

Professional Speech and the Content-Neutrality Trap

Claudia E. Haupt

ABSTRACT. The Eleventh Circuit’s en banc decision in *Wollschlaeger v. Governor of Florida* is remarkable for embracing content neutrality as a tenet of First Amendment doctrine in the realm of professional speech. It reflects a new form of aggressive content neutrality on the rise in First Amendment jurisprudence beginning with *Reed v. Town of Gilbert*, a seemingly innocuous case about a municipal sign ordinance. *Reed* ushered in what may turn out to be a dramatic shift in the way courts employ content neutrality as a core principle of the First Amendment. But content neutrality should not be thought of as axiomatic across the First Amendment. This Essay illustrates the dangers of falling into the content-neutrality trap in the context of professional speech. Professional speech communicates the profession’s insights to the client for the purpose of providing professional advice, and the value of professional advice critically depends on its content. The First Amendment therefore may not require regulation to be blind to the content of professional speech.

The federal appellate courts are decidedly at odds in their respective approaches to professional speech. In 2014, the Ninth Circuit concluded that a California law prohibiting “sexual orientation change efforts,” or conversion therapy, for minors concerned professional conduct, not speech.¹ Conversely, the Third Circuit, addressing a similar New Jersey law in the same year, considered the law to concern speech.² The persisting theoretical and doctrinal difficulties faced by courts in analyzing professional speech are encapsulated in the now-infamous case of *Wollschlaeger v. Governor of Florida*,³ popularly known

1. *Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2014).

2. *King v. Governor of N.J.*, 767 F.3d 216, 240-41 (3d Cir. 2014).

3. *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293 (11th Cir. 2017) (holding unconstitutional as violating the First Amendment the recordkeeping, inquiry, and antiharassment provisions and holding constitutional the antidiscrimination provision of the Florida Firearms Owners’ Privacy Act).

as the “Docs v. Glocks” case.⁴ After a three-judge panel of the Eleventh Circuit issued three consecutive, contradictory decisions,⁵ the court handed down an en banc decision that offers yet another analysis built on the requirement of content neutrality. At issue in *Wollschlaeger* was a First Amendment challenge to a Florida law, the Firearms Owners’ Privacy Act (FOPA), prohibiting doctors from asking their patients about guns as a matter of course.⁶ The en banc decision is remarkable for its emphasis on content neutrality as a core principle of First Amendment doctrine in the realm of professional speech. Building on the theory of First Amendment protection for professional speech I developed in my recent Article on professional speech,⁷ I suggest here that content neutrality should be rejected in the professional speech context.

Indeed, a new form of aggressive content neutrality is on the rise in First Amendment jurisprudence. The Supreme Court’s decision in *Reed v. Town of*

-
4. See, e.g., Ben Guarino, *Appeals Court Strikes Down Florida ‘Docs v. Glocks’ Law that Barred Physicians from Asking About Gun Ownership*, WASH. POST (Feb 17, 2017), <http://www.washingtonpost.com/news/morning-mix/wp/2017/02/17/appeals-court-strikes-down-fla-docs-v-glocks-law-that-barred-physicians-from-asking-about-gun-ownership> [<http://perma.cc/KB4J-AEGB>].
 5. The first panel decision upheld the Florida law prohibiting doctors from inquiring about gun ownership as a “legitimate regulation of the practice of medicine.” *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1225 (11th Cir. 2014). The second panel decision upheld the Florida law as “a permissible restriction of physician speech.” 797 F.3d 859, 868–69 (11th Cir. 2015). The court reached its decision by applying a reduced form of scrutiny commonly applied in commercial speech cases. *Id.* at 892–94. Finally, vacating and superseding on rehearing, in the third panel decision, 814 F.3d 1159, 1168 (11th Cir. 2015), the court held the statute survived strict scrutiny—but it did so without determining what level of scrutiny should apply. *Id.* at 1186, *vacated by granting en banc reh’g*, 649 F. App’x 647 (11th Cir. 2016).
 6. The four FOPA provisions at issue in the case concerned recordkeeping, inquiry, anti-harassment, and antidiscrimination. Under the recordkeeping provision, “a doctor or medical professional may not intentionally enter any disclosed information concerning firearm ownership into [a] patient’s medical record if he or she knows that such information is not relevant to the patient’s medical care or safety, or the safety of others.” *Wollschlaeger*, 848 F.3d at 1302 (internal quotations omitted). Pursuant to the inquiry provision, “a doctor or medical professional should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home unless he or she in good faith believes that this information is relevant to the patient’s medical care or safety or the safety of others.” *Id.* at 1302–03 (internal quotation marks omitted). Under the antidiscrimination provision, “a doctor or medical professional may not discriminate against a patient based solely on the patient’s ownership and possession of a firearm.” *Id.* at 1303 (internal quotation marks omitted) Finally, under the antiharassment provision, “a doctor or medical professional should refrain from unnecessarily harassing a patient about firearm ownership during an examination.” *Id.* (internal quotation marks omitted).
 7. Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016) (providing a theory of First Amendment protection for professional speech based on an understanding of the professions as knowledge communities).

Gilbert,⁸ a seemingly innocuous case about a municipal sign ordinance, ushered in what may turn out to be a dramatic shift in the way courts approach content neutrality as a tenet of the First Amendment.⁹ Taken together with the newly emergent deregulatory thrust of the First Amendment articulated by the Supreme Court in *Sorrell v. IMS Health, Inc.*,¹⁰ a case that applied heightened scrutiny to the regulation of pharmaceutical marketing as a form of commercial speech,¹¹ the First Amendment landscape may be changing.¹²

But it would be a mistake to think of content neutrality as axiomatic across the First Amendment, as this Essay illustrates in the context of professional speech. In Part I, I outline the court's embrace of content neutrality in *Wollschlaeger*.¹³ In Part II, I analyze and critique the influence of *Reed* and *Sorrell* on the decision.¹⁴ In Part III, I offer an assessment of the emergent competing approaches to professional speech,¹⁵ and I conclude by arguing for analyzing professional speech in light of the distinctive character of the learned professions as knowledge communities.¹⁶ From this conceptual approach follow deeper understandings of the theoretical basis of First Amendment protection for professional speech,¹⁷ the limits of that protection, and the permissibility of professional regulation.¹⁸ This approach theoretically substantiates the conclusion that in order to preserve the values underlying professional speech—ensuring the accuracy and reliability of professional advice for the benefit of the client who depends on it to make important decisions—the First Amendment may not require state regulation to ignore the content of that advice. Content neutrality therefore is a particularly ill-fitting approach for professional speech cases.

8. 135 S. Ct. 2218 (2015).

9. See Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1987 (2016) (“If interpreted at full breadth, *Reed* could provide a grant for transforming First Amendment doctrine . . .”).

10. 564 U.S. 552 (2011).

11. *Id.* at 557.

12. See, e.g., Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 179 (noting that “*Reed*, like *Sorrell*, signals growing tension between various First Amendment sub-doctrines.”).

13. See *infra* Part I.

14. See *infra* Part II.

15. See *infra* Part III.

16. Haupt, *supra* note 7, 1248-54.

17. *Id.* at 1269-77.

18. *Id.* at 1277-89.

I. *WOLLSCHLAEGER*: CONTENT NEUTRALITY IN ACTION

The *Wollschlaeger* en banc majority opinion, authored by Judge Jordan, conspicuously starts by identifying the content-neutrality paradigm as the guiding First Amendment principle in the case.¹⁹ The opinion's opening paragraph, noting the difficulty of interpreting the First Amendment, concludes: "Yet certain First Amendment principles can be applied with reasonable consistency, and one of them is that, subject to limited exceptions, '[c]ontent-based regulations [of speech] are presumptively invalid."²⁰ This framing—also reflected in the concurring opinions—betrays a profound misunderstanding of the distinctive character of professional speech.

Judge Jordan's majority opinion states that FOPA imposes both speaker-focused and content-based restrictions, by restricting and sanctioning speech by doctors and medical professionals on firearm ownership.²¹ The opinion then further notes that while content-based restrictions typically trigger strict scrutiny, the court need not decide whether it applies here, as the provisions in question fail even under heightened scrutiny as set forth in *Sorrell*.²² Thus the opinion avoids one of the most problematic implications of *Reed*, the potentially sweeping application of strict scrutiny.²³

Rejecting rational basis as the standard of review for content-based restrictions on professional speech, the opinion elaborates that if it were the appropriate standard, it would allow the government, "based on its disagreement with the message being conveyed[, to] easily tell architects that they cannot propose building in the style of I.M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques . . ."²⁴

The application of heightened scrutiny to FOPA's recordkeeping, inquiry, and antidiscrimination provisions provides a first glimpse at the analytical infirmities that plague the decision. It finds "no actual conflict between the First Amendment rights of doctors and medical professionals and the Second Amendment rights of patients that justifies FOPA's speaker-focused and con-

19. There are two majority opinions, one authored by Judge Jordan and the other by Judge Marcus.

20. *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1300 (11th Cir. 2017) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)).

21. *Id.* at 1300.

22. *Id.*

23. See *infra* notes 68–69 and accompanying text.

24. *Wollschlaeger*, 848 F.3d at 1311.

tent-based restrictions on speech.”²⁵ The discussion of the Second Amendment concludes with the observation that “[i]n the fields of medicine and public health . . . information can save lives. Doctors, therefore, must be able to speak frankly and openly to patients.”²⁶ This suggests an appropriate focus on speech within the professional-client relationship. But then, the opinion’s analytical perspective shifts: “Florida may generally believe that doctors and medical professionals should not ask about, nor express views hostile to, firearm ownership, but it may not burden the speech of others in order to tilt public debate in a preferred direction.”²⁷ The reference to “public debate,” of course, is telling, as it reveals the court’s failure to distinguish public discussions from advice-giving within the confines of the professional-client relationship. And this distinction is important to determine whether content neutrality should apply in the first place.

After rejecting patient privacy interests, the opinion turns next to “ensuring access to health care without discrimination or harassment.”²⁸ As part of that discussion, the opinion dismisses the claim that the content-based restrictions FOPA imposes on speakers are permissible due to a power imbalance between doctors and their patients.²⁹ To the extent that this “power” is based on knowledge, however, the argument misses that an asymmetry of knowledge is a characteristic of the professional-client relationship. This asymmetry of knowledge, in fact, is why a professional’s advice is valuable to the client in the first place.³⁰ Nonetheless, the opinion goes on to note that there is no constitutional basis for regulating otherwise protected speech deemed offensive in order to protect unwilling listeners or viewers. Adult audiences, moreover, have never been considered to fall under “a vulnerable listener/captive audience rationale to uphold speaker-focused and content-based restrictions on speech.”³¹ For this proposition, the opinion relies on the Supreme Court’s reasoning in *Snyder v. Phelps*, which rejected a father’s claim for intentional infliction of emotional distress following the Westboro Baptist Church’s picketing of his fallen soldier son’s funeral.³² The Court’s conclusion centered on the holding

25. *Id.* at 1313.

26. *Id.* (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578-79 (2011)).

27. *Id.* at 1313-14 (internal quotations and citations omitted).

28. *Id.* at 1314.

29. *Id.* at 1315.

30. See Haupt, *supra* note 7, at 1250.

31. *Wollschlaeger*, 848 F.3d at 1315 (citing, inter alia, *Snyder v. Phelps*, 562 U.S. 443, 459-60 (2011)).

32. 562 U.S. 443 (2011).

that the picketing was speech on a matter of public concern.³³ In other words, *Wollschlaeger* apparently obliterates any demarcation between speech in public discourse and speech within the professional-client relationship.

Finally, the opinion turns to “the need to regulate the medical profession in order to protect the public.”³⁴ As Judge Wilson had already noted in his dissents from the earlier panel decisions, “a state’s authority to regulate a profession does not extend to the entirety of a professional’s existence.”³⁵ But the analysis that follows of the relationship between state regulation and professional advice-giving seems backwards. The opinion identifies various professional groups’ recommendations that doctors “routinely ask patients about firearm ownership” in order to advise them on its potential dangers.³⁶ These professional recommendations, however, do not provide sufficient justification in the court’s view to restrict professionals’ speech in a speaker-and content-based manner.³⁷ It notes the absence of evidence suggesting “that routine questions to patients about the ownership of firearms are medically inappropriate, ethically problematic, or practically ineffective. Nor is there any contention (or, again, any evidence) that blanket questioning on the topic of firearm ownership is leading to bad, unsound, or dangerous medical advice.”³⁸ The analysis appears to proceed from the medical community’s guidelines and then asks whether a reason for state intervention exists. The relevant question, however, should be whether state regulation aligns with professional insights, not vice versa.

In closing, the opinion notes “that the applicable standard of care encourages doctors to ask questions about firearms (and other potential safety hazards),” but determines that FOPA’s tailoring inadequately responds to potential concerns.³⁹ Therefore, Florida’s general interest in regulation of the medical profession did not satisfy heightened scrutiny.⁴⁰ This analysis juxtaposes professional speech and the regulation of the professions, suggesting that a better match between the need to protect patients and the regulatory intervention of FOPA presumably would have permitted the state to alter the content of pro-

33. 562 U.S. at 458 (“Given that Westboro’s speech was at a *public place on a matter of public concern*, that speech is entitled to ‘special protection’ under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.” (emphasis added)).

34. *Wollschlaeger*, 848 F.3d at 1316.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 1317.

40. *Id.*

fessional advice-giving. But regulation of the professions—through licensing requirements, for example—does not directly affect the content of professional advice, nor does it justify interference with the content of professional speech in a way that would contradict professional insights.⁴¹

The second majority opinion, written by Judge Marcus, additionally holds the antiharassment provision to be unconstitutionally vague. He points to the connection between FOPA's regulatory intervention and doctors' professional responsibilities.⁴² Noncompliant patients, he explains, may be particularly likely to find a doctor's frequent reminders "unnecessarily harassing" while the "doctor may feel professionally obligated" to reiterate the advice.⁴³ Thus, the antiharassment provision "forces doctors to choose between adequately performing their professional obligation to counsel patients on health and safety on the one hand and the threat of serious civil sanctions on the other."⁴⁴ In its emphasis on professional obligations, this framing seems somewhat more responsive to the realities of the professional-client relationship.

Judge Wilson's concurrence, like the first majority opinion, embraces the content-neutrality paradigm. Whereas the majority leaves open whether strict scrutiny should apply, Judge Wilson (who previously applied intermediate scrutiny in his dissents from the panel decisions⁴⁵) strongly suggests its application to be necessary because FOPA "imposes a content- and viewpoint-based restriction on physicians' speech."⁴⁶ Specifically, the law "restricts physicians' communications with patients about a specific subject—the possession of firearms—to prohibit advocating a specific viewpoint—firearm safety."⁴⁷ Citing *Reed*, Judge Wilson notes that laws restricting speech based on content are "presumptively unconstitutional."⁴⁸

41. See Haupt, *supra* note 7, at 1277-78 (distinguishing between regulation of the profession and regulation of professional speech).

42. *Wollschlaeger*, 848 F.3d at 1321 ("A doctor who believes his counseling beneficial and thinks the advice necessary to fulfill his professional responsibilities might have a tendency to overestimate the amount of advice he can give before he has engaged in 'unnecessarily harassing' conduct.").

43. *Id.*

44. *Id.* at 1323.

45. He explicitly attributes this change to the Supreme Court's intervening decision in *Reed*, see *id.* at 1324; cf. *Wollschlaeger v. Governor of Fla.*, 797 F.3d 859, 902 (11th Cir. 2015) (Wilson, J., dissenting) (suggesting that intermediate scrutiny applies); *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1230-31 (11th Cir. 2014) (Wilson, J., dissenting) (same).

46. *Id.*

47. *Id.*

48. *Id.* (internal quotation marks omitted).

Applying *Reed* to FOPA, he asserts that it would be “hard to imagine a more paradigmatic example of a content-based law.”⁴⁹ The speech FOPA regulates is solely defined by its content, as the law only suppresses questions regarding firearms.⁵⁰ Characterizing FOPA as “[t]he state’s subversive attempt to stop a perceived political agenda,” he asserts that it “silences doctors who advance a viewpoint about firearms with which the state disagrees.”⁵¹ Because it is an “egregious form of content discrimination,” strict scrutiny applies.⁵²

Judge Wilson then turns to the underlying First Amendment interests served by the application of strict scrutiny: “We must make sure that there is ‘no realistic possibility that official suppression of ideas is afoot.’ The government must not regulate speech ‘based on hostility—or favoritism—towards the underlying message expressed.’”⁵³ But this demonstrates the heart of the problem with *Reed*’s application in this case. Referencing the values underlying content neutrality in *Reed* makes the theoretical dimension of the doctrinal mismatch apparent: the “official suppression of ideas,” and “hostility—or favoritism—towards the underlying message” are not readily translatable to the professional speech context. This is because hostility toward certain messages and preference for others is essential to ensuring the patient or client receives good professional advice. And the tort regime appropriately sanctions professional malpractice, that is, bad advice.⁵⁴ Nonetheless, Judge Wilson applies the content-neutrality framework to the facts of this case, suggesting that a straightforward analysis is possible: “Florida, perhaps guided by a paternalistic notion that it needs to protect its citizens from viewpoints they do not like, prohibits doctors from discussing an entire topic and advocating a position with which it does not agree. This it cannot do.”⁵⁵

Judge William Pryor’s concurrence, too, frames the case in terms of content neutrality. Unlike Judge Wilson, his stated aim is “to reiterate that our decision is about the First Amendment, not the Second.”⁵⁶ Like Judge Wilson, however, he asserts that the First Amendment forbids the government “to restrict expression because of its message, its ideas, its subject matter, or its content.”⁵⁷ Again, the exposition of the values underlying content neutrality exposes the

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1325.

54. See Haupt, *supra* note 7, at 1284-87.

55. *Wollschlaeger*, 848 F.3d at 1325.

56. *Id.* at 1327.

57. *Id.* (citation omitted).

mismatch. Judge Pryor cautions that rather than achieving a “legitimate regulatory goal,” the danger posed by content-based speech regulation is suppression of “unpopular ideas or information or manipul[at]ing the public debate through coercion rather than persuasion.”⁵⁸ These interests, as already indicated, do not have equal salience as applied to professional speech. Judge Pryor concludes that “[t]he power of the state must not be used to drive certain ideas or viewpoints from the marketplace, even if a majority of the people might like to see a particular idea defeated.”⁵⁹ With respect to its application, he asserts that the law’s “focus[] on doctors is irrelevant. The need to prevent the government from picking ideological winners and losers is as important in medicine as it is in any other context.”⁶⁰ It is true that the specific profession involved is irrelevant as the interests in protecting professional speech are shared across professions.⁶¹ But the notion that professional advice-giving is susceptible to the government “picking ideological winners and losers” does not resonate in professional speech as it does in public discourse.

Finally, Judge Tjoflat’s dissent has at its core an exegesis of *Reed* and its “pernicious and far reaching effects.”⁶² Noting “the confusion *Reed* introduced into this already complex area of legal doctrine,” he suggests that intermediate scrutiny is proper.⁶³ His dissent is animated by the view that the *Reed* Court’s interpretation of the First Amendment jeopardizes “the implementation of reasonable, democratically enacted laws.”⁶⁴ Thus, he argues against applying *Reed*’s analytical framework directly to professional speech: “Balancing the First Amendment risks posed by allowing content discrimination against the longstanding tradition of government regulation of medical professionals engaged in practice suggests that we should apply intermediate, rather than strict, scrutiny to the Act.”⁶⁵ In the end, however, he would uphold FOIA, because it “advance[s] the State’s compelling interest in protecting the Second Amendment’s guarantee to keep and bear arms and patients’ privacy rights in their medical records.”⁶⁶

In sum, the *Wollschlaeger* en banc majority opinion and the concurrences adopt content neutrality as the core principle to be applied in professional

58. *Id.* (citation omitted).

59. *Id.* (citation omitted).

60. *Id.* at 1328.

61. See Haupt, *supra* note 7, at 1247 (defending a unified approach to professional speech).

62. *Wollschlaeger*, 848 F.3d at 1331.

63. *Id.* at 1337.

64. *Id.* at 1333.

65. *Id.* at 1337.

66. *Id.* at 1338.

speech cases, providing a vivid illustration of, as one commentator on *Reed* put it, letting “the content-based tail wag the First Amendment dog.”⁶⁷ Reluctant to apply the rigidity of *Reed* to its full extent, however, the majority combines it with the intermediate scrutiny standard of review found in *Sorrell*. This is one way to dilute the standard of scrutiny, as Justice Breyer cautioned against in *Reed*⁶⁸ and as commentators have predicted lower courts might do in an effort to cabin the effect of *Reed*.⁶⁹ But even in this modified form, content neutrality is unsuitable to the professional speech context, because—as the next Part illustrates in more detail—the underlying First Amendment values do not align.

II. PROFESSIONAL SPEECH AND CONTENT REGULATION

Professional speech communicates the knowledge community’s insights through the professional to the client, within a professional-client relationship, for the purpose of enabling the client to make important decisions based on this advice.⁷⁰ Good professional advice, as measured against the insights of the knowledge community, should receive robust First Amendment protection.⁷¹ Bad advice, that is, advice falling outside the range of what the knowledge community considers defensible professional knowledge, is subject to professional malpractice liability, and the First Amendment provides no defense.⁷² But, as Robert Post notes, “If content and viewpoint neutrality is the cornerstone of the Supreme Court’s First Amendment jurisprudence, the production of expert knowledge rests on quite different foundations.”⁷³ The same is true for providing expert knowledge to a client. Determining what is good and what is bad professional advice depends on its content.⁷⁴ And so, to quote Post, “[e]xpert knowledge requires exactly what normal First Amendment doctrine prohibits.”⁷⁵

To illustrate how professional speech differs from the speech at issue in *Reed* and *Sorrell*, and why rejecting content regulation is theoretically misguided-

67. Note, *supra* note 9, at 1982.

68. 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring).

69. Note, *supra* note 9, at 1995-96 (discussing the panel decision in *Wollschlaeger*).

70. Haupt, *supra* note 7, at 1247.

71. *Id.* at 1284.

72. See Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. 671 (forthcoming 2017) (manuscript at 4), <http://ssrn.com/abstract=2827762> [<http://perma.cc/4C9H-EATS>].

73. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 9 (2012).

74. Haupt, *supra* note 72, at 5.

75. POST, *supra* note 73, at 9.

ed with respect to professional speech, I will discuss its constituent components—“content” and “regulation”—in turn. Ultimately, the relevant question in *Wollschlaeger*—as in all professional speech cases—is not whether the law is content-based; rather, the relevant question is whether it aligns with or contradicts professional insights.

A. Content

A comparison of the values underlying professional speech protection with those articulated by the Court in *Reed* illustrates why the *Wollschlaeger* decision should not have so readily embraced content neutrality. When the town of Gilbert, Arizona, adopted a municipal regulation subjecting various signs to different restrictions, the Supreme Court unanimously held it unconstitutional under the First Amendment as a content-based regulation that failed to survive strict scrutiny.⁷⁶

The underlying interests in prohibiting content-based regulations, as Justice Thomas’ majority opinion explains, concern the “danger of censorship” and the risk that “government officials may one day wield such statutes to suppress disfavored speech.”⁷⁷ He notes that “[t]he vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.”⁷⁸ The example he marshals to support this point, incidentally, involves professional regulation: an antisolicitation statute which was unconstitutional despite “the State’s claim that its interest in the ‘regulation of professional conduct’ rendered the statute consistent with the First Amendment.”⁷⁹

Justice Alito’s concurrence also invokes the dangers of content-based laws, asserting that, though they are perhaps subtler, they do not otherwise differ from the dangers created by viewpoint-based regulation.⁸⁰ The limit so imposed “favors those who do not want to disturb the status-quo. Such regulations may interfere with democratic self-government and the search for truth.”⁸¹

By contrast, Justice Breyer, skeptical that content discrimination necessarily indicates “unconstitutional suppression of expression,” emphasizes context.⁸²

76. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015).

77. *Id.* at 2229.

78. *Id.* (citation omitted).

79. *Id.*

80. *Id.* at 2233 (Alito, J., concurring).

81. *Id.*

82. *Id.* at 2234 (Breyer, J., concurring).

Content discrimination in his view “cannot and should not *always* trigger strict scrutiny.”⁸³ He notes “that content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government’s rationale for a rule that limits speech.”⁸⁴ Linking marketplace, democratic self-government, and autonomy interests, he also admits that government intervention that disfavors and thus disadvantages some speech both potentially distorts the marketplace of ideas and interferes “with an individual’s ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.”⁸⁵ He identifies one instance of government regulation of speech “that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place” as “doctor-patient confidentiality.”⁸⁶

Justice Kagan similarly identifies two reasons for applying strict scrutiny to content-based speech: preserving “an uninhibited marketplace of ideas in which truth will ultimately prevail” and “ensur[ing] that the government has not regulated speech based on hostility—or favoritism—towards the underlying message expressed.”⁸⁷ But she points out that in order to trigger strict scrutiny, there must be a “realistic possibility” of the “official suppression of ideas.”⁸⁸ This is always possible with respect to viewpoint regulation and restrictions limiting the public discussion of entire topics.⁸⁹ Maintaining a free and open marketplace of ideas does not allow for governmental determinations of what is worth discussing.⁹⁰ Nor may the state prefer one side.⁹¹ And so it is the possibility that the government’s restriction could “drive certain ideas or viewpoints from the marketplace” that requires strict scrutiny to be imposed.⁹² Absent such a possibility, however, “entirely reasonable” regulations, in Justice Kagan’s view, ought not to be subject to strict scrutiny.⁹³ In addition, she clarifies that the “concern with content-based regulation arises from the fear that

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 2234-35.

87. *Id.* at 2237 (Kagan, J., concurring) (citation omitted).

88. *Id.* (citation omitted).

89. *Id.* (citation omitted).

90. *Id.* (citation omitted).

91. *Id.* (citation omitted).

92. *Id.* at 2237-38 (citation omitted).

93. *Id.* at 2238.

the government will skew the public's debate of ideas,"⁹⁴ thus emphasizing the public context in which the discussion occurs.

Commentators have noted that "the standard for deeming a regulation content based" "divorces the content distinction from its intended purpose of ferreting out impermissible government motive."⁹⁵ This makes equally suspect, and subject to strict scrutiny, *all* content-based laws—regardless of motive. Moreover, *Reed* "defines the category of content-based regulations in language sufficiently broad to cover nearly all regulations."⁹⁶ Taken literally, it could plausibly encompass "any regulation that even incidentally distinguishes between activities or industries."⁹⁷ In short, the potential doctrinal impact of *Reed* is sweeping. But the values underlying professional speech are distinctive and not easily reconciled with *Reed*'s doctrinal content-neutrality approach, which is suspicious of any kind of regulation that is not content neutral.

The *Reed* Court discussed several standard justifications for First Amendment protection of speech that would be undermined by content-based regulations. The opinions invoke marketplace, democratic self-government, and autonomy interests. Moreover, they emphasize an interest in speaker equality in public debate, prohibiting the government from favoring or disfavoring certain opinions. Professional speech protection can be based on the same set of justifications as First Amendment protection generally, though these justifications apply in a unique manner.⁹⁸ The associated interest in speaker equality, however, is inapposite in professional speech. A closer look at the normative underpinnings reveals the important differences.

The Holmesian articulation of "a free trade in ideas," where "the best test of truth is the power of the thought to get itself accepted in the competition of the market,"⁹⁹ does not directly apply to professional speech. Whereas marketplace interests resonate in public discourse, "the professional does not seek to subject her professional opinion to this test when speaking within the confines of the professional-client relationship."¹⁰⁰ Moreover, the state may even ensure, through professional malpractice liability, that clients are not harmed by "false" ideas.¹⁰¹

94. *Id.*

95. Note, *supra* note 9, at 1986.

96. *Id.*

97. *Id.*

98. See Haupt, *supra* note 7, at 1269.

99. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

100. Haupt, *supra* note 7, at 1273-74.

101. *Id.* at 1274.

Conceptualizing the professions as knowledge communities points to the existence of a different, internal marketplace of ideas where professional insights are generated.¹⁰² The client, however, is not a market participant here. Thus, while the marketplace metaphor has salience in justifying professional speech protection to guard the formation of professional insights, it does not directly map onto the professional-client relationship itself.¹⁰³

Democratic self-government interests, too, justify First Amendment protection for professional speech. But their operationalization also differs from public discourse. Professional speech has informational value that the individual client can draw on in public discourse. Thus, professional advice obtained within the professional-client relationship “may contribute to expanding the knowledge base upon which citizens can make informed decisions.”¹⁰⁴ Again, this suggests that professional speech protection may be justified by invoking democratic self-government interests. But the way in which these interests function is decidedly different from the type of public debate contemplated in *Reed*.

Autonomy interests constitute another set of normative justifications for protecting professional speech. Distinctively, speaker (professional autonomy¹⁰⁵) and listener (decisional autonomy¹⁰⁶) interests are equally salient.¹⁰⁷ The very purpose of professional speech is to provide useful advice to the client whose “interests are only served if the professional communicates information that is accurate (under the knowledge community’s current assessment), reliable, and personally tailored to the specific situation of the listener.”¹⁰⁸ In other words, the content of advice matters to the listener. It also matters to the speaker, who “speaks not only for herself, but also as a member of a learned profession—that is, the knowledge community.”¹⁰⁹ This creates “a unique autonomy interest in communicating her message according to the standards of the profession to which she belongs, precisely in order to uphold the integrity of its knowledge community.”¹¹⁰ The autonomy interests supporting profes-

102. *Id.* at 1275.

103. *Id.*

104. *Id.* at 1276.

105. *Id.* at 1272-73.

106. *Id.* at 1271-72.

107. Cf. Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 170 (2015) (“Ordinary First Amendment doctrine . . . focuses on the rights of speakers, not listeners.”).

108. Haupt, *supra* note 7, at 1271.

109. *Id.* at 1272.

110. *Id.* at 1272-73.

sional speech protection thus differ in important ways from those discussed perhaps most prominently by Justice Breyer in *Reed*.

Finally, First Amendment jurisprudence traditionally has been firmly committed to speaker equality in public discourse. The underlying justification is based in democratic theory: equality of speakers in public discourse is necessary for equal participation, which in turn forms the basis of democracy. This strong interest in equality of speakers and opinions pervades the First Amendment. The values underlying professional speech protection, however, run opposite to these assumptions. The professional deploying her expert knowledge within the professional-client relationship affirmatively is *not equal* to other, non-professional speakers, and her professional advice is therefore *not* to be regarded as just another opinion.¹¹¹ We want to affirmatively be able to pick winners and losers: good professional advice should receive robust First Amendment protection while bad professional advice should be subject to professional malpractice liability. I will revisit the discussion of regulation shortly.¹¹² The simple but important point here is that in light of the underlying normative justifications for speech protection, the professional-client relationship significantly differs from public discourse in its stance toward content neutrality.

Returning to *Wollschlaeger*, Judge Jordan's majority opinion quotes Cass Sunstein's proposition that content regulation points to a potentially illegitimate goal, "an effort to foreclose a controversial viewpoint, to stop people from being offended by certain topics and views, or to prevent people from being persuaded by what others have to say."¹¹³ But these concerns relate to the framework of public discourse, not the content of advice-giving. They are orthogonal to the professional-client relationship.

One could perhaps imagine marginally related concerns in the professional-client relationship. A controversial viewpoint translated into the professional context might be one that diverges from core professional knowledge.¹¹⁴ But conceptualizing the professions as knowledge communities who subscribe to a shared body of knowledge limits the opinions that may be found valid.¹¹⁵ Simi-

111. Note that the existence of a professional-client relationship is key. In public discourse, expert knowledge is just another opinion. See Post, *supra* note 73, at 44 ("Within public discourse, traditional First Amendment doctrine systematically transmutes claims of expert knowledge into assertions of opinion.").

112. See *infra* Part II.B.

113. *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1307-08 (11th Cir. 2017) (quoting CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 169 (1993)).

114. See Haupt, *supra* note 72, at 19-32 (discussing justifications for professional outlier status).

115. Haupt, *supra* note 7, at 1251; see also Haupt, *supra* note 72, at 47-55 (discussing the knowledge communities model with respect to emergent knowledge).

larly, as a personal matter, professionals and clients may find certain topics and views offensive. But the potential to offend does not render a particular professional insight bad advice. And the power of persuasion within the confines of the professional-client relationship is mitigated by the professional's fiduciary duty, which holds the professional to the best interests of the client with whom the ultimate decision rests.¹¹⁶

There are, to sum up, perfectly good reasons to be suspicious of content-based regulation in public discourse, but the First Amendment concerns animating the *Reed* Court do not neatly map onto the professional speech context.

B. Regulation

In *Wollschlaeger*, the majority adopts intermediate scrutiny as articulated in *Sorrell*, where the Supreme Court held that “[s]peech in aid of pharmaceutical marketing” is protected under the First Amendment and subject to heightened scrutiny.¹¹⁷ Justice Kennedy, writing for the Court, elaborates that commercial speech doctrine requires the state “to justify its content-based law as consistent with the First Amendment.” To do so, “the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.”¹¹⁸

Justice Breyer's dissent, by contrast, rejects this departure from previous commercial speech doctrine.¹¹⁹ In his view, the majority's “far stricter, specially ‘heightened’ First Amendment standards” are inapplicable to commercial speech regulation.¹²⁰ Taken on its own terms, as Justice Breyer rightly points out in his dissent, *Sorrell* signals a significant change in the way the Court reviews commercial regulation.¹²¹ My concern here, however, is not with the changes to commercial speech doctrine—though the Court's approach in *Sorrell* is troubling, to be sure.¹²² Rather, I am concerned with the Eleventh Circuit's

116. See Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1217 (2016) (“This is the opposite of the model of independent, autonomous individuals presupposed by the model of public discourse.”).

117. 564 U.S. 552, 557 (2011).

118. *Id.* at 571-72.

119. *Id.* at 581 (Breyer, J., dissenting).

120. *Id.* at 582.

121. *Id.* at 592 (asserting that “the imposition of ‘heightened’ scrutiny in such instances would significantly change the legislative/judicial balance, in a way that would significantly weaken the legislature's authority to regulate commerce and industry”).

122. For critical analysis, see, for example, Shanor, *supra* note 12, at 150 (suggesting that *Sorrell* “goes the furthest in chipping away the initial architecture of the commercial speech doctrine

incorporation of *Sorrell*'s standard of review into professional speech doctrine in *Wollschlaeger*.

Aside from the internal inconsistency caused by diminishing the scrutiny afforded content-based regulations pursuant to *Reed*,¹²³ the *Wollschlaeger* majority apparently is unwilling to settle on a standard of review for professional speech. It seemingly adopts intermediate scrutiny as a stopgap rather than on principle—and, indeed, it expressly leaves open whether strict scrutiny should apply. This is how *Sorrell*, a commercial speech case, enters the picture. But “the extent of protection should not be the primary reason to analogize the two types of speech unless doctrine is tethered to theory.”¹²⁴

Extending robust First Amendment protection, theorized on its own terms, to professional speech does not preclude regulation of the professions.¹²⁵ In *Wollschlaeger*, Judge Jordan's majority opinion correctly points out that professional licensing is not the same as professional speech regulation.¹²⁶ Various forms of regulation, including licensing requirements and advertising regulation, “do not implicate professional speech interests.”¹²⁷ This is because they do not directly target the content of the speech between a professional and a client for the purpose of giving advice.¹²⁸ These types of regulations do not even reach the content of advice within the professional-client relationship.

Another form of permissible regulation that does in fact directly target the content of speech between professional and client is professional malpractice liability.¹²⁹ But it is important to recognize that professional speech protection and professional malpractice liability are complementary.¹³⁰ Crucially, “the substantive content of both is determined by the insights of the knowledge community.”¹³¹ We affirmatively want to be able to sanction bad professional advice while retaining consistency with the First Amendment. And it must be the

and in undermining the features that the Court that created the doctrine put in place to ensure that the First Amendment would not be the undoing of the regulatory state”).

123. *Cf. supra* notes 68-69 and accompanying text.

124. Haupt, *supra* note 7, at 1264.

125. *See id.* at 1284.

126. *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017).

127. Haupt, *supra* note 7, at 1278.

128. *Id.* at 1277-78.

129. *Id.* at 1278-79 (“The tort regime in this context functions as a form of regulation.”).

130. *Id.* at 1285.

131. *Id.*

knowledge community that decides what is within the range of good professional advice.¹³²

As a matter of tort doctrine, the profession's standard of care is imposed on the individual professional, linking the professional to the knowledge community.¹³³ Regarding the question of who determines the content of good advice, the first of the three panel decisions in *Wollschlaeger* shows the conceptual errors that can follow from an inadequate theoretical basis. The panel held that FOIA is constitutional as "a legitimate regulation of professional conduct."¹³⁴ Just as the state may impose malpractice liability "for all manner of activity that the state deems bad medicine," the opinion notes, it may determine "that good medical care does not require inquiry . . . regarding firearms when unnecessary to a patient's care."¹³⁵ Thus, the panel determined that it is the state's responsibility to assess what constitutes appropriate care. But "it is misleading to assert, as the Eleventh Circuit did, that the state imposes liability for activities that the state deems bad medicine. Rather, the state's imposition of liability should track what the *knowledge community* deems bad medicine."¹³⁶ To reiterate, the relevant question is not whether the regulation is content-based, but rather whether its content aligns with the insights of the knowledge community.

III. ALTERNATIVE APPROACHES

Several competing approaches to professional speech have emerged as such cases have percolated through the federal courts.¹³⁷ I will first take up the Ninth Circuit's approach in *Pickup*¹³⁸ and the Third Circuit's approach in

132. *Id.* at 1287 ("The extent of liability under the common law should be congruent with the scope of protection of the knowledge community's discourse under the First Amendment. Only if liability and protection are coextensive can this liability mechanism yield fair results. If liability is properly measured against the standard of care determined by the profession, the knowledge community's formation of this standard should remain uncorrupted and its application within the professional-client relationship should receive robust First Amendment protection.").

133. *Id.* at 1242.

134. *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1203 (11th Cir. 2014).

135. *Id.*

136. Haupt, *supra* note 7, at 1302.

137. See, e.g., Ashutosh Bhagwat, *When Speech Is Not "Speech,"* 28 OHIO ST. L.J. (forthcoming 2017) (manuscript at 23-25, 34), <http://ssrn.com/abstract=2916448> [<http://perma.cc/TZU6-HRVH>] (arguing against First Amendment coverage of professional speech but noting that "[t]he coverage problem here is much more complex and debatable than in . . . other examples"); Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67 (2016) (arguing against a distinctive approach to professional speech).

138. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014).

King,¹³⁹ both of which predate the Supreme Court's decision in *Reed*. Then I will turn to the approach adopted by Judge Tjoflat in his *Wollschlaeger* dissent,¹⁴⁰ and finally expand upon the theory of professional speech based on an understanding of the professions as knowledge communities.¹⁴¹ Despite their differences, and notwithstanding the shortcomings of some of them, none of these approaches adopts content neutrality as a principle in the professional speech context. They demonstrate that courts are by no means trapped into *Wollschlaeger*-type reasoning post-*Reed*. Indeed, they provide good arguments for distinguishing the professional-client relationship from the public discourse framework contemplated in *Reed*.

The Ninth and the Third Circuits addressed professional speech in cases involving conversion therapy legislation. The Ninth Circuit in *Pickup* proposed a speech-conduct continuum¹⁴² that locates at one end a professional's speech in public discourse, at the midpoint professional speech within a professional-client relationship, and at the other end professional conduct.¹⁴³ The standard of scrutiny, accordingly, would be highest in public discourse, lower at the midpoint, and lowest when regulation concerns conduct.¹⁴⁴ Ultimately, the court considered the conversion therapy law "a regulation of professional conduct" subject to rational basis review.¹⁴⁵

The *Pickup* continuum introduces a certain degree of theoretical inaccuracy because it portrays as differences in degree what are probably better understood as differences in kind. Viewed from a normative perspective that considers the free speech values served, it is not clear that the distinction of professional speech from public discourse is one of degree.¹⁴⁶ The majority notes as much in its discussion of the "midpoint" of the speech-conduct continuum.¹⁴⁷ Notwithstanding this theoretical quibble, and regardless of the ultimate decision to locate the conversion therapy law on the conduct-regulating end of the

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

140. *Wollschlaeger*, 848 F.3d at 1330 (Tjoflat, J., dissenting).

141. Haupt, *supra* note 7, at 1241-42; see also Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1294 (2015) (adopting the characterization of the professions as "knowledge communities").

142. *Pickup*, 740 F.3d at 1227.

143. *Id.* at 1227-29.

144. See *id.*

145. *Id.* at 1222.

146. See Haupt, *supra* note 7, at 1248-57 (distinguishing professional speech from professionals' speech in public discourse).

147. *Pickup*, 740 F.3d at 1228 ("When professionals . . . form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than contribute to public debate.").

spectrum, the majority is cognizant of the need for content-based regulation of professional speech. The opinion links professional speech protection to professional malpractice liability, noting that “doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care.”¹⁴⁸ Rejecting the majority’s decision to consider the law a regulation of conduct, Judge O’Scannlain’s dissent makes the same point in discussing professional liability and ethical rules.¹⁴⁹ In short, all agree that content-based regulation of professional speech is permissible.

The Third Circuit in *King*, by contrast, considered the same type of conversion therapy law to be a regulation of “speech that enjoys some degree of protection under the First Amendment.”¹⁵⁰ But the “level of protection is diminished” for those “speaking as state-licensed professionals within the confines of a professional relationship.”¹⁵¹ The opinion analogizes professional to commercial speech in determining that intermediate scrutiny is appropriate.¹⁵² Despite the flaws in this analogy,¹⁵³ the important point is that law survives this level of scrutiny because it serves the “interest in protecting . . . citizens from harmful or ineffective professional practices.”¹⁵⁴ The First Amendment, according to the court, permits state regulation of professional speech based on content and viewpoint.¹⁵⁵

Judge Tjoflat’s *Wollschlaeger* dissent largely follows Justice Breyer’s concurrence in *Reed*.¹⁵⁶ Taking a critical view of *Reed*’s expansive doctrinal implications and its rigid demands for categorizing speech,¹⁵⁷ he suggests that courts should “instead embrace an approach focused on the values underlying the jurisprudential significance of those categories.”¹⁵⁸ Under such an approach, content neutrality may still serve as a useful proxy, but it does not automatically trigger strict scrutiny.¹⁵⁹ Rather, it “properly centers [the court’s] analysis on

148. *Id.*

149. *Pickup*, 740 F.3d at 1220-21 (O’Scannlain, J., dissenting).

150. *King v. Governor of N.J.*, 767 F.3d 216, 224 (3d Cir. 2014).

151. *Id.*

152. *Id.* at 233-35.

153. See Haupt, *supra* note 7, at 1264-68 (rejecting the commercial speech analogy).

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

155. *Id.* at 236-37.

156. See *supra* text accompanying notes 82-86.

157. See *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1332-35 (11th Cir. 2017) (Tjoflat, J., dissenting).

158. *Id.* at 1334.

159. *Id.* at 1335.

the relative importance of the First Amendment values implicated by a particular regulation, while preventing undesirable judicial interference in the everyday business of government.”¹⁶⁰ Applying the approach to FOIA, he contends that the state has a substantial interest in patient privacy protection as well as protection of their Second Amendment rights.¹⁶¹ He concludes that FOIA “narrowly protects patients in a focused manner in order to advance the State’s compelling interest in protecting the Second Amendment’s guarantee to keep and bear arms and patients’ privacy rights in their medical records.”¹⁶²

In the end, however, this analysis too suffers from a misalignment of interests. The countervailing interests identified—the patient’s Second Amendment and privacy rights—must be understood within the context of the professional-client relationship. As between the doctor and the patient, the majority correctly notes, it is difficult to see a direct Second Amendment conflict. Moreover, the patient’s privacy interest runs in a different way than it does outside the professional-client relationship. While the dissent conceptualizes the patient’s privacy interest as susceptible to violation *within* the advice-giving relationship, the professional-client relationship itself typically contemplates privacy interests as internal to that relationship and protected against violations by third parties *outside* of the professional-client relationship. It is against disclosure to third parties that the evidentiary privilege and other privacy-protecting measures are directed. Nonetheless, the *Wollschlaeger* dissent does provide a well-founded rebuke of content neutrality in professional speech. But after rightly rejecting content neutrality, we still need a theory of how to properly analyze professional speech that best accounts for the specific context of the professional-client relationship.

Notwithstanding *Reed*, an approach responsive to both the character of the learned professions and the characteristic features of the professional-client relationship would proceed from the assumption that content regulation in the professional speech realm must be permissible. In fact, *Reed* is best considered as orthogonal to the questions raised by professional speech for the reasons explained earlier in this Essay.¹⁶³ A First Amendment theory of professional speech based on an understanding of the professions as knowledge communities would align the interests underlying speech protection with those underlying the professional malpractice liability regime.¹⁶⁴

160. *Id.*

161. *Id.* at 1338.

162. *Id.*

163. See *supra* Part II.A.

164. Haupt, *supra* note 7, at 1285.

This leaves the question of the appropriate level of scrutiny. The federal appellate courts have taken divergent paths that, at least so far, have generally resulted in some form of heightened scrutiny for professional speech.¹⁶⁵ Instead of asking into which of the judge-made buckets of scrutiny to sort professional speech, however, the better approach is to ask what professional speech is scrutinized for. The goal is to protect expertise as determined by the knowledge community. Thus, restrictions should be examined in light of how well they map onto the content of professional advice as determined by the profession. This is another way of saying that it should generally be up to the knowledge community to decide what is good professional advice. The further state regulation diverges from professional consensus—understanding that knowledge communities are not monolithic and professional knowledge not static¹⁶⁶—the more skeptical courts ought to be.

Contrasting the conversion therapy laws and FOPA illustrates the point. In both instances, state regulation limits what professionals may say to their clients based on content. But the fundamental difference lies in who determines the content: the California state legislature codified the professional standard by relying on findings of professional groups; the Florida state legislature did exactly the opposite. While the American Medical Association and other professional groups have determined that asking about guns is relevant as a professional matter, the state legislature substituted its own judgment. But thinking about the professions as knowledge communities should result in a high degree of skepticism toward state interference at odds with professional insights.

IV. CONCLUSION

The Eleventh Circuit's en banc decision ultimately reaches the right result. But emphasizing content neutrality does not resolve, and instead exacerbates, the theoretical and doctrinal uncertainties at the root of the professional speech issue. This type of speech in fact vividly illustrates the dangers of an expansive understanding of content-neutrality. A close reading that isolates the judges'

165. See *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014) (“At the midpoint of the continuum, within the confines of a professional relationship, First Amendment protection of a professional’s speech is somewhat diminished.”); *King v. Governor of N.J.*, 767 F.3d 216, 224, 237 (3d Cir. 2014). (“[W]e believe intermediate scrutiny is the applicable standard of review in this case.”); *Wollschlaeger*, 848 F.3d at 1301 (“[B]ecause these three provisions do not survive heightened scrutiny under *Sorrell*, we need not address whether strict scrutiny should apply to them.”).

166. See generally *Haupt*, *supra* note 72 (incorporating this understanding into a theory of professional speech).

explanations of the theoretical underpinnings supporting the content-neutrality approach reveals the source of the mismatch. In *Wollschlaeger*, it seems, the court reflexively embraced content neutrality without considering whether this doctrinal approach is at all responsive to questions raised in the professional speech context. Avoiding its rigid application, it transplanted the intermediate scrutiny standard of review extracted from *Sorrell*, illustrating along the way that “*Reed* is not a free speech test for all seasons.”¹⁶⁷

A better approach would have considered the distinctive nature of professional speech. The value of professional speech to the client critically depends on its content. The professional malpractice liability regime is but one example of content regulation to ensure that professionals give their clients, to whom they owe a fiduciary duty, comprehensive and accurate advice. First Amendment protection of professional speech therefore should be coextensive with professional malpractice liability. The First Amendment should protect good professional advice. But bad advice is subject to malpractice liability, and the First Amendment provides no defense. The First Amendment, in other words, may not be blind to the content of professional speech. The content-neutrality paradigm traps courts in an analytical framework that is unresponsive to the questions professional speech raises.

Claudia E. Haupt is a Resident Fellow at the Information Society Project at Yale Law School. Many thanks to Jack Balkin, Vince Blasi, Carl Coleman, Rebecca Crootof, Jeff Gordon, Genevieve Lakier, Robert Post, Amanda Shanor, and participants in the 2017 Freedom of Expression Scholars Conference at Yale Law School for helpful comments and conversations.

Preferred Citation: Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 YALE L.J. F. 150 (2017), <http://www.yalelawjournal.org/forum/professional-speech-and-the-content-neutrality-trap>.

¹⁶⁷. Note, *supra* note 9, at 1981.