispositions upholding them—are indicative of future First Amendment analysis, this issue demands more serious attention.

The distinction between speech and conduct has engaged and, indeed, confounded courts and First Amendment scholars for decades.²⁴² The deep mysteries and conundrums related to this distinction cannot be resolved here. Rather, the discussion will focus on current doctrines and precedents rather than theoretical arguments such as, for example, there is in fact no defensible distinction between speech and conduct. In other words, the discussion will engage courts where and how they actually decide such matters—in the arena of precedents and principles.

There are a number of reasons to reject the “everything is conduct” interpretation. First, to parse snippets from the incomplete doctrine of professional speech, the words “incidental to the conduct of the profession” are Justice White’s, from his *Lowe* concurrence.²⁴³ Justice White’s concurrence did not embrace the notion that *all* restrictions on professional communications are regulations of conduct beyond the Free Speech Clause’s coverage. Indeed, in the very next sentence, Justice White provided this

239. *Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985) (White, J., concurring).

240. See, e.g., POST, JURISPRUDENCE, *supra* note 3, at 50 (asserting that professional advice given by lawyer to client in a private setting is covered by the Free Speech Clause); Halberstam, *supra* note 3, at 840–41 (equating professional speech and professional advice); Haupt, *supra* note 3, at 49 (asserting that “‘talk therapy’ is speech”); Kry, *supra* note 3, at 896 (arguing that regulation of professional advice is not regulation of conduct); see also Volokh, *supra* note 190, at 1343 (“Most of what many lawyers, investment advisors, accountants, psychotherapists, and even doctors do is speech.”).

241. An exception is Kry, *supra* note 3, at 892–97 (offering detailed arguments regarding why regulation of professional advice is not the regulation of conduct).

242. See, e.g., *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 17 (1970) (arguing that while expression could not be controlled by government, conduct usually can be restricted); Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) (“A constitutional distinction between speech and conduct is specious. Speech is conduct, and actions speak.”); see also Frederick Schauer, *On the Distinction Between Speech and Action* (Jan. 17, 2015) (unpublished manuscript) (on file with author) (arguing that a distinction between speech and action/conduct may not be defensible).

243. *Lowe*, 472 U.S. at 232 (White, J., concurring).

example: “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.”²⁴⁴

Recent restrictions on professional-client communications do not imitate this example. However one characterizes them, the inquiry restrictions, therapy bans, and compulsory disclosure requirements discussed in Parts I and II are not “generally applicable” professional access limitations. Rather, they are direct and specific limitations on, or requirements for, professional-client communications. State officials, and some courts, have inappropriately relied on the “incidental to the conduct of the profession” language in the *Lowe* concurrence. That language does not justify the extraordinary restrictions enacted by Florida, California, New Jersey, and other states.²⁴⁵

Second, the “all professional speech is conduct” position is inconsistent with a number of Supreme Court decisions subsequent to *Lowe*, which have rejected similar arguments in professional settings.²⁴⁶ Thus, *Casey* explicitly states that “the physician’s First Amendment rights not to speak *are implicated*” when the state requires abortion disclosures.²⁴⁷ Similarly, *Rust* strongly suggests that the state is not at liberty to dictate detailed scripts to physicians—even where it funds the project in which the communications takes place.²⁴⁸ *Velazquez* also applies free speech limitations to Congress’s funding restrictions, in that case as applied to lawyers representing clients in constitutional and legal challenges to federal welfare laws.²⁴⁹ Perhaps most notably, in *Humanitarian Law Project*, the Court explicitly rejected the government’s argument that rendering professional advice and assistance—including professional legal advice—to foreign terrorist organizations constituted conduct as opposed to covered speech.²⁵⁰

These and other precedents cannot be squared with the notion that medical professionals’ *oral* inquiries, *talk* therapies, and physician *disclosures* are all instances of pure conduct entirely beyond the First Amendment’s coverage.

244. *Id.*

245. See *Wollschlaeger v. Governor of Fla. (Wollschlaeger II)*, 797 F.3d 895, 911 (11th Cir. 2014) (Wilson, J., dissenting) (“Thus, *Lowe* established only that the existence of a professional relationship is a *necessary* condition” for evading First Amendment scrutiny, not “that such a condition was *sufficient* to support this conclusion.”).

246. See *supra*, notes 23–33 and accompanying text.

247. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 838 (1992) (emphasis added).

248. *Rust v. Sullivan*, 500 U.S. 173, 192–96 (1991).

249. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 540–49 (2001).

250. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27 (2010). The Court has rejected the speech-conduct argument in other recent cases. See, e.g., *Doe v. Reed*, 561 U.S. 186, 194–95 (2010) (holding that the act of signing a referendum petition is “speech” within the First Amendment’s coverage).

To conclude that these activities are all instances of “conduct,” simply by virtue of state licensure of the practices of medicine or psychotherapy, would mean that the granting of a license transforms all professional advice into a continuous “course of conduct” beyond the First Amendment’s domain.²⁵¹ Nothing that Justice White or the Court have written or held can be interpreted to support that extraordinary proposition, which would effectively extinguish *all* First Amendment protections for licensed professionals.

Still, drawing *some* distinction between speech and conduct is obviously necessary in the context of professional-client interactions. Otherwise, activities such as writing a drug prescription or making notations on a patient’s chart would qualify as “speech” subject to First Amendment coverage and perhaps even protection. The law of malpractice, which regulates such activities, is a paradigmatic example of a type of generally applicable regulation that is, in Justice White’s words, “incidental to the conduct of the profession.” This is why physicians cannot invoke the First Amendment as protection against claims that they breached the applicable standard of patient care relating to prescribing medicines or treating patients’ conditions.²⁵²

It does not follow, however, that states may evade First Amendment scrutiny when they enact regulations establishing a professional standard of care that restricts specific inquiries about matters of public concern, bans targeted therapies that undermine sexual orientation equality, or compels particular abortion disclosures. The concern that malpractice and other standards might be vulnerable to free speech challenges likely accounts, to some degree, for the positive reception the “everything is conduct” argument has received in some recent cases. However, the argument confuses application of general standards of professional care, which can indirectly regulate speech, with the sort of direct and content-based regulations of professional-client communications described in Part I.

Malpractice liability indirectly affects professionals’ ability to communicate certain information to clients, or punishes the failure to communicate information required by the applicable standard of care. While malpractice liability ultimately rests to some degree on communicative

251. Nor are laws like Florida’s firearms inquiry ban regulations of “symbolic conduct,” as the Eleventh Circuit held. *See* *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, No. 12-14009, 2015 WL 8639875, at *19–20 (11th Cir. Dec. 14, 2015). Asking patients questions is clearly a form of *pure* speech.

252. *See* POST, JURISPRUDENCE, *supra* note 3, at 47 (“Malpractice law protects the vulnerability of clients by requiring professionals to maintain strict standards of expert knowledge.”); Halberstam, *supra* note 3, at 867 (arguing that state may regulate in order to “ensure the integrity of the communicative institution”); Haupt, *supra* note 3, at 36 (arguing that tort liability for professional malpractice is consistent with freedom of speech).

content, general standards of care do not forbid specific inquiries or treatments, or require specific statements, in advance of the formation of a professional-client relationship. Although states have sometimes required detailed disclosure requirements for certain risky procedures, laws do not *typically* enact scripts, or ban targeted professional inquiries, or eliminate particular therapies.²⁵³

Malpractice laws generally require the trier of fact to assess a course of care, to determine whether it meets applicable professional standards. By contrast, inquiry restrictions, therapy bans, and compelled disclosures do not merely codify general standards of professional care. The regulations are direct, increasingly detailed, and explicitly content-based state interventions in the realm of professional-client interactions. Such regulations fit uncomfortably within a tradition of professional malpractice regulation. They raise at least the possibility that legislators are prescribing or proscribing *communications*, rather than setting standards of conduct or care that are supported by the relevant professional community.

For example, Florida's Firearms Owners' Privacy Act restricts inquiries that are *supported* by the principal medical authorities, and thus purports to override medical judgment.²⁵⁴ SOCE therapy bans are based on still-disputed empirical evidence (although the evidence that does exist strongly suggests the therapy is harmful for some patients).²⁵⁵ Compelled abortion disclosures, which are rooted in state efforts to dissuade abortion, sometimes command communication of opinions or ideological statements rather than established medical facts.²⁵⁶ These and similar laws are not run-mine professional course of treatment regulations. They are content-based restrictions on expression.

There is something unsettling about resting First Amendment coverage and, ultimately, protection for the very broad category of "professional speech" on a contested distinction between speech and conduct. This has not been done for public employee speech, student speech, or any other free speech framework under which government stands in some special relationship with the speaker or communication. And for good reason. As discussed further below, granting the state power to re-define all interactions

253. See Orentlicher, *supra* note 226, at 9 (discussing state disclosure requirements relating to electroconvulsive treatment).

254. See *Wollschlaeger v. Governor of Fla. (Wollschlaeger I)*, 760 F.3d 1195, 1230 (11th Cir. 2014) (Wilson, J., dissenting) (observing that the American Medical Association, among other authorities, supported collection of firearms ownership information).

255. *King v. Governor of N.J.*, 767 F.3d 216, 239 (3d Cir. 2014) (noting that empirical studies on the effects of SOCE "fall[] short of the demanding standards imposed by the scientific community").

256. See *Corbin*, *supra* note 3, at 1327–29 (discussing the distortion harms associated with some compelled abortion disclosures).

and encounters between professionals and clients as conduct, so long as they occur in the context of the professional-client relationship, threatens significant free speech, professionalism, and other values.²⁵⁷ These general concerns are in addition to the specific constitutional concerns already examined in Part II.

What some federal judges have called the speech-conduct “labeling game”²⁵⁸ can generally be avoided by adopting a general standard that requires strict First Amendment scrutiny for any direct, content-based regulation of lawful professional advice. This approach is consistent with recent Supreme Court precedents. It is also consistent with the treatment of general malpractice and other professional standard of care obligations, which as noted have not generally been thought to raise any First Amendment concerns. Under this standard, state licensure and registration, professional access limits, and general standard of care requirements would all remain beyond the First Amendment’s coverage. However, when the state ventures beyond these traditional boundaries, it enters an area in which it must respect First Amendment limitations.

In sum, some recent decisions have erred in concluding that inquiry restrictions, therapy bans, and compelled disclosures are mere regulations of conduct incident to the practice of a profession. These unprecedented regulations target or compel communications based on their specific content. The communications themselves may ultimately turn out to be unprotected speech. However, to characterize patient inquiries, follow-up questions, detailed oral and visual scripts, and lengthy exchanges between patients and their therapists regarding sexual orientation as pure conduct not even covered by the Free Speech Clause tortures and further confuses an already unstable and unreliable distinction. States cannot evade scrutiny of professional rights speech or other professional speech regulations on this basis.

B. *Institutionalism and Opportunism*

The speech-conduct analysis taps into some broader First Amendment concerns. In assessing the appropriate scope of governmental power over professional practices and professional speech, First Amendment institutionalism and opportunism are both worthy of some consideration. In its strong form, institutionalism would suggest that First Amendment coverage ought to be quite broad, perhaps covering any and all professional

257. See discussion *infra* Sections III.E–F.

258. *Pickup v. Brown*, 740 F.3d 1208, 1218 (9th Cir. 2013) (O’Scannlain, J., dissenting from the denial of rehearing en banc).

communications and practices. Opportunism, by contrast, might suggest no First Amendment coverage at all for professional speech. The examples discussed in Part I demonstrate that at least in their strongest forms, both of these approaches are flawed.

First Amendment institutionalists argue that when applying First Amendment doctrines and principles, courts ought to pay special attention to the unique characteristics of certain institutions.²⁵⁹ Some institutions, such as universities and churches, perform unique functions and play critical roles in terms of serving First Amendment values. Rather than insisting upon application of general expressive rules across the entire range of social interactions, an institutional approach takes these special functions and roles into account. It provides special protection to worthy First Amendment institutions, deferring to their judgments and granting them special protection from governmental regulation.

Under an institutional approach, one might argue that professional practices, *as such*, are deserving of special protection from state regulation. Under this strong version of the institutional approach, the licensed professions would be considered legally autonomous and self-governing institutions largely free from state regulation. Following this approach, many or even most state efforts to regulate professional practices, including the examples discussed in Part I, would be considered presumptively suspect under the First Amendment. At the very least, such regulations would raise serious free speech concerns. Indeed, under a strong institutionalist approach even generally applicable laws, such as malpractice laws, might be considered suspect.

The basic institutionalist intuition is correct: professional-client relationships are social institutions which are grounded in specialized knowledge, as to which a considerable degree of self-regulation applies.²⁶⁰ However, for a number of reasons, a strong institutionalist approach would be problematic insofar as professional speech is concerned. Thus, the argument that regulations of professional rights speech and other professional-client communications are suspect under the First Amendment ought not to rest on institutionalist principles.

In contrast to entities such as universities and churches, which are readily identifiable, defining the relevant institution insofar as the professions are concerned is not so simple. It is not clear whether the institutionalist approach

259. See, e.g., PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2012); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 *UCLA L. REV.* 1497 (2007); Frederick Schauer, *Towards an Institutional First Amendment*, 89 *MINN. L. REV.* 1256 (2005).

260. Halberstam, *supra* note 3, at 777–78.

would define the relevant institution as a group of professionals, professional associations, or the relationship between individual professionals and their clients or patients. Unlike a church or library, “professional speech” is not, as such, an “institution.” Moreover, even if professional speech generally meets the basic criteria for institutional consideration,²⁶¹ not all professions perform important First Amendment functions. Legal and medical professions can plausibly be described as engaged in important processes of collecting and disseminating knowledge and information to the public. However, the same cannot generally be said of nail technicians, morticians, tour guides, and a host of other licensed professionals. As a result, in the case of the licensed professions, the basic rationale for providing special deference and protection to institutions may not hold up across the range of disciplines.

There are also substantive problems with application of the institutionalist approach to licensed professionals. As Robert Post has observed, under the strongest and most literal application of institutionalism, “First Amendment coverage should be triggered by any political regulation of extant professional practices.”²⁶² This approach, which Post correctly characterizes as “implausible,” would render not just state inquiry bans and the like but even professional malpractice regulations subject to First Amendment review.²⁶³ However, as discussed earlier, professional malpractice rules and other professional regulations do not generally implicate First Amendment values.²⁶⁴ In sum, First Amendment institutionalism may sweep too broadly insofar as it assigns constitutional value to professional practices *as such*.

Institutionalism could also undermine important individual free speech values. Insofar as the institutional approach assigns great deference to the professions themselves to restrict speech, it may negatively affect the free speech rights of both professionals and their clients. Within the social institution of the professional-client relationship, individual expressive rights must also be protected and preserved. Moreover, as discussed below, granting too much deference to the professions to police their own members’ speech could validate politically motivated professional restrictions.²⁶⁵ Professional organizations are susceptible to political pressure and, in some cases, capture. Thus, institutionalism’s basic assumption that the professions and other institutions will generally or always be guided by First Amendment values and principles seems questionable.

261. See HORWITZ, *supra* note 259, at 248 (arguing that professional speech “meets the basic definitional criteria for First Amendment institutions”).

262. POST, JURISPRUDENCE, *supra* note 3, at 51.

263. *Id.*

264. See discussion *supra* Section III.A.

265. See discussion *infra* Section III.E.

Perhaps these and other concerns have led even committed institutionalists to locate the licensed professions, and professional speech, within the “borderlands of institutionalism.”²⁶⁶ As discussed in the next Section, institutionalists’ supposition that as an “institution,” professional speech often “contributes to public discourse” in a way that makes it worthy of First Amendment consideration, is surely correct.²⁶⁷ And institutionalists’ focus on social and other contextual factors can flesh out why certain kinds of restrictions on professional advice are deeply problematic. Thus, the institutionalist account provides further reason to view at least some restrictions on professional speech as troubling from a free speech perspective. However, not all professional advice makes a contribution to social discourse, and even within the professional-client relationship some state regulation is justified. Recent professional speech regulations support Robert Post’s assertion that “a more nuanced inquiry is required, one which will evaluate whether particular government regulations threaten particular constitutional values.”²⁶⁸

At the opposite end of the spectrum, one might argue that the Free Speech Clause is simply not an appropriate “fit” for most challenges to professional regulations—including, or especially, the sorts of professional regulations discussed in Part I. This argument is based on the concept of free speech “opportunism,” which is associated most prominently with Professor Fred Schauer.²⁶⁹ Schauer’s central observation is that “doctrinally dubious” arguments against government regulations are sometimes “recast in First Amendment terms” in order to convince judges that the regulations are morally or otherwise invalid.²⁷⁰ According to Schauer, this strategic use of the Free Speech Clause has occurred in various contexts, including commercial speech, nude dancing, and campaign finance.²⁷¹ Schauer contends that opportunistic or strategic invocation of the First Amendment in these and other contexts may ultimately transform the free speech guarantee in unanticipated ways, and could have a negative effect on coverage for things like core political speech.²⁷²

266. See HORWITZ, *supra* note 259, at 247 (placing professional speech in the “borderlands”).

267. *Id.* at 249.

268. POST, JURISPRUDENCE, *supra* note 3, at 52.

269. Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 174, 174–97 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). Professor Schauer has also, incidentally, been influential in the area of First Amendment institutionalism. See Schauer, *supra* note 259.

270. Schauer, *supra* note 269, at 184.

271. *Id.*

272. See *id.* at 176 (observing that if the choice of free speech claims is based on goals “external to the First Amendment rather than as a consequence of the purposes the First

A critique based on “opportunism” would suggest that litigants, courts, and commentators who claim free speech protection against professional inquiry bans, therapy bans, and compulsory disclosures might be engaged in a form of strategic behavior. In effect, they may be substituting a free speech argument for a more apt or fitting economic liberty argument grounded in the Due Process Clause. In sum, recognizing, correctly, that due process claims will have no real purchase in the context of economic regulation, litigants are turning to the Free Speech Clause as a second-best argument against a new generation of professional regulations.

Part II is at least a partial response to this concern. It contended that inquiry bans, therapy bans, and compelled disclosures are regulations of professional rights speech that affect important First Amendment rights and principles. Viewed from this perspective, constitutional challenges to these regulations are not regulatory challenges masquerading as expressive claims. They are appropriate invocations of the Free Speech Clause, not opportunistic substitutions.

First Amendment challenges to licensure requirements, certain state-imposed entry barriers, or even pricing regulations would indeed be second-best claims worthy of the label “opportunistic.” In contrast, inquiry bans, therapy bans, and compulsory abortion disclosures do not in any way target the *economic* dimension of professional-client relationships. Nor do they challenge the state’s basic police power to license professionals, or demand that they meet rudimentary standards of expertise or care. Instead, First Amendment challenges to laws like those discussed in Part I aim squarely at free speech values and concerns. In essence, professionals are claiming First Amendment coverage for asking questions and engaging in therapeutic exercises. They are also responding to state compulsion of detailed scripts and narratives. But for the fact of state licensure, coverage and protection in these contexts would be presumed. The pertinent question, then, is not why free speech claims are appropriate in these contexts, but rather why licensure *permits* the government to ban and compel in the asserted ways.

Indeed, it is arguably the states, not the plaintiffs, who are acting opportunistically. States are using their licensure authority to restrict what would otherwise be clearly covered expression. State defendants have offered seemingly limitless accounts of their power to regulate licensed professionals. Relying primarily on Justice White’s *Lowe* concurrence and the inscrutable *Casey* paragraph, states have argued that any communications that occur within the professional-client relationship are conduct, part of a

Amendment was designed to serve, we may as a nation find ourselves with a cultural understanding of the First Amendment that diverges substantially from what a less misused First Amendment would have produced”).

course of treatment, or otherwise subject to reasonable regulations. What is reasonable under this regime is to be defined by the state, pursuant to its power to license.

This is an extraordinary claim of regulatory power, one that extends far beyond entrance barriers, knowledge requirements, or ordinary standards of care. It is essentially an argument that physicians, therapists, lawyers, and other licensed professionals leave their First Amendment rights outside their office doors. States are asserting this extraordinary power in the context of treatments and professional practices that implicate constitutional rights, such as the right to bear arms and abortion. Perhaps unable or unwilling to regulate speech on these matters directly, or with respect to the public, states have turned to their licensure power to express disagreement with professional speech and to convey particular state viewpoints regarding these matters. Regulation of professional speech is thus a second-best means for states to weigh in on disputed constitutional rights.

As the examples discussed in Part I show, states are reshaping the professional-client relationship in fundamental ways. We ought not to respond to professional speech regulations by declaring that the professions are entitled to be free from *all* state regulations. That takes institutionalism too far, and may sacrifice important state interests as well as individual free speech rights. Nor, however, can we simply dismiss professionals' free speech concerns by pointing to their licensed status. As recent enactments show, the danger stemming from professional regulations is not that the First Amendment will be unrecognizable should some professional free speech claims succeed. Rather, the greater danger is that the professional-client relationship will be unrecognizable should all such claims fail.

C. Professional Speech and First Amendment Values

Even assuming that inquiry restrictions, therapy bans, and compelled disclosures regulate speech and not merely conduct and that challenges to these laws are not examples of opportunism, questions remain regarding both the value of such communications and the degree of First Amendment protection to afford them. Judicial analysis has been particularly deficient in considering this issue. The Supreme Court has not said anything explicit regarding the First Amendment values associated with professional speech. In recent cases, lower courts have also failed to address the First Amendment values associated with professional communications.

As I have argued, courts have failed to consider professional rights speech concerns, such as those identified in Part II. In particular, courts have failed to appreciate the connection between professional speech and the world

beyond professionals' offices. Contrary to judicial suppositions, professional-client interactions are not insular events shut off from the concerns of the broader society.

Some commentators have attempted to fill the First Amendment theoretical gap.²⁷³ Although existing theories and approaches are underdeveloped in certain respects, they demonstrate that courts have generally ignored the connection between professional communications and free speech values.

Free speech scholars have elaborated on the speech rights of clients and professionals and, perhaps most importantly, generated important insights into the public-private distinction some courts have relied on to uphold professional speech regulations. As commentators have noted, professionals advising their clients are not similarly situated to street corner orators and other speakers present in the public sphere.²⁷⁴ Thus, the state can regulate professional speech in ways that would be unconstitutional if applied to ordinary public speech. Again, malpractice laws, which indirectly regulate some speech content, are paradigmatic examples. These laws are designed to preserve and protect the professional-client relationship, including important aspects and characteristics such as trust, professional expertise, and confidence.²⁷⁵

Professional-client interactions occur within what Professor Halberstam has referred to as "bounded speech institutions."²⁷⁶ Within these socially defined relationships, the state may intervene in ways that are necessary to preserve the institution.²⁷⁷ Client protection and preservation of professional standards are undoubtedly important state interests. However, these interests do not extinguish the First Amendment rights of clients or the professionals they consult.²⁷⁸ Commentators have argued that professional speech

273. See sources cited *supra* note 3.

274. See, e.g., POST, JURISPRUDENCE, *supra* note 3, at 18–23 (discussing the application of the First Amendment in public and private spheres); Halberstam, *supra* note 3, at 773, 777 (explaining the difference between regulation of public speech by street corner orator and regulation of speech by professionals).

275. See POST, JURISPRUDENCE, *supra* note 3, at 45 (“[L]aw stands as a surety for the disciplinary truth of expert pronouncements.”); Halberstam, *supra* note 3, at 773 (explaining that regulation of professionals “maintain[s] the profession” by insisting on adherence to professional standards).

276. Halberstam, *supra* note 3, at 778.

277. *Id.*

278. See *id.* at 846 (contending that professional speech merits some free speech protection); see also POST, JURISPRUDENCE, *supra* note 3, at 47 (“First Amendment coverage might arise in contexts that are distinct from malpractice, in which the state may seek to corrupt, rather than to protect, the diffusion of expert knowledge.”); Haupt, *supra* note 3, at 5 (professionals have First Amendment right “to express one’s professional opinion as a member of the knowledge community”).

regulations generally implicate the free speech rights of both clients and professionals, and that coverage and protection for professional speech is justified under some or all of the principal First Amendment theories—autonomy, self-government, and the search for truth.²⁷⁹

Commentators, and a few courts, have expressly acknowledged the important autonomy interests that can be affected by professional speech regulations.²⁸⁰ Professionals have a First Amendment interest in conveying relevant information to their clients, and clients in turn have a First Amendment interest in receiving this information. Nonetheless, most courts reviewing recent regulations have not considered these personal liberty or autonomy interests to be weighty enough to merit full First Amendment coverage or protection.

In particular, courts have placed significant emphasis on the “private” nature of professional-client communications and consultations.²⁸¹ As a result, they have attached little or no *public* value to speech that occurs in a physician’s office during a one-on-one consultation. However, as Professor Halberstam observes, “professionals provide individuals with access to information that enables the latter to come to important decisions affecting their lives.”²⁸² Further, as discussed in Part II, professionals such as attorneys “take an active part in assisting in the vindication of existing legal and constitutional rights in courts and other government fora.”²⁸³

279. See, e.g., POST, JURISPRUDENCE, *supra* note 3, at 33–34 (resting basis for protection for professional speech on the principle of “democratic competence,” which focuses on the dissemination and receipt of knowledge relevant to public discourse); Halberstam, *supra* note 3, at 815 (observing that professional speech “serves to educate the citizenry, is integral to the workings of self-government, and may even itself form part of a lesson in democracy” and that liberty theories offer no justification for excluding professional speech from coverage); Haupt, *supra* note 3, at 28–35 (arguing that professional speech protection is justified under autonomy, marketplace, and self-government approaches).

280. See, e.g., *King v. Governor of N.J.*, 767 F.3d 216, 234 (3d Cir. 2014) (emphasizing the “informational function” of professional speech and drawing an analogy to protection for commercial speech); Berg, *supra* note 3, at 234 (rooting theory of protection for doctor-patient discourse in autonomy interests of patients); Haupt, *supra* note 3, at 29–32 (discussing the “decisional autonomy interests” of clients and the “professional autonomy interests” of physicians and other professionals).

281. See, e.g., *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, No. 12-14009, 2015 WL 8639875, at *20 (11th Cir. Dec. 14, 2015) (explaining that when physicians meet with patients in examination rooms and discuss treatment, the conversation “is easily classified as professional speech”); *Wollschlaeger v. Governor of Fla. (Wollschlaeger I)*, 760 F.3d 1195, 1218 (11th Cir. 2014) (contending that a professional’s speech rights “approach a nadir . . . when the professional speaks privately, in the course of exercising his or her professional judgment, to a person receiving the professional’s services”).

282. Halberstam, *supra* note 3, at 812.

283. *Id.*; see also discussion, *supra* Section II.B.

Indeed, even intimate, personal treatment advice from professionals can relate to significant public concerns. Professor Halberstam argues that the fact that professionals generally address the personal concerns of clients “does not rule out the possibility that individuals take political action based on the knowledge gained from consulting with a professional about an issue that was initially of a particularly personal concern.”²⁸⁴ Thus, he concludes, professional speech “would appear to fall within the expanded political speech principle.”²⁸⁵ According to Halberstam: “[P]rofessional speech serves to educate the citizenry, is integral to the workings of self-government, and may even itself form part of a lesson in democracy.”²⁸⁶ These observations support the argument that professional rights speech regulations threaten significant free speech values. Beyond that, they raise questions about the proposition that what takes place in examining rooms and therapists’ offices is a private dialogue that has no effect on public discourse.

Robert Post contends that protection for professional speech depends upon its relationship to self-government and public discourse.²⁸⁷ Post argues that a professional’s interest in autonomy will not shield her from liability for malpractice or other breaches of professional standards. Only insofar as the professional’s speech relates to public matters and is important to discussion of those matters does First Amendment coverage “materialize.”²⁸⁸ Under Post’s approach, First Amendment coverage “should extend to all efforts deemed normatively necessary for influencing public opinion.”²⁸⁹ As he notes, public opinion is generally formed in the public sphere.²⁹⁰ In that sphere, individual speakers and their audiences are presumed to be autonomous and equal. In the private sphere, by contrast, the state may sometimes treat audiences as “dependent, vulnerable, and hence unequal.”²⁹¹ Thus, owing to asymmetries of information and power in the professional-client relationship, malpractice law can regulate the content of a professional’s speech in a manner that would be impermissible in the public sphere.²⁹²

Nevertheless, Post argues that shielding some professional-client interactions from state regulation and interference is critical to the formation

284. Halberstam, *supra* note 3, at 813.

285. *Id.* at 812.

286. *Id.* at 815.

287. POST, JURISPRUDENCE, *supra* note 3, at 13.

288. *Id.* at 12.

289. *Id.* at 18.

290. *Id.*

291. *Id.* at 23.

292. *Id.*

of public opinion and public decision-making.²⁹³ His approach does not locate coverage and protection for professional speech in the concept of the marketplace of ideas. Post contends that scientific and other technical expertise are not products of “the indiscriminate engagement of all.”²⁹⁴ Thus, the government can impose standards to ensure the reliability of expert knowledge. However, as Post puts it, “[a] state that controls our knowledge controls our minds.”²⁹⁵ Thus, he proposes a constitutional principle of “democratic competence,” which “refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge.”²⁹⁶ Cognitive empowerment, he writes, “is necessary both for intelligent self-governance and for the value of democratic legitimation.”²⁹⁷

Although public opinion is generally formed in the public sphere, Post argues that “there is no reason why public opinion might not be formed one conversation at a time.”²⁹⁸ He offers as an example a dental patient who, upon hearing from his dentist that amalgams are dangerous, wants to advocate in favor of legislation banning the devices.²⁹⁹ Post observes: “So long as knowledge is potentially relevant to the formation of public opinion, I do not see in principle why it should constitutionally matter whether it is distributed to one person or to a thousand.”³⁰⁰

Under the democratic competence approach, expert knowledge communicated in the private setting of a physician’s or lawyer’s office would sometimes be covered by the First Amendment. According to Post, malpractice and other general standard of care regulations do not generally interfere with the formation and exercise of democratic competence.³⁰¹ However, “legislation which prohibits expert professionals from communicating knowledge to their clients, or, conversely, legislation which compels professionals to communicate false information to their clients,” undermines democratic competence.³⁰² Such laws “compromise the

293. *Id.* at 41.

294. *Id.* at 29.

295. *Id.* at 33.

296. *Id.* at 33–34.

297. *Id.* at 34.

298. *Id.* at 46.

299. *Id.*

300. *Id.*

301. *See id.* at 45–46 (observing that malpractice law “endows [professional] communications” with the status of knowledge and protects vulnerable clients).

302. *Id.* at 47–48.

constitutional value of democratic competence” by interfering with the dissemination of expert knowledge.³⁰³

In a recent analysis of professional speech, Claudia Haupt similarly concludes that professional-client communications are deserving of at least some First Amendment protection.³⁰⁴ Haupt argues that professional speech merits protection under autonomy, marketplace, and self-government theories.³⁰⁵ Although she agrees with Post and others that traditional marketplace principles do not apply in the context of professional speech, Haupt argues that the First Amendment covers and protects a marketplace defined by the relevant “knowledge community.”³⁰⁶ Thus, government can regulate for the purpose of “preserving the integrity of the search for truth—that is, the formation of professional knowledge—within the discourse of the knowledge community.”³⁰⁷ However, regulations that threaten to destroy or negatively affect the integrity of the search for truth are suspect.

Like Post, Haupt also contends that professionals generally contribute to the knowledge base of information that is used by citizens to make informed decisions, both within the boundaries of the professional relationship and beyond it.³⁰⁸ She is skeptical that a client is typically thinking about the “policy implications of the professional advice she receives.”³⁰⁹ However, Haupt concludes that “the abstract possibility of taking political action based on the individualized professional advice received appears to be enough to justify applying [self-government] theory to professional speech.”³¹⁰

As the discussion here and in Part II shows, there is a considerable disconnect between the academic commentaries on the free speech values of professional speech and many recent professional speech precedents. Unlike courts, most commentators have recognized the public and collective values inherent in professional-client interactions. They have observed the manner in which these interactions connect with, affect, and facilitate self-governance and, to a lesser extent, the search for truth. Also in stark contrast to recent court decisions, commentators have looked beyond the “private” professional-client relationship and have identified constructs—bounded speech institutions, democratic competence, knowledge communities—that

303. *Id.* at 53.

304. Haupt, *supra* note 3, at 59.

305. *Id.* at 28.

306. *Id.* at 32; *see also* Kry, *supra* note 3, at 960 (concluding that professional speech, even when personalized in the professional-client setting, “is no more or less valuable than impersonal speech in helping recipients ascertain the truth”).

307. Haupt, *supra* note 3, at 34.

308. *Id.*

309. *Id.*

310. *Id.*

permit government to regulate, but that also apply some free speech limits. In sum, scholars have generally rejected the rigid private-public distinction some courts have relied on to characterize professional-client interactions as private conduct undeserving of First Amendment consideration.

Of course, First Amendment coverage does not automatically or necessarily entail First Amendment protection. Commentators also recognize the government's important interests in maintaining professional standards and protecting clients. However, some argue that the free speech values associated with professional-client interactions support applying a form of heightened scrutiny to at least some professional speech regulations. Thus, Halberstam and Post both suggest that professional speech merits protection roughly analogous to that provided for commercial speech.³¹¹ Haupt would peg protection for professional speech to the state of the art in the relevant "knowledge community."³¹² Under her approach, any professional speech that does not follow the discipline's standard of care, as determined by the expert community, would not be entitled to free speech protection.³¹³ However, speech that falls within the standard of care would merit at least some First Amendment protection.

These justifications and observations support application of heightened scrutiny to at least some professional speech regulations. In particular, they support meaningful scrutiny of professional rights speech regulations. For example, Florida's Firearm Owners Privacy Protection Act, which restricts physician inquiries that the relevant expert community believes to be relevant to patient care, implicates the free speech rights of both patients and professionals. Further, the Florida law prohibits conversations about gun ownership and health care, both of which are clearly matters of public concern—even when they are discussed in the "private" confines of a professional's office. The Florida law does not seek to preserve the bounded speech institution or professional relationship, but to suppress inquiries and "remodel the institution to [the state's] liking."³¹⁴ The Florida law also interferes with the dissemination of expert advice and the development of what Post calls "democratic competence," by undermining "social practices that produce and distribute disciplinary knowledge."³¹⁵ In other words, it seeks "to corrupt, rather than to protect, the diffusion of expert knowledge."³¹⁶

311. See POST, JURISPRUDENCE, *supra* note 3, at 43; see also Halberstam, *supra* note 3, at 838 (contending that professional speech should receive "no less protection than commercial speech").

312. Haupt, *supra* note 3, at 9.

313. *Id.* at 44.

314. Halberstam, *supra* note 3, at 862.

315. POST, JURISPRUDENCE, *supra* note 3, at 33.

316. *Id.* at 47.

Finally, as Haupt observes, laws like Florida's corrupt the insights of the knowledge community rather than defer to them.³¹⁷

Under current theories and approaches, laws banning SOCE and perhaps other talk therapies present closer and more complex free speech issues. Although the empirical evidence relating to the harms associated with talk versions of reparative therapy is not fully developed, the professional (knowledge) community's experts generally support state bans as to minors. That may be sufficient under Haupt's approach, which advocates deference to the "knowledge community" regarding the identifiable state of the art.³¹⁸ Halberstam's "bounded institution" approach might also allow for SOCE bans on the ground that they are necessary to preserve the social and legal relationship between professional and client.³¹⁹ Finally, although Dean Post's "democratic competence" theory suggests that laws which prohibit experts from communicating knowledge to their clients may violate the First Amendment, he also suggests that courts must take relevant expert knowledge into account and apply the disciplinary standards and methods of the expert community.³²⁰ Post also acknowledges that "[p]olitical correction may at times be necessary to overcome the temptation of professional experts to engage in forms [sic] self-aggrandizement that harm the public."³²¹

As discussed more fully in Part II, perhaps the most compelling case for meaningful First Amendment scrutiny of SOCE bans does not relate to the therapy's positive free speech values, but rather the negative justification that government is not permitted to restrict speech based on its disagreement with the message it represents.³²² Commentators have failed to contextualize the SOCE bans as relating to an important matter of public concern—the nature of sexual orientation and its relationship to gay equality. Insofar as the therapy causes harm, the bans may well be justified. However, the free speech concern cannot be resolved solely by referring to the experts' or knowledge communities' state of the art. Here, and in other examples, states are regulating more than ordinary professional-client interactions.

Under existing scholarly approaches, some compulsory abortion disclosure laws would also be vulnerable to First Amendment challenge. Some of these laws, in particular those that require the disclosure of

317. See Haupt, *supra* note 3, at 57–58 (arguing that Florida's restrictions on gun ownership inquiries violates the professional speech rights of physicians and patients).

318. See *id.* at 48–51 (suggesting that courts defer to expert community regarding SOCE, but acknowledging fact-finding difficulties will likely arise).

319. See Halberstam, *supra* note 3, at 857, 866–67 (suggesting that states may regulate medical advice regarding marijuana use).

320. POST, JURISPRUDENCE, *supra* note 3, at 47, 55–58.

321. *Id.* at 97.

322. See *supra* Section II.D.

untruthful or ideological statements and that do not adequately preserve the medical expert's opportunity to disagree or disassociate, would undermine rather than preserve the physician-client relationship.³²³ Robert Post singles out laws that compel the dissemination of untruthful or misleading information about abortion, arguing that they undermine democratic competence.³²⁴ Similarly, Haupt concludes that compelled abortion disclosures are the "most problematic" examples of professional speech regulation and the "most likely impermissible."³²⁵ These regulations are sometimes "incompatible with the knowledge community's insights, or prohibit[] the professional from communicating the knowledge community's insights."³²⁶

Some of these arguments might be gaining a modicum of traction in the courts. For instance, the Fourth Circuit, in a decision that parts company with sister circuits, recently invalidated an abortion disclosure law under a heightened scrutiny standard.³²⁷ Were courts more generally to recognize the free speech values associated with professional-client interactions, other new and even next-generation regulations might also come under serious First Amendment scrutiny.

In sum, existing academic literature provides support for reviewing at least some professional speech regulations under a heightened scrutiny standard. The fact that the speech occurs within the boundaries of a licensed professional-client relationship does not license the state to suppress, restrict, and compel whatever content it wishes. Commentators have provided a useful foundation for skeptical judicial review of professional speech regulations, including those that target professional rights speech. As I argue in the next two sections, however, there are additional reasons, separate and apart from preserving speech institutions, facilitating democratic competence, and respecting knowledge communities, for instituting rigorous review of professional speech regulations.

D. *Professional Independence and Judgment*

In defending recent professional speech regulations, states have emphasized the vulnerability of clients and the need to preserve the trust and

323. See, e.g., *Stuart v. Camnitz*, 774 F.3d 238, 250 (4th Cir. 2014) (criticizing North Carolina abortion disclosure law for undermining professional judgment).

324. See POST, JURISPRUDENCE, *supra* note 3, at 47–48; see also Post, *Informed Consent*, *supra* note 3, at 978–79 (discussing abortion informed consent laws).

325. Haupt, *supra* note 3, at 53–54.

326. *Id.* at 53.

327. See *Camnitz*, 774 F.3d at 249.

confidence necessary for effective professional-client relationships.³²⁸ Courts and commentators have also acknowledged and emphasized asymmetries of information and power within professional relationships, and the government's need to regulate in response to these concerns.³²⁹ However, for the most part, neither courts nor theorists have paid adequate attention to the need to preserve professional independence and judgment.

As a general matter, client trust and confidence are serious and weighty concerns the state may act to preserve. However, as recent regulations show, these regulatory justifications may not be as strong as first appears, in part because they are incomplete. One significant problem is that prohibiting specific professional inquiries and providing detailed scripts to professionals can undermine the very trust and confidence states purport to be protecting.

States are rightly concerned about the asymmetries of power and information that inhere in professional-client relationships. Malpractice and informed consent laws seek to account for such concerns. However, these and other regulations assume some degree of expert independence from the state and other third parties. Unlike some recent regulations, professional care standards do not typically proscribe or prescribe, in advance of treatment, a set of specific statements, lines of inquiry, courses of care, etc. A trier of fact may ultimately determine that the professional's exercise of independent judgment has failed to meet the expert community's standards. However, that determination follows the exercise of a professional's *independent* judgment.³³⁰

Concerns regarding professional independence do not prohibit regulators from banning dangerous treatments or procedures *ex ante*. Where expert evidence demonstrates a clear and specific harm, states may act to prevent it. Moreover, if a practice is proven to be harmful or fraudulent, states can enforce generally applicable health and consumer fraud laws. However, special concerns arise where regulations target professionals' advice to clients or expert methods that rely solely or substantially on things like oral communications.

Client trust and confidence is reposed in professionals in part owing to the presumption that their advice is based on independent assessments and judgments. Given their character and specificity, recent regulations create

328. See, e.g., *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, No. 12-14009, 2015 WL 8639875, at *28 (11th Cir. Dec. 14, 2015) ("A patient is in a relationship of trust and confidence with a doctor and looks to the doctor's informed opinion for guidance.").

329. See *id.* (noting the "significant power imbalance" between physician and patient); see also Halberstam, *supra* note 3, at 845 (noting the "imbalance of authority" in professional-client relationships).

330. See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY Canon 5 (AM. BAR ASS'N 1980) (requiring that lawyers exercise independent judgment).

serious doubt regarding the degree of experts' independence from the state. This raises risks that are related to, but distinct from, issues of professional or client autonomy.³³¹ In a variety of contexts, clients may begin to wonder whether the questions they are being asked (or not asked), the oral persuasion they may encounter, or the disclosures they are receiving are the product of external forces or independent expert judgment. Professional speech regulations might allow the state to “remodel the institution to its liking” by removing or seriously undermining professionals' independence.³³² Professional speech regulations, including those that target rights speech, could undermine the very trust and confidence the state purports to be preserving. This could alter the fundamental nature of the professional-client relationship itself.

Licensed professionals obviously do not operate entirely independent of the state. Indeed, as noted, governments can insist on compliance with professional standards of care, ethical codes, and the like. However, client trust and confidence are based at least in part on the state's understanding of and respect for the professional state of the art. The need for professional independence is perhaps greater for certain professions. As Kathleen Sullivan has observed, lawyers cannot be treated entirely as agents of the state, “for part of their very job description within the administration of justice is to challenge the state.”³³³ However, regardless of profession, any expert treated as an “agent of the state” cannot be said to exercise independent professional judgment. Professionals employed by the state can certainly be designated as such, and their advice communicated and received as expressly state-sanctioned. However, professionals who are not employed by the state cannot be subject to its complete control and must be permitted to exercise independent judgment on behalf of their clients.³³⁴

States may argue that they are merely defining professional standards of care in very specific terms. However, for example, the substance of Florida's Firearms Privacy Protection Act is actually *contrary to* the professional community's expert understandings, insights, and practices.³³⁵ Similarly,

331. See, e.g., Corbin, *supra* note 3, at 1334–38 (discussing physician and patient autonomy concerns as they relate to compulsory abortion disclosures).

332. Halberstam, *supra* note 3, at 862. Cf. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) (“Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys”).

333. Sullivan, *supra* note 3, at 588.

334. See, e.g., Halberstam, *supra* note 3, at 849 (“[A] federally funded physician cannot be given a script, although a federally funded family planning official can.”).

335. See Haupt, *supra* note 3, at 58 (contending that restrictions on firearms ownership violate the free speech rights of physicians and patients because they prohibit inquiries that are considered relevant to the “knowledge community”).

some compelled abortion disclosures are incompatible with expert knowledge and opinion, or seek to compel blatantly ideological statements.³³⁶

These and similar regulations can distort the physician-patient relationship in harmful ways. For example, they may create serious doubt regarding whose opinion is being communicated, and thus about whether the facts and opinions patients are receiving from chosen professionals originate with the expert or someone else.³³⁷ Even when the professional is permitted to disclaim the state's ideology or its specific statements, the client may already have ceased listening, or may be confused as to why the professional must disclaim information that is simultaneously being provided.

As in other respects, SOCE bans present a more complicated example but ultimately raise similar concerns. The bans are based at least in part on an *ex ante* determination of harm, a finding that trumps any interest in professional independence. Further, SOCE prohibitions permit therapists to discuss the therapy with patients, and even to recommend the therapy be obtained through an *unlicensed* professional. Presumably, therapists can also explain why they are not permitted to perform the therapy on consenting patients.

Still, this kind of law distorts conversations between professionals and clients in unusual ways and may even distort the professional-client institution itself.³³⁸ Clients may be told that despite the therapist's independent assessment of the harms and benefits of the proscribed therapy, the state has banned its use. However, the same therapist can provide a referral to an unlicensed therapist, who may then legally perform the banned therapy. If the state may dictate the state of professional knowledge and judgment in this fashion, at the very least clients may be confused or, more seriously, they may begin to more generally question the value of the licensed professional's expertise. Again, this does not necessarily mean that SOCE bans violate the Free Speech Clause. However, courts ought to proceed carefully in light of the independence and distortive harms that may be associated with these and similar proscriptions.

States have also pointed to the need to protect vulnerable clients from professional overreaching, harassment, and other harmful behavior. Fully independent professionals may go rogue, they suggest, in effect disregarding

336. *See id.* at 53 (characterizing compelled physician disclosures as the “most problematic” example of professional speech regulation); Post, *Informed Consent*, *supra* note 3, at 978–79 (contending that some compulsory abortion disclosures violate the First Amendment).

337. *See Corbin*, *supra* note 3, at 1326–34 (discussing the “distortion” harms associated with some mandatory abortion disclosures).

338. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001) (invalidating spending conditions relating to lawyers' expression in part because “the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning”).

their clients' interests and pursuing their own. For example, the Eleventh Circuit emphasized Florida's concerns regarding the vulnerability of adult patients presenting for annual checkups.³³⁹ The court expressed particular concerns regarding patients in rural areas, who may only have access to a single physician.³⁴⁰

Courts should view these sorts of justifications with some skepticism. Moreover, they should demand some degree of consistency. If client vulnerability constitutes a real and substantial concern in the context of detailed professional speech regulations, states would presumably account for it in all contexts. However, states have generally shown little or no concern regarding the vulnerability of women—including those in rural areas—who present at health clinics for the purpose of procuring an abortion.³⁴¹ In fact, the uniqueness of the abortion procedure is most often cited as a reason why women must be provided with ever-more-detailed information about the procedure. With regard to the SOCE bans, minors are surely among the most vulnerable patient populations. However, if SOCE is as harmful as some states contend, the harmful effects and potentially insidious power dynamic would seem to be present in adult-professional interactions as well. Yet to date, no state has banned SOCE as to adult patients.

Focusing on recent professional speech regulations helps to highlight often-ignored concerns regarding professional independence and distortion of the professional-client relationship. These concerns relate not solely to specific communications, but rather to the nature of professional-client relationships. Recent and perhaps next-generation professional speech regulations may undermine rather than preserve clients' trust and confidence in professional judgment. Treating licensed professionals as agents of the state will undermine broad free speech values relating to the independent gathering and dissemination of expert knowledge and the free flow of information, which are critically important well beyond the confines of professional offices.

339. See *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, No. 12-14009, 2015 WL 8639875, at *28 (11th Cir. Dec. 14, 2015) (discussing the power imbalance and access to care concerns inherent in physician-patient interactions regarding firearms).

340. *Id.*

341. The Fourth Circuit's recent *Camnitz* decision is a notable exception. See *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) (discussing the special vulnerabilities of women during abortion-related examinations).

E. Politics and Professionalism

Robert Post has argued that extending protection to some professional speech “immunizes such practices and methods from unrestricted political manipulation.”³⁴² Recent enactments and judicial decisions demonstrate just how vulnerable professionals remain to different kinds of political manipulation, and how important it is to provide free speech protection to some of their communications. This includes, but is not limited to, communications relating to constitutional rights.

Some recent professional speech regulations appear to be rooted in political rather than medical, therapeutic, or other legitimate disciplinary considerations. Florida’s restrictions on firearms inquiries and “harassment” were enacted in part owing to complaints—some made by National Rifle Association representatives—that doctors were questioning patients’ ownership of firearms on safety grounds.³⁴³ Contrary to the judgment of medical professionals and their leading organizations, the Florida legislature chose to restrict firearms inquiries in order to combat a supposed political agenda against firearms. Moreover, the seemingly selective concerns regarding patient trust and confidence discussed earlier suggest that laws like Florida’s are rooted in concerns other than, or at least in addition to, the preservation of professional-client relationships. Ultimately, the physician-patient relationship was altered and distorted so that the state could defend purportedly vulnerable gun owners from questions about firearms safety.

Compulsory abortion disclosures are often similarly connected to the politics of abortion.³⁴⁴ States that mandate ideological disclosures are pursuing something other than, or again in addition to, informed consent protections. Indeed, some of the laws are appropriately viewed as official statements that abortion is discouraged as a matter of state policy. Particularly insofar as they do not permit physicians to disclaim or disassociate from the state’s policy, compulsory disclosures smuggle politics into examining rooms under the pretext of providing expert advice. Again, when this occurs, law does not “stand[] as a surety for the disciplinary truth of expert pronouncements.”³⁴⁵ Instead, law becomes a means of importing abortion politics into medical decision-making. Physicians become not just agents of the state, but in some instances a kind of political operative—though one that is not on the states’ official payroll.

342. POST, JURISPRUDENCE, *supra* note 3, at 59.

343. See *Wollschlaeger v. Governor of Fla.* (*Wollschlaeger I*), 760 F.3d 1195, 1232–33 (11th Cir. 2014) (Wilson, J., dissenting) (recounting legislative history).

344. See *Zick*, *supra* note 1, at 39 (noting the political context in which abortion speech regulations have been enacted).

345. POST, JURISPRUDENCE, *supra* note 3, at 45.

As discussed, SOCE bans are based in part on concerns about the physical and mental well-being of minors. However, that does not mean the laws are entirely devoid of political motivations or implications. The bans explicitly reject not merely a course of treatment, but with it a *political* argument that was once commonly used to denigrate gays and deny their equality—namely, that homosexuality is a sickness or disease.³⁴⁶ This medical argument has generally been discredited, and the scientific narrative is no longer a prominent part of debates concerning gay equality. However, the reparative therapy movement continues to insist that gay people can change their sexual orientation with professional assistance.³⁴⁷ Just as Florida disagreed with the alleged anti-firearms perspective said to have been communicated in some examining rooms, California and New Jersey’s legislatures have banned a therapy with significant political implications and undertones.

The politicization of professional speech undermines not just individual client trust and confidence, but to some extent the very notion of professionalism itself. Again, in the context of professional-client relationships, “law stands as a surety for the disciplinary truth of expert pronouncements.”³⁴⁸ This “suretyship” helps to separate professional interactions from ordinary politics. However, when the state politicizes the professions, law becomes a means to political rather than disciplinary (expert) ends.

To be sure, most professional regulations do not raise such concerns. Most of what the state requires or prohibits in terms of professional conduct may have little, if any, political valence. However, recent professional rights speech regulations demonstrate how professional and political influences can intersect in dangerous ways. This raises the question whether, under its authority to regulate licensed professionals, the state may restrict or even prohibit expert activities for solely political reasons. If the First Amendment simply does not apply within the professional-patient relationship, then one would assume the state is at liberty to do so. This indeed is the impression conveyed by some recent professional speech decisions.

Should this impression ripen into actual doctrine, there would seem to be no reason why governments would be unable to simply ban professionals from discussing health care policy and other matters of public concern with their patients. States would be empowered to restrict communications and conversations that touch upon political subjects that the state itself does not

346. See Eskridge, *supra* note 233, at 1331 (noting that antigay discourse has changed over the decades, “with social republican arguments superseding medical arguments, which earlier had superseded natural law arguments”).

347. See *id.* at 1367 (discussing reparative therapy movement).

348. POST, JURISPRUDENCE, *supra* note 3, at 45.

consider relevant, or appropriate, in the context of professional consultations.³⁴⁹ Governments would be able to merge politics and professionalism in a manner that makes it increasingly difficult to distinguish the two.

Thus far, the focus has been on the possibility that *governments* will politicize the professions by using them to communicate state policies. Professional organizations may also be complicit in the politicization of the professions. Professional organizations are often powerful lobbyists. Although their expert judgments are entitled to deference, professionals may seek to import their own political judgments into professional speech regulations.³⁵⁰ Thus, courts must be aware that professional speech regulations might be infected with both official and organizational political biases.

Manipulation of professional-client communications for political purposes, whatever their origins, undermines not just individual client trust and confidence but more generally public trust and confidence in expert judgments and professional advice. In this respect, recent professional rights speech regulations may contribute to a growing general public cynicism regarding professional expertise. Clients and the public will repose far less trust in the professions as expositors of expert judgment. Even if professionals are not viewed as agents of the state, they will lack the separation and independence necessary to earn public trust. Regulating professional speech may become a means to a political ends—simply another pathway for states or third parties to impose political judgments on regulated individuals, institutions, and those that consult them for advice. In this way, the “bounded institutions” and “knowledge communities” of the learned professions may become just another part of the political landscape.

When they review speech regulations, courts do not typically take such considerations directly into account. However, going forward, they ought to influence, to at least some degree, how judges approach professional speech—particularly professional rights speech—regulations. Like concerns relating to professional judgment and distortion of professional-client interactions, the prospect of state political manipulation of the licensed professions is cause for skepticism—particularly insofar as broad state claims

349. See *Wollschlaeger v. Governor of Fla. (Wollschlaeger I)*, 760 F.3d 1195, 1238 (11th Cir. 2014) (Wilson, J., dissenting) (“Nor would First Amendment scrutiny apply to an act barring doctors from talking to their patients about the Affordable Care Act, Medicare or Medicaid, medical malpractice laws, or any other topic whatsoever.”).

350. See Kry, *supra* note 3, at 972–73 (observing that professions are not just governed by law but actively seek to influence what the law is, and may have a bias toward weak free speech rights of members).

to license professional communications are concerned. Recent examples indicate that states are becoming increasingly aggressive in their approach to professional-client interactions. In order to ensure that free speech values and professional institutions are preserved, courts must engage in rigorous First Amendment scrutiny of professional rights speech regulations.

IV. CONCLUSION

More often than is commonly appreciated, professionals engage with their clients on matters relating to constitutional rights. Lawyers, physicians, and other professionals provide information and advice to clients that directly or indirectly concern the recognition, exercise, or scope of constitutional rights. Many professionals play unique and important roles in terms of the facilitation, mediation, and exercise of constitutional rights. State and federal regulations of what this Article refers to as professional rights speech implicate a range of constitutional rights, including the right to bear arms, abortion, contraception, due process, and equality. Future enactments could affect communications regarding personal choices with regard to family relationships, gender identity, and the circumstances of one's own death.

The Article has used recently enacted professional regulations to demonstrate the expressive and non-expressive harms that can occur when governments suppress, restrict, or compel professional rights speech. Regulations of professional rights speech are, and ought generally to be treated as, regulations of political expression based on content. As such, they raise important free speech concerns and merit strict judicial scrutiny. The fact that the speakers are licensed professionals, and their audiences are clients or patients, does not eliminate the need to guard against state suppression or compulsion of speech—particularly, although not exclusively, when the speech concerns or relates to constitutional rights.

Strict First Amendment scrutiny is an appropriate response to the increasingly detailed regulation of professional-client interactions that touch on or concern constitutional rights. Judicial review of rights speech regulations would not threaten or eliminate state power to license professionals, or to insist on their compliance with general standards of professional care. However, it would protect against resort to professional regulation to suppress viewpoints contrary to those held by the state, or to compel private individuals to communicate ideological messages on the government's behalf. Contrary to some recent lower court rulings, regulations of professional-client interactions are not merely part of a course of treatment or professional conduct. Nor, as professional rights speech

regulations show, are all such conversations merely private discourse having nothing to do with matters of public concern.

Governmental regulation of professional-client conversations cuts far closer to core First Amendment concerns than courts have so far been willing to acknowledge. Challengers are not merely engaging in opportunistic invocations of free speech rights. Professional rights speech regulations implicate basic First Amendment values, non-expressive constitutional rights, the scope of professional independence and judgment, and even the nature of professionalism itself.

The precise boundaries of free speech protection must be worked out in individual cases. However, future analysis and commentary should consider the constitutional and policy implications of increasingly detailed and politicized governmental regulations of professional rights speech.