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Licensing Knowledge

Claudia E. Haupt

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Licensing Knowledge

*Claudia E. Haupt**

When professionals give advice, they disseminate professional knowledge to their clients. Professional advice is valuable to clients because they gain access to a body of knowledge they do not otherwise possess. To preserve the accuracy, and hence the value, of this knowledge transfer, the First Amendment should protect professional speech against state interference that seeks to alter the content of professional advice in a way that contradicts professional knowledge. But before professionals can give professional advice, they are routinely subject to licensing by the state. This seemingly creates a tension between state involvement in professional licensing and protection against state involvement in professional speech.

This Article provides a theoretical framework to reconcile professional speech protection with professional licensing. Under this theory, the interests underlying First Amendment protection of professional speech and those underlying state licensing are the same: preserving the reliability of expert knowledge by guarding professionals' competence and protecting the dissemination of reliable professional advice to the client.

INTRODUCTION.....	502
I. PROFESSIONAL LICENSING	509
A. <i>Traditional Justifications for Professional Licensing</i>	511
B. <i>Standard Critiques</i>	515
1. Economic Interests.....	515

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502	VANDERBILT LAW REVIEW	[Vol. 72:2:501
	2. Character and Fitness.....	518
	3. Competence.....	522
	C. <i>The New First Amendment Critique</i>	524
	D. <i>Identifying the Object of Licensing</i>	530
II.	EXPERT KNOWLEDGE AND PROFESSIONAL ADVICE.....	531
	A. <i>Distinguishing Information and Knowledge</i>	532
	B. <i>Expert Knowledge in Professional Advice-Giving</i>	534
	C. <i>The Democratic Dimension of Professional Advice</i>	539
III.	LISTENER INTERESTS, SPEAKER INEQUALITY, AND FIDUCIARY DUTIES.....	543
	A. <i>Listener Interests</i>	544
	B. <i>Speaker Inequality</i>	548
IV.	RETHINKING PROFESSIONAL LICENSING.....	552
	A. <i>Professionals and the First Amendment</i>	552
	1. Doctrinal Implications.....	552
	2. The Framework of Professional Advice-Giving.....	555
	B. <i>Professional Licensing Reform</i>	557
	CONCLUSION.....	559

INTRODUCTION

Professional licensing is under attack. Before professionals may dispense advice to their clients, they routinely have to obtain a license to practice, subjecting them to state regulation. But efforts to deregulate professional licensing that enlist the First Amendment as a new deregulatory weapon of choice are underway.¹ These challenges have created marked judicial disagreement on the First Amendment implications of licensing,² reflecting the underdeveloped theoretical basis of professional advice-giving.

1. Cf. David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. FORUM 287, 289 n.9 (2016) (“An emerging issue . . . is whether the First Amendment provides robust protection against occupational restrictions that impinge on freedom of speech . . .”); Clark Neily, *Beating Rubber-Stamps into Gavels: A Fresh Look at Occupational Freedom*, 126 YALE L.J. FORUM 304, 306 (2016) (arguing that “increased skepticism toward the rational basis test, and the collision of occupational licensing with more highly scrutinized realms of speech regulation and antitrust, have created both opportunities and an inclination for judges to reconsider the traditional evaluation of occupational licensing”).

2. Compare *Edwards v. District of Columbia*, 755 F.3d 996, 998 (D.C. Cir. 2014) (holding D.C. tour guide licensing requirement to violate the First Amendment), with *Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir. 2014), cert. denied, 135 S. Ct. 1403 (2015) (holding New

Professional speech should receive robust First Amendment protection. Dispensing professional advice within the professional-client relationship ought to remain free from state interference that seeks to prescribe its content in a way that contradicts professional knowledge. A doctor's advice, for example, should reflect the insights of the medical profession rather than a state legislature's opposing view.³ I have argued elsewhere that the First Amendment provides a shield against such state interference.⁴ At the same time, state licensing remains an important regulatory tool to prevent "quacks" from giving bad advice.⁵

The new First Amendment-based attacks on licensing suggest that a tension exists between state regulation of the professions and speech protection. Permitting state involvement in licensing while at the same time prohibiting intrusive state involvement in professional speech presents a puzzle that this Article addresses in its theoretical and doctrinal dimensions. So doing, it articulates a defense of professional licensing against First Amendment challenges and reconciles licensing with robust First Amendment protection for professional speech.

Orleans tour guide licensing requirement to be permissible under the First Amendment). *See also* *Serafine v. Branaman*, 810 F.3d 354, 365–70 (5th Cir. 2016) (holding that the provision of the Psychologists' Licensing Act governing "psychological services to individuals, groups, organizations, or the public" was an overbroad restriction on free speech as related to offers to provide such services without commercial purpose); *Locke v. Shore*, 634 F.3d 1185, 1197–98 (11th Cir. 2011) (upholding Florida licensing requirement for interior designers against First Amendment challenge); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1056 (9th Cir. 2000) (upholding California licensing requirement for mental health professionals against First Amendment challenge).

3. *See, e.g.*, Rick Rojas, *Arizona Orders Doctors to Say Abortions with Drugs May Be Reversible*, N.Y. TIMES (Mar. 31, 2015), <http://nyti.ms/1DpDo0Q> [<https://perma.cc/7MHN-W55A>] ("Arizona . . . became the first state to pass a law requiring doctors who perform drug-induced abortions to tell women that the procedure may be reversible, an assertion that most doctors say is wrong."); *see also* *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1319 (11th Cir. 2017) (holding that the recordkeeping, inquiry and antiharassment provisions of the Florida Firearm Owners' Privacy Act violated the First Amendment and that the antidiscrimination provision was constitutional). *But see* *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 906 (8th Cir. 2012) (upholding a state law requiring doctors to inform patients seeking an abortion of an increased risk of suicide to obtain informed consent).

4. *See generally* Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016) (offering a theory of First Amendment protection for professional speech based on an understanding of the professions as knowledge communities).

5. *Id.* at 1277–84 (discussing licensing as permissible regulation).

Courts⁶ and scholars⁷ have linked First Amendment questions of professional speech protection to the permissibility of licensing. What is still missing from the debate, however, is a firm theoretical basis to defend professional licensing against deregulatory undertakings that seek to enlist the First Amendment in an effort to curb state regulation of commercial—including professional—activities.

A theory of professional speech based on an understanding of the professions as knowledge communities aligns the interests underlying professional speech protection from state interference on the one hand and those underlying state involvement in professional licensing on the other. The respective interests, I submit, are the same: preserving the reliability of expert knowledge by guarding professionals' competence, and protecting the dissemination of reliable professional advice to the client. Therefore, the First Amendment cannot in a theoretically and doctrinally coherent manner be used as a deregulatory device against professional licensing.

This Article plays out against the larger jurisprudential backdrop that is the current debate over the deregulatory use of the First Amendment in pursuit of a *laissez faire*, *Lochner*-style market.⁸

6. See, e.g., *Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2375 (2018):

All that is required to make something a “profession,” according to these courts, is that it involves personalized services and requires a professional license from the State. But that gives the States unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement. States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose “invidious discrimination of disfavored subjects.;

King v. Christie, 981 F. Supp. 2d 296, 319 (D.N.J. 2013):

[T]here is a more fundamental problem with [the argument that professional counseling is speech], because taken to its logical end, it would mean that *any* regulation of professional counseling necessarily implicates fundamental First Amendment free speech rights, and therefore would need to withstand heightened scrutiny to be permissible. Such a result runs counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services.

7. See, e.g., Robert Kry, *The “Watchman for Truth”: Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885 (2000) (discussing licensing as a regulation of professional advice); Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. FORUM 165 (2015) (discussing the use of licensing to regulate occupational speech); Vikram Amar, *Licensing Regulations Are Not a Free-Speech Issue*, N.Y. TIMES: ROOM FOR DEBATE (Aug. 20, 2014), <http://www.nytimes.com/roomfordebate/2014/08/20/when-do-doctors-have-the-right-to-speak/licensing-regulations-are-not-a-free-speech-issue> [<https://perma.cc/H5VZ-TL6F>] (arguing that professional licensing regulations should not trigger review under the First Amendment).

8. See, e.g., *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2502, 2460 (2018) (Kagan, J., dissenting) (“[T]he majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy.”); *NIFLA*, 138 S. Ct. at 2383 (Breyer, J., dissenting) (“Using the First Amendment to strike down economic and social laws . . . will, for the American public, obscure, not clarify, the true value of protecting freedom of speech.”); see also C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J.

In the professional context in particular, such developments would be extremely problematic. In contrast to the commercial realm, where the free flow of information is at stake, professionals deal in a specific kind of information—namely, advice based on professional knowledge.⁹ What is good professional advice, in turn, is determined by the knowledge community rather than the market.¹⁰ Thus, even if the First Amendment were to justify deregulation in the commercial context generally¹¹—which I doubt, but will not explore within the confines of

981, 990–94 (2009) (arguing that commercial speech should be subject to regulation due to its relation to market transactions); Julie Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1157–58 (2015) (describing how the First Amendment has been used to advance economic interests); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2588 (2008) (arguing against the expansive protection of commercial speech, especially as applied to for-profit corporations); Post & Shanor, *supra* note 7, at 167 (“[T]he First Amendment has become a powerful engine of constitutional deregulation.”); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 10 (2000) (“Nothing could be more damaging to the First Amendment than to equate it with a specific economic perspective, and in this way to transform it into a mere “basis for reviewing economic regulations.”); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 137 (“Courts’ growing protection of commercial speech threatens to revive a sort of *Lochnerian* constitutional economic deregulation . . .”); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1454 (2017) (“By conceptualizing corporate and listeners’ interests as aligned because both benefit from deregulation, the Court has developed a tradition in which corporate interests are always vindicated while listeners’ interests are not.”). *But see* Jonathan H. Adler, *Persistent Threats to Commercial Speech*, 25 J.L. & POL’Y 289, 316 (2016) (“[C]ommercial speech can pose a threat to established economic interests . . .”); Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 378 (2017) (arguing that broad First Amendment protections are important in the marketplace).

Indicative of a larger trend, scholars explore the *Lochnerization* of the First Amendment beyond commercial speech. *See, e.g.*, Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 572 (2015) (“[R]enewed focus in conservative political thought on limiting government interference in the marketplace has begun to affect mainstream conservative legal thought.”); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917 (2016) (explaining that First Amendment *Lochnerism* has affected “campaign financiers, food and drug companies, right-to-work activists, and religious employers”); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1455 (2015) (“[C]ourts increasingly incorporate the central premises of *Lochner* into religious liberty doctrine.”). For a popular press account, see Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://nyti.ms/2ID0Wov> [<https://perma.cc/9HKG-YD4S>] (“Conservative groups . . . have used the First Amendment to justify unlimited campaign spending, discrimination against gay couples and attacks on the regulation of tobacco, pharmaceuticals and guns.”).

9. *Cf.* Haupt, *supra* note 4, at 1283 (stating that the First Amendment may be used to protect “the individual professional’s opinion”).

10. *See generally* Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. 671, 678 (2017) (“The advice-giving function of the individual professional is thus tied back to the range of defensible opinions within the knowledge community.”).

11. For competing views, see Bernstein, *supra* note 1, at 295 (advocating for “[t]he right to pursue an occupation free from arbitrary government action”); Neily, *supra* note 1, at 312 (criticizing “the dubious jurisprudential foundation upon which the occupational licensing doctrine rests”); and Amanda Shanor, *Business Licensing and Constitutional Liberty*, 126 YALE L.J. FORUM 314, 314 (2016) (“[T]he Constitution is increasingly being invoked as a trump against certain types of economic regulation.”).

this Article—the underlying considerations, as I will argue here, do not apply in the *professional* context.

In making that argument, this Article unpacks the distinctive nature of professional speech. Several key features distinguish professional speech from speech in public discourse and from commercial speech.¹² Professional speech takes place within the confines of the professional-client relationship. In light of the characteristics defining this social relationship, two strands of current First Amendment scholarship concerning questions of listener interests and speaker equality are especially salient. Both constitute the flip side of dominant First Amendment theory as it applies to public discourse, and both remain generally underexplored even though they are of foundational importance in the context of professional speech.

The predominant perspective in First Amendment doctrine tends to focus primarily on speaker interests.¹³ But in the professional context, this focus is misplaced. Likewise, there is a strong presumption of speaker equality that pervades our understanding of the First Amendment.¹⁴ The reasons underlying professional speech protection, however, run counter to these assumptions. The very purpose of professional speech is to provide useful advice *to the client*. A focus solely on the speaker is misguided because within the professional-client relationship, the perspective of the listener—who receives access to knowledge from the speaker—is essential.¹⁵ Moreover, the professional deploying her expert knowledge within the professional-client relationship affirmatively is *not equal* to other, nonprofessional speakers, and her professional advice is therefore *not* to be regarded as

12. See Haupt, *supra* note 4, at 1254–58 (distinguishing professional speech from private speech in public discourse and from government speech); *id.* at 1264–68 (distinguishing professional speech and commercial speech).

13. See, e.g., Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 52 (2016) (“Many think of the First Amendment as safeguarding the interests of speakers, especially the lonely individual speaker of conscience.”); Post & Shanor, *supra* note 7, at 170 (“Ordinary First Amendment doctrine . . . focuses on the rights of speakers, not listeners.”).

14. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231–32 (2015) (invalidating municipal sign ordinance and holding that content-based restrictions on speech are subject to strict scrutiny); *Citizens United v. FEC*, 558 U.S. 310, 350 (2010) (striking down restrictions of independent political expenditures based on the identity of the speaker, stating that “the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity”); see also ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE*, at xi (2012) (“We have interpreted the First Amendment to mean that every person has an equal right to speak as he or she thinks right.”).

15. Cf. Norton, *supra* note 13, at 83 (discussing “professionals’ speech to their patients” as a listener-centered relationship and asserting that “a listener-centered approach supports the protection of speech in these relationships that furthers listeners’ First Amendment interests, while permitting the regulation of speech that frustrates those interests”).

just another opinion.¹⁶ These considerations make the First Amendment a poor vehicle to challenge professional licensing. In fact, quite to the contrary, the justifications underlying professional licensing and professional speech protection, as the remainder of this Article demonstrates, largely align.

To be clear, the argument is not that the First Amendment requires professional licensing as a constitutional matter.¹⁷ Rather, the argument is that the First Amendment does not prohibit professional licensing. It thus cannot be used as a tool against state regulation that requires professionals to be licensed. The constitutional basis for such regulations comfortably rests in the police powers of the states.¹⁸ Doctrinally, these regulations are thus subject to rational basis review rather than First Amendment strict scrutiny or, under the commercial speech doctrine, intermediate scrutiny.

This Article proceeds in four parts. Part I outlines the traditional justifications for state licensing and presents the main critiques of these justifications, including critiques based on economic interests, character and fitness, and competence. On closer inspection, they are best understood as efforts to recalibrate existing licensing regimes. This Part then highlights the new, First Amendment–based critique of licensing that raises the stakes significantly by questioning the constitutionality of licensing. Finally, it addresses the object of licensing and concludes that ensuring the professional’s competence to serve the client’s interests within the professional-client advice-giving relationship is the most relevant basis for licensing.

16. Note that the existence of a professional-client relationship is key. See POST, *supra* note 14, at 44 (“Within public discourse, traditional First Amendment doctrine systematically transmutes claims of expert knowledge into assertions of opinion.”).

17. Licensing of clergy, in particular the jailing of Baptist ministers in Virginia for preaching without licenses, is at the root of religious freedom in the United States. See Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2119–20 (2003); *id.* at 2164–65 (discussing England’s Act of Toleration, which expanded the right to preach freely in the American colonies and served as a precursor to the First Amendment). The clergy is generally considered one of the three paradigmatic professions, alongside law and medicine. Haupt, *supra* note 4, at 1248–49. However, in light of the religion clauses of the First Amendment, I explicitly exclude the clergy from my discussion.

A different rationale for excluding the clergy is given by Walter Gellhorn, who notes: “After examining the roster of who must receive official permission to function, a cynic might conclude that virtually the only people who remain unlicensed in at least one of the United States are clergymen and university professors, presumably because they are nowhere taken seriously.” Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 6 (1976).

18. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1872) (police power extends “to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State”).

Part II offers a descriptive-analytical account of the specific character of expert knowledge. Drawing on insights from sociology and science and technology studies—fields traditionally concerned with understanding knowledge and the professions—it provides an assessment of the sociological reality of how knowledge is produced and disseminated by professionals and thus made useful to clients. So doing, it first explores the distinction between information and knowledge. It then turns to the societal role of expert knowledge communicated through professional advice. Expert knowledge is based on inequality between professionals and nonprofessionals, and hence might be considered fundamentally “undemocratic.” Yet, this very characteristic makes professional knowledge—and professional advice based on it—valuable to the client and, by extension, to society at large. Exploring these knowledge-centered societal benefits, it offers a perspective traditionally underexplored in First Amendment theory.¹⁹

Part III shifts to a normative perspective, considering more fully the specific interests at stake. It examines listener interests and speaker inequality within the professional-client relationship as features distinctive from public discourse and in contrast to the normative assumptions underlying public discourse. It then turns to the normative dimension of speaker inequality, bringing the First Amendment values underlying professional speech into conversation with the values underlying the fiduciary relationship between professionals and clients. Because fiduciary duties are anathema to our understanding of public discourse, they remain generally overlooked in First Amendment theory.²⁰

Part IV offers a reassessment of professional licensing in light of the concept of the professions as knowledge communities along two axes. First, it demonstrates from a First Amendment perspective that professional licensing and the values underlying speech protection align in the interest of ensuring competence. It outlines the doctrinal implications of the theory and its interactions with the professional advice-giving framework. Second, it argues that the states’ police powers offer ample room for recalibrating existing professional

19. Cf. Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 902 (2010) (“Yet although factual truth is important, surprisingly little of the free speech tradition is addressed directly to the question of the relationship between a regime of freedom of speech and the goal of increasing public knowledge of facts or decreasing public belief in false factual propositions.”). One notable exception is Post’s theory of expertise and democracy, see POST, *supra* note 14, upon which my analysis builds, see *infra* Section II.C.

20. Cf. 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.”).

licensing regimes in light of the interplay of professional expertise, public expectations, and the interest in harm avoidance.

The First Amendment, to borrow loosely from Alexander Meiklejohn, “is not the guardian of unregulated talkativeness.”²¹ Regulating the professions through professional licensing requirements does not contradict the values served by the First Amendment in the professional context. Ultimately, the juxtaposition of professional licensing and the First Amendment in antilicensing litigation is strategically innovative but theoretically unsound. There may be good reasons to question the scope and design of current professional licensing requirements. But the First Amendment poses no constitutional barrier to professional licensing.

I. PROFESSIONAL LICENSING

Processes of professionalization bring with them the advent of licensing regimes. Whether among lawyers in medieval England,²² physicians in eighteenth-century Germany,²³ or across various professional groups in the United States,²⁴ professionalization generates exclusive claims to expertise, which in turn routinely results in calls for state intervention to establish admissions regulations or licensing regimes.²⁵

We live in an era of ever-expanding professional licensing.²⁶ That general trend, to be sure, is not particularly new. Henry

21. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1948).

22. See, e.g., Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 5 (1998) (“[O]ne sees the adoption of competence and character based admission standards . . .”).

23. See, e.g., Thomas Broman, *Rethinking Professionalization: Theory, Practice, and Professional Ideology in Eighteenth-Century German Medicine*, 67 J. MOD. HIST. 835, 858–62 (1995) (claiming that licensing brought “a new sense of professionalism” to the medical profession); *id.* at 839 (“Most significant . . . was the creation of state medical boards . . . which established a separate licensing examination for admission to medical practice.”).

24. See, e.g., Harold J. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137, 137 (1964) (stating that the U.S. “labor force as a whole is in one way or another becoming professionalized”).

25. See, e.g., Gellhorn, *supra* note 17, at 11 (“[R]estricting access is the real purpose, and not merely a side effect, of many if not most successful campaigns to institute licensing schemes”); Henry Paul Monaghan, *The Constitution and Occupational Licensing in Massachusetts*, 41 B.U. L. REV. 157, 166 (1961) (“[T]he prime impetus for the creation of a state board to administer standards for entry into an occupation emanates from the occupational group itself . . .”).

26. See, e.g., Eduardo Porter, *Job Licenses in Spotlight as Uber Rises*, N.Y. TIMES (Jan. 27, 2015), <http://nyti.ms/1zt0vHe> [<https://perma.cc/8GWL-YJNS>] (reporting on various studies of licensing, including Morris M. Kleiner, *Reforming Occupational Licensing Policies*, BROOKINGS INSTITUTION: HAMILTON PROJECT (Mar. 2015), https://www.brookings.edu/wp-content/uploads/2016/06/THP_KleinerDiscPaper_final.pdf [<https://perma.cc/SBZ6-LFUV>]; and Dick M. Carpenter

Monaghan noted in an article published in 1961: “The continuous growth of the occupational license as a method for restricting entry into an occupation is, in its own way, an arresting social phenomenon. Occupation after occupation is withdrawn from unrestricted access by requiring a license as a prerequisite to entrance.”²⁷ But a half century later, the scope far exceeds previous licensing requirements.

By serving as a prerequisite to practicing one’s occupation, licensing constitutes a “significant control over free occupational entry.”²⁸ Only those individuals who exhibit “a certain minimum proficiency” receive licenses. This mechanism necessarily means that there is no unlimited access to professions subject to licensing.²⁹ And although unlimited entry may be justifiably rejected for some professions based on certain prerequisites of expertise,³⁰ limiting entry may also be designed to exclude otherwise qualified individuals. On this point, a parallel reading of the *Slaughter-House Cases*³¹ and *Bradwell v. Illinois*³² is instructive.

II, Lisa Knepper, Angela C. Erickson & John K. Ross, *License to Work: A National Study of Burdens from Occupational Licensing*, INST. FOR JUST. (May 2012), <https://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf> [<https://perma.cc/8NKR-Q63E>].

27. Monaghan, *supra* note 25, at 164; *see also* Gellhorn, *supra* note 17, at 6:

Possibly the founding fathers knew of restrictions in some of the new American states on the practices of law and medicine. They would, however, have been aghast to learn that in many parts of this country today aspiring bee keepers, embalmers, lightning rod salesmen, septic tank cleaners, taxidermists, and tree surgeons must obtain official approval before seeking the public’s patronage.

(footnote omitted).

28. Monaghan, *supra* note 25, at 158.

29. *Id.*

30. *See* *Dent v. West Virginia*, 129 U.S. 114, 128 (1889) (upholding licensing requirement to practice medicine, concluding that “[t]he law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the state”); *see also* *Douglas v. Noble*, 261 U.S. 165, 169–70 (1923) (upholding licensing requirement for dentists).

31. 83 U.S. (16 Wall.) 36, 62 (1872) (defining extent of police powers).

32. 83 U.S. (16 Wall.) 130, 139 (1872) (rejecting challenge of qualified female applicant’s denial of a license to practice law under the Fourteenth Amendment). The concurrence elaborates:

It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

Id. at 142 (Bradley, J., concurring).

Licensing requirements are based on the states' police powers to protect the health, safety, and welfare of their citizens,³³ and they are routinely justified by invoking protection of the public as the underlying rationale. The rationales for regulation across professions are similar, though they are not typically "precisely the same as those underlying many typical forms of health, safety, and economic regulation."³⁴ That is to say, the "protecting the public" rationale for professional licensing can be fuzzy. One important consequence is that licensing regimes are often insufficiently calibrated. An improved approach would move away from the generic "protecting the public" rationale toward a more clearly defined and justified regulatory objective: ensuring the reliability of expert knowledge for the benefit of the client by ascertaining the competence of the professional advice-giver and tying the professional's advice to the body of knowledge generated by the professional knowledge community.³⁵ But that does not mean that licensing is not—and ought not be—permissible.

A. Traditional Justifications for Professional Licensing

The Supreme Court noted in 1889 in *Dent v. West Virginia*: "No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering the community his services as a physician, that he possess such learning and skill, shall present evidence of it by a certificate or license from a body designated by the state as competent to judge of his qualifications."³⁶ Expertise and licensing are thus coupled.

In the context of legal advice, while acknowledging the need for affordable access to legal services, the American Bar Association's ("ABA") position regarding nonlawyer providers has rejected "open[ing] the practice of law to unschooled, unregulated nonlawyers" primarily with a view to potential "grave harm to clients."³⁷ Though many legal

33. See, e.g., *Hawker v. New York*, 170 U.S. 189, 191 (1898) (concerning medical licenses); *Dent*, 129 U.S. at 122 (discussing medical licensing "conditions imposed by the state for the protection of society").

34. Rose, *supra* note 22, at 3 (focusing on the legal profession).

35. See Haupt, *supra* note 4, at 1248–54 (explaining the role of professional knowledge communities).

36. 129 U.S. at 123.

37. Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 *FORDHAM L. REV.* 2587, 2607 (2014) (quoting William T. Robinson, *Legal Help for the Poor: The View from the A.B.A.*, *N.Y. TIMES* (Aug. 30, 2011), <https://www.nytimes.com/2011/08/31/opinion/legal-help-for-the-poor-the-view-from-the-aba.html> [<https://perma.cc/VG5H-JCX9>]).

issues may look fairly straightforward, they likely “involve myriad legal rights and responsibilities. If the case is not handled by a professional with appropriate legal training, a person can suffer serious long-term consequences . . .”³⁸

This justification seems fairly intuitive, and it is easily translatable to other professions. It also resonates with the public’s expectations toward providers of professional services. As one observer remarked,

Sometimes professional licenses make sense, ensuring decent standards of health and safety. I’m reassured that if I ever need brain surgery, the doctor performing it will have been recognized by the profession to be up to the task. We don’t want to return to the 19th century, when barbers pulled teeth and freelance doctors with no certification peddled miraculous cures.³⁹

Accordingly, states establish licensing systems for various professions. When challenged, courts have upheld them by relying on traditional justifications. Consider, for example, *National Ass’n for the Advancement of Psychoanalysis v. California Board of Psychology*, decided by the U.S. Court of Appeals for the Ninth Circuit in 2000.⁴⁰ The state of California has regulated psychology as a profession since 1958.⁴¹ Initially, only the title “psychologist” was protected, but there was no definition of what “the practice of psychology” entailed.⁴² In light of “the actual and potential consumer harm that can result from the unlicensed, unqualified or incompetent practice of psychology,” however, the state created the Psychology Licensing Law.⁴³ The state legislature relied on the state’s police powers, reasoning “that the practice of psychology in California affect[ed] the public health, safety, and welfare and [was] to be subject to regulation and control in the public interest to protect the public from the unauthorized and unqualified practice of psychology.”⁴⁴

The statute defines the profession,⁴⁵ sets forth a licensing requirement, and defines the services rendered.⁴⁶ It also establishes certain educational requirements as a prerequisite for obtaining a license.⁴⁷ Moreover, the statute allows other professionals to engage in

38. *Id.*

39. Porter, *supra* note 26.

40. 228 F.3d 1043 (9th Cir. 2000).

41. *Id.* at 1047.

42. *Id.*

43. *Id.* (quoting CAL. BD. OF PSYCHOLOGY, SUNSET REVIEW REPORT).

44. *Id.* (quoting CAL. BUS. & PROF. CODE § 2900 (West 2018)).

45. *See id.*

46. *See id.*

47. *See id.* (summarizing education, work experience, and admissions exam requirements for licensing).

“work of a psychological nature consistent with the laws governing their respective professions” as long as “they do not hold themselves out to the public as psychologists.”⁴⁸ At issue in this particular case were provisions concerning psychoanalysts.⁴⁹ Several individuals and an organization, not licensed under California law but intending to practice psychoanalysis in California, challenged the licensing scheme on Fourteenth and First Amendment grounds.⁵⁰ The Ninth Circuit held that it was constitutional under both.⁵¹

With respect to the Fourteenth Amendment substantive due process and equal protection challenge, the court held “that there is no fundamental right to choose a mental health professional with specific training.”⁵² Since the licensing requirement “neither utilizes a suspect classification nor implicates a fundamental right,” the court subjected it to rational basis review.⁵³ Plaintiffs argued that there was no rational basis to require additional training prerequisites in order to obtain a license, that there was no rational basis for exempting certain professionals, and that the entire licensing scheme was “unnecessary and ineffective” and overly restrictive.⁵⁴ The court rejected all of these arguments and in so doing made the—in light of contemporary developments, perhaps overconfident⁵⁵—observation that “the *Lochner* era has long passed.”⁵⁶

Regarding the First Amendment challenge, the plaintiffs argued that psychoanalysis—the “talking cure”—is pure speech and as such deserves First Amendment protection.⁵⁷ The court, however, noted that the state’s police power allows regulation and licensing of professionals, particularly when issues of public health and safety are involved.⁵⁸

The professions discussed so far—medicine, law, and psychology—suggest an important connection between the permissibility of a licensing requirement and the nature of the occupational activity to be regulated.⁵⁹ There is a broad range of

48. *Id.* at 1047–48.

49. *See id.* (outlining criteria for psychoanalysts and research psychoanalysts).

50. *Id.* at 1048–49.

51. *Id.* at 1056.

52. *Id.* at 1050.

53. *Id.*

54. *Id.* at 1051.

55. *See supra* note 8 and accompanying text (discussing the *Lochner*ization of the First Amendment).

56. *Nat’l Ass’n for the Advancement of Psychoanalysis*, 228 F.3d at 1051 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

57. *Id.* at 1054.

58. *Id.*

59. Moreover, the medical services sector accounts in large part for the increase in licensing requirements. *See Kleiner, supra* note 26, at 7.

occupations, and pinning down the exact reason why licensing is likely indispensable for some, debatable for others, and perhaps unnecessary for the rest is a vexing issue. As one commentator notes:

It is one thing to require a great deal of training and government certification for someone to work as a physician or attorney—occupations where the well-being of the public can reasonably be thought to be at stake. It is quite another for potential florists, African hair-braiders, or casket-sellers—all of whom have sued over occupational restrictions, and none of whom present risks to public well-being—to face expensive, time-consuming and broadly unreasonable barriers to entry.⁶⁰

Whether this broad assertion of harmlessness is descriptively accurate is questionable.⁶¹ It is also important to note that outlier cases should not dictate the overall approach to licensing.⁶²

One key consideration is potential harm to clients resulting from bad advice. Thus, Richard Posner ties “the professional’s capacity to harm society” to the belief that entry into the profession “should be controlled by the government: that not only should the title of ‘physician,’ ‘lawyer,’ etcetera be reserved for people who satisfy the profession’s own criteria for entry to the profession, but no one should be allowed to perform the services performed by the members of the profession without a license from the government.”⁶³ Whatever the debates are at the margins, the theoretical point is most clearly conveyed with respect to these paradigmatic advice-giving professions where, from the client’s perspective, both the value of good advice and the potential harm caused by bad advice are especially great.

60. Bernstein, *supra* note 1, at 297–98. Even critics of licensing acknowledge such differences among professions. See, e.g., Kevin Dayranta, Paul J. Larkin, Jr. & John O’Shea, *Reforming American Medical Licensure*, 42 HARV. J.L. & PUB. POL’Y 223, 241–42 (2019) (asserting that “occupational licensing regulations are not always necessary, and in most fields are far too onerous to be justified on informational asymmetry grounds” but acknowledging that “medicine is inherently different from most other fields”). But see Shirley V. Svorny, *Beyond Medical Licensure: Is Licensing More Important for Doctors than for Interior Decorators or Hair Braiders?*, HEALTH & MED., Spring 2015, at 26, 27, [hereinafter Svorny, *Beyond Medical Licensure*] <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2015/3/regulation-v38n1-6.pdf> [https://perma.cc/TYQ7-99NP] (“There are people who seriously dispute the need for some form of professional regulation of health care providers . . .”); Shirley Svorny, *End State Licensing of Physicians*, CATO INST. (Aug. 7, 2015), <https://www.cato.org/publications/commentary/end-state-licensing-physicians> [https://perma.cc/5BVZ-QNJJ] (arguing against physician licensing).

61. See, e.g., Monica C. Bell, *The Braiding Cases, Cultural Deference, and the Inadequate Protection of Black Women Consumers*, 19 YALE J.L. & FEMINISM 125, 140–43 (2007) (disputing the characterization of braiding as “harmless” and discussing potential harms).

62. See, e.g., Sandeep Vaheesan & Frank A. Pasquale, *The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy*, 14 ANN. REV. L. & SOC. SCI. 309, 312 (“Commentators all too often extrapolate from horror stories to make claims about the entirety of licensing . . .”).

63. Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 2 (1998).

B. Standard Critiques

Scholars and advocates have long criticized professional licensing for several reasons. Most prominent among these criticisms is the assertion that licensing improperly enshrines professionals' economic interests. Moreover, licensing allegedly creates specious character and fitness requirements and insufficiently ensures competence. More recently, a new line of attack has emerged that raises the stakes considerably. First Amendment challenges to licensing are framed as "occupational freedom" cases explicitly based on economic considerations. By attempting to raise the level of scrutiny under which professional licensing is reviewed—from rational basis review of economic regulation to a higher level of scrutiny under the First Amendment⁶⁴—these challenges cast licensing as constitutionally suspect.

Whereas the previous critiques are best understood as primarily aimed at tailoring existing regimes to better fit the goals of licensing, the First Amendment critique introduces a constitutional dimension. After briefly surveying the previous critiques, it is the First Amendment–based deregulatory claim that this Article primarily contends with.

1. Economic Interests

Licensing limits access to the profession. It therefore arguably may be used in an anticompetitive manner to protect the economic interests of professionals against both potential outside competitors seeking entry into the profession and those within the group itself.⁶⁵ Contemporary economic criticism of professional licensing spans a wide political spectrum. The Obama administration called for a reduction of "unnecessary occupation licenses";⁶⁶ the Clinton campaign in 2016 likewise embraced the reduction of licensing.⁶⁷ The Hamilton Project at

64. See *infra* notes 128–132 and accompanying text.

65. Monaghan, *supra* note 25, at 164.

66. Press Release, Obama White House, Fact Sheet: New Steps to Reduce Unnecessary Occupation Licenses that are Limiting Worker Mobility and Reducing Wages (June 17, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting> [<https://perma.cc/2HBQ-LJGZ>]; see also DEPT OF THE TREASURY OFFICE OF ECON. POLICY ET AL., OCCUPATIONAL LICENSING 45–46 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [<https://perma.cc/U29Z-2W5Q>] (encouraging states to reduce the burdens of professional regulations).

67. Jeanne Sahadi, *Hillary Clinton's New Plan to Help Small Business Owners*, CNN BUS. (Aug. 23, 2016, 2:17 PM ET), <https://money.cnn.com/2016/08/23/news/economy/hillary-clinton-small-business/index.html> [<https://perma.cc/KKC5-R8C2>].

the Brookings Institution released a report on licensing reform.⁶⁸ Libertarian groups have spearheaded current antilicensing litigation efforts.⁶⁹ Official statements from the Trump administration do not seem to be readily available, but as then-governor of Indiana, Vice President Mike Pence vetoed a number of licensing requirements for professions, including diabetes counselors, anesthesiologist assistants, and dietitians.⁷⁰

Is licensing merely an access control mechanism that serves a profession's economic interests by excluding newcomers? To pick just one example, critics have charged the legal profession with economic protectionism since the Great Depression, when it first began restricting the unauthorized practice of law.⁷¹ The profession, however, has denied that protecting its economic interests motivated the restrictions placed on legal practice.⁷² Complicating the picture, claims to expertise are intertwined with claims to authority that may be inseparable from economic interests.⁷³ As Monaghan puts it, "Competency,' then, may be but a euphemism for economic control of the trade group."⁷⁴ Historically, as critics of licensing readily acknowledge,⁷⁵ concerns for health and public safety provided the basis for regulation.⁷⁶ Tracing the origins of state medical boards, scholars note that "private medical associations pushed state legislators to adopt laws regulating the practice of medicine."⁷⁷ Physicians favored legislation protecting their market share from "irregulars" and "quacks."⁷⁸ Such laws advance economic interests, but whether they were the primary impetus or whether patient safety was the main concern remains contested among historians.⁷⁹ Regardless of motive, the ensuing state regulation of medical practice was, "as a matter of

68. Kleiner, *supra* note 26; Ryan Nunn, *The Future of Occupational Licensing Reform*, BROOKINGS INSTITUTION (Jan. 30, 2017), <https://www.brookings.edu/opinions/the-future-of-occupational-licensing-reform/> [https://perma.cc/D7WY-BL83].

69. See *Occupational Licensing*, INST. FOR JUSTICE, <http://ij.org/issues/economic-liberty/occupational-licensing> (last updated July 10, 2018) [https://perma.cc/47UQ-2JYK] ("[O]ccupational licenses, which are essentially permission slips from the government, routinely stand in the way of honest enterprise.").

70. See Kleiner, *supra* note 26, at 5.

71. Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing to Protect Consumers*, 82 FORDHAM L. REV. 2683, 2693 (2014).

72. *Id.*

73. See, e.g., Monaghan, *supra* note 25, at 167.

74. *Id.* at 165.

75. See, e.g., Kleiner, *supra* note 26, at 12.

76. Nadia N. Sawicki, *Character, Competence, and the Principles of Medical Discipline*, 13 J. HEALTH CARE L. & POL'Y 285, 290 (2010).

77. *Id.*

78. *Id.*

79. *Id.*

law, clearly adopted pursuant to the legislative authority to protect public health and safety.”⁸⁰

Excavating some of the assumptions underlying the market in professional services helps assess whether licensing merely creates barriers to entry or whether it serves a public interest in ensuring competence—or both. Two familiar positions compete. On the one hand, critics of licensing contend that occupational licensing has overwhelmingly negative effects. It creates barriers to entry and restricts employment in licensed occupations, drives up prices, and limits economic opportunity.⁸¹ This results in reduced employment and increased prices and wages rather than better quality and safety.⁸² Licensing under this view restricts upward mobility for lower-income individuals who seek occupational licensing⁸³ and geographic mobility for higher-income individuals due to differing eligibility requirements across licensing jurisdictions for highly skilled occupations such as medical and legal professionals.⁸⁴ Moreover, consumers may not benefit from licensing. Whereas prices have arguably risen and economic output declined, critics of licensing suggest that the quality of services may not have improved as a result of licensing.⁸⁵

On the other hand, scholars answer complaints that licensing raises prices without increasing the quality of services and blocks competitors from entering the market unless they fulfill certain training and testing requirements by pointing out that “each of these objections is not sufficiently theorized, justified, or empirically grounded” to support deregulatory interventions.⁸⁶ Anecdotal “horror stories” of outlier cases (such as “falconers, ferret breeders, and palm readers,” “beekeepers and taxidermists,” and “cosmetologists and florists”⁸⁷) provide an insufficient empirical basis.⁸⁸ The argument articulated by critics of licensing also points to larger problems within antitrust doctrine which insufficiently accounts for “the *societal value* of occupational licensure or professional standards. Instead, it reflects

80. *Id.*

81. See Kleiner, *supra* note 26, at 6 (“[B]y making it more difficult to enter an occupation, licensing can affect employment in licensed occupations, wages of licensed workers, the prices for their services, and worker economic opportunity more broadly.”).

82. *Id.*

83. See *id.*

84. *Id.* at 13; see also David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 117–22 (2017) (discussing how “licensing requirements limit interstate mobility”).

85. Kleiner, *supra* note 26, at 6.

86. Vaheesan & Pasquale, *supra* note 62, at 3.

87. *Id.* at 3, 5.

88. *Id.* at 5.

mainstream economics' bias against occupational licensure and a more general belief that government is the principal obstacle to competitive markets."⁸⁹

Whether one subscribes to one or the other of the two models of the professional-services market has a significant impact on one's view of professional licensing. It directly influences answers to fundamental and enduring questions, such as whether the professions are ordinary businesses. At a high enough level of abstraction, professionals' economic activities may not fundamentally differ from other commercial endeavors. For example, as Bradley Wendel points out, "The legal profession has always been rhetorically committed to the distinction between a business and a profession."⁹⁰

Thus, economic arguments for and against licensing exist. A system solely grounded in economic protectionism would certainly not justify a licensing regime⁹¹—but things are more complicated than that. Without resolving the conflict between different market models for professional services, the upshot is that economic considerations do not pose an insurmountable obstacle to imposing licensing requirements. However, different segments of the professional services market may be better regulated by more differentiated licensing regimes.

2. Character and Fitness

Deborah Rhode observes in her seminal article on the topic that "[m]oral character as a professional credential has an extended historical lineage."⁹² Professional licensing is routinely tied to evaluations of the applicant's moral character and fitness. For the legal profession, "the requirement dates to the Roman Theodesian Code, and its Anglo-American roots reach to thirteenth-century England."⁹³ In the medical context, the Supreme Court noted in the 1898 case *Hawker v. New York* that "[c]haracter is as important a qualification as

89. *Id.* at 2.

90. W. Bradley Wendel, *The Profession's Monopoly and Its Core Values*, 82 *FORDHAM L. REV.* 2563, 2566 (2014); *see also* Norman Bowie, *The Law: From a Profession to a Business*, 41 *VAND. L. REV.* 741 (1988).

91. *Cf.* *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1105 (2015) ("Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy."); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.").

92. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 *YALE L.J.* 491, 493 (1985).

93. *Id.*

knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished.”⁹⁴

In the United States, all state bars require “certification of character” as a condition for admission to practice law.⁹⁵ The same is true in most other nations and for most other licensed professions.⁹⁶ At the same time, moral character requirements evoke a bygone era in which they served as an attempt at establishing “distinctiveness” absent a claim to special expertise.⁹⁷ And despite their long history, the requirements remain fuzzy and exceedingly difficult to objectively assess.⁹⁸ Rhode explains:

94. 170 U.S. 189, 194 (1898) (upholding retroactive application of law prohibiting medical license for persons convicted of a crime against challenger after he had served a ten-year sentence for performing an abortion); *see also* Eastman v. State, 10 N.E. 97 (Ind. 1887) (affirming that the state may require good moral character for licensing); Thompson v. Hazen, 25 Me. 104 (1845); State *ex rel.* Powell v. State Med. Examining Bd., 20 N.W. 238 (Minn. 1884) (same); State v. Hathaway, 21 S.W. 1081 (Mo. 1893) (same); State v. Call, 28 S.E. 517 (N.C. 1897) (same).

95. Rhode, *supra* note 92, at 493.

96. *Id.*

97. *See, e.g.*, Broman, *supra* note 23, at 842 (“In a situation where physicians were not manifestly more ‘expert’ as practitioners, their rhetoric tended to emphasize social distinctiveness in other ways.”). Accordingly, the advice given to young physicians reflected this distinctiveness claim in the following way:

Even at the very end of the century, physicians routinely depicted themselves as members of a gentlemanly caste distinguished by its learning and dignified reserve. One well-received guide for aspiring physicians, written by the Tübingen medical professor Wilhelm Gottfried Ploucquet (1744–1814), emphasized the good moral character and bearing required of a physician. To develop these traits, Ploucquet suggested that young men intended for the medical profession be given training in dancing (which would teach them to move gracefully), music, drawing, and painting. For those who had finished their education and entered upon professional life, Ploucquet sternly enjoined them from being seen in public drinking houses or playing games of chance. In outfitting their offices, he advised young doctors to display their testimonials and degrees prominently and to assemble an impressive library, the contents of which should presumably be read, although Ploucquet did not elaborate on that point. They should also guard against changing churches without good cause, as well as creating any suspicion of either irreligiosity or zealotry. Finally, Ploucquet recommended that the young doctor dress well but not too elegantly, that he cultivate a pleasant and witty manner, and that he not contradict his superiors, except of course in medical matters.

Id. at 844.

98. *See, e.g.*, Rhode, *supra* note 92, at 529–46 (discussing subjectivity of standards and idiosyncrasies of implementation); *id.* at 559–63 (discussing problems with predictions based on prior conduct); *see also, e.g.*, Leslie C. Levin, *The Folly of Expecting Evil: Reconsidering the Bar’s Character and Fitness Requirement*, 2014 BYU L. REV. 775, 777 (2014) (discussing the many shortcomings of the character and fitness inquiry); Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2622 (2014) [hereinafter Levin, *Monopoly Myth*] (“[T]he information elicited during that process (e.g., prior convictions, substance abuse) does not strongly predict who will later be disciplined.”).

In the absence of meaningful standards or professional consensus, the filtering process has proved inconsistent, idiosyncratic, and needlessly intrusive. We have developed neither a coherent concept of professional character nor effective procedures to predict it. Rather, we have maintained a licensing ritual that too often has debased the ideals it seeks to sustain.⁹⁹

On the one hand, few applicants are actually denied admission.¹⁰⁰ Historically, as Rhode points out, “[t]he only substantial group effectively excluded on grounds of character seems to have been women.”¹⁰¹ On the other hand, “the number deterred, delayed or harassed has been more substantial.”¹⁰²

But the individual professional can be tied to the ethics of the profession without an individualized character test as a precondition for entry. Subsequent enforcement of ethics codes by disciplinary bodies more plausibly accomplishes this goal. Implementation of subsequent enforcement, however, is not without potential pitfalls. In the healthcare context, Nadia Sawicki has argued that state medical licensing boards ought to prioritize disciplinary action taken on the basis of competence rather than character.¹⁰³ Medical boards “often focus on character-related misconduct, including criminal misconduct, that bears only a tangential relation to clinical quality and patient care.”¹⁰⁴ Citing disciplinary actions for behaviors “as varied as tax fraud, failure to facilitate review of child support obligations, soliciting sex in a public restroom, possession of marijuana for personal use, and reckless driving involving alcohol,” Sawicki “questions whether, in light of the traditional goals of professional discipline, sanctioning physicians on these grounds (as opposed to grounds more clearly linked to clinical practice) is the most effective or efficient use of medical boards’ resources.”¹⁰⁵

Rhode reaches the same conclusion with respect to the legal profession. Abandoning the character inquiry as a prerequisite for admissions and ending the policing of nonprofessional behavior would

99. Rhode, *supra* note 92, at 494.

100. *Id.* at 493–94. For a prominent example, see *In re Anastaplo*, 366 U.S. 82, 83 (1961). See also Crimesider Staff, *From Jail to Yale: Man Faces Scrutiny in Bid to Be Lawyer*, CBS NEWS (Aug. 8, 2017, 3:36 PM), <https://www.cbsnews.com/news/from-jail-to-yale-man-faces-scrutiny-in-bid-to-become-lawyer/> [<http://perma.cc/349D-ZXVR>] (“A convicted felon who graduated from Yale Law School and won acclaim as a poet is being asked by a Connecticut committee to prove his ‘good moral character’ before he is allowed to practice law.”); Bari Weiss, Opinion, *Admit This Ex-Con to the Connecticut Bar*, N.Y. TIMES (Aug. 9, 2017), <https://nyti.ms/2vkj!TF> [<https://perma.cc/DRY8-3RPN>] (“Dwayne Betts is the kind of man who should be receiving awards from the bar association of Connecticut. Instead, he hasn’t been admitted.”).

101. Rhode, *supra* note 92, at 497.

102. *Id.* at 494.

103. Sawicki, *supra* note 76.

104. *Id.* at 287.

105. *Id.* at 288.

allow a new focus on professional abuses.¹⁰⁶ She notes that “if the profession’s regulatory process is to assume meaningful symbolic dimensions, its force should be conserved for acts bearing directly on professional practice.”¹⁰⁷ Further, “[m]ost garden variety professional misconduct—incompetence, harassment, deception, and delay—is rarely reported or sanctioned. Until those priorities are reversed, the bar can lay no special claim to character as a professional credential.”¹⁰⁸ Understanding the professions as knowledge communities adds force to this argument.¹⁰⁹ A knowledge-centered approach highlights the ill fit between character requirements upon entry and nonprofessional discipline, while also emphasizing the need for more oversight of professional behavior and, in particular, an emphasis on ensuring competence.

Ultimately, absent empirical support for the claim that the character and fitness inquiry actually ensures professionals’ superior moral character for the benefit of clients, ascertaining the character and fitness of professionals as a prerequisite for entry into the profession is a weak justification for professional licensing. It seems particularly outdated to the modern view of professionalism, which, at its core, means professional competence. Whereas *ex post* enforcement of professional responsibility and ethics rules on professional activities by way of disciplinary action can plausibly ensure that the licensed member of the profession acts in accordance with the profession’s rules,

106. Rhode, *supra* note 92, at 585; *id.* at 589 (“[A]bandoning the enterprise has much to commend it. In essence, the bar would cease monitoring character for purposes of admitting attorneys or of disciplining non-professional abuses. Such an approach would avoid the indeterminacies of standards, the rigidity of rules, and the pretense that either promises adequate public protection.”).

107. *Id.* at 591.

108. *Id.*

109. *See id.* at 509:

[T]he bar’s own interest in maintaining a professional community and public image. In both its instrumental and symbolic dimensions, the certification process provides an opportunity for affirming shared values. As sociologists since Durkheim have argued, the concept of a profession presupposes some sense of common identity. Excluding certain candidates on character grounds serves to designate deviance, thus establishing the boundaries of a moral community.

Whereas Rhode’s focus is on the profession as a moral community, I emphasize the profession’s shared knowledge. This approach likewise demands the exclusion of outliers, but not on moral grounds. Exclusion of outliers under the knowledge community approach excludes those who do not base their professional advice on a shared methodology and justify their professional advice in terms of shared ways of knowing and reasoning of the profession. *See* Claudia E. Haupt, *Religious Outliers: Professional Knowledge Communities, Individual Conscience Claims, and the Availability of Professional Services to the Public*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 173 (Holly Fernandez Lynch et al. eds., 2017); Haupt, *supra* note 10, at 690–705 (discussing justifications for outlier status).

ex ante assessments of the applicant's moral character and fitness do not provide a useful justification for professional licensing.

3. Competence

Perhaps most importantly, licensing requirements are intended to ensure professionals' competence. Competence is at the core of the harm-avoidance principle that underlies traditional justifications of licensing. Only a competent professional will give good advice, and licensing should help ensure that unqualified providers do not harm clients and patients by giving bad advice. With respect to the legal profession, Wendel thus has "no doubt that regulation can be justified as a means of ensuring the quality of some product or service," including the provision of legal services.¹¹⁰ Graduating from law school and passing the bar exam can be required as a matter of professional regulation because these benchmarks signal to prospective clients the requisite competence of the person providing legal services.¹¹¹ But other scholars cite empirical evidence suggesting "that experienced nonlawyers can provide competent legal services in certain contexts and in some cases, can seemingly do so as effectively as lawyers."¹¹² Stated another way, just being licensed does not guarantee expertise; it may be necessary, but not sufficient for rendering competent advice.¹¹³ However, the professional-practice context matters. Lawyer representation in civil proceedings, for example, is deemed superior to nonlawyer representation in the same arena.¹¹⁴ Another way to put the question is whether "formal legal training" matters and when outcomes are most likely to be affected.¹¹⁵ Studying a variety of settings, including unemployment compensation appeals, social security disability appeals, state labor grievance arbitration, and tax appeals, one prominent scholar "concluded that the 'presence or absence of formal legal training is less important than substantial experience with the

110. Wendel, *supra* note 90, at 2579.

111. *Id.* But see Rigertas, *supra* note 71, at 2683 ("[R]estricting the practice of law to those who have completed a juris doctor has constrained the market options so that many consumers have no access to legal services at all.").

112. Levin, *Monopoly Myth*, *supra* note 98, at 2614.

113. See Wendel, *supra* note 90, at 2580–81 (suggesting that "it may be the case that professional expertise is highly differentiated. Merely being admitted to practice law does not guarantee one's competence at any particular task, let alone one's comparative advantage over nonlawyer professionals at performing that task").

114. Levin, *Monopoly Myth*, *supra* note 98, at 2617–18 (further noting that "the procedural complexity of the matters may affect the degree of differences in outcomes when individuals are represented by lawyers and when they are not").

115. *Id.* at 2619–20 (citing HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998)).

setting.’ Three types of expertise were important: knowledge about the substantive law, an understanding of the procedures, and familiarity with the regular players in the process.”¹¹⁶

None of this cuts against professional licensing in general. Rather, these insights suggest alternative licensing regimes. They do not, however, support the notion that clients are better off being represented by unlicensed providers. In fact, citing the example of unlicensed “notarios,” Leslie Levin notes that their lack of training in the complex area of immigration law and their inadequate advice “can have devastating consequences.”¹¹⁷ Moreover, certain particularly complex matters are best handled by experienced individuals.¹¹⁸ Likewise, the case for restricting legal practice to trained and licensed attorneys is strongest in the litigation setting.¹¹⁹ In other words, expertise is important, and licensing—subject to appropriate calibrating—is a useful mechanism in principle to achieve the important goal of protecting the public by way of ensuring quality in professional services.

The upshot of this line of criticism primarily concerns tailoring. One solution might involve licensed nonlawyer providers.¹²⁰ But that is very different from opposition to licensing, as these scholars readily point out.¹²¹ Similarly, Levin notes that “the public would be better served if more nonlawyer representatives—who were subject to educational and licensing requirements—could provide more legal services to the public.”¹²² The critics of unauthorized practice laws thus do not, in fact, challenge in any fundamental way the wisdom of

116. *Id.* at 2620.

117. *Id.* at 2616.

118. *Id.* at 2629 (“No one seriously questions that an experienced securities litigator is more competent to handle a federal securities lawsuit than an untrained lay representative.”).

119. Rigertas, *supra* note 71, at 2699. However, Rigertas notes that “[t]he relative strength of the justification does not necessarily mean that only lawyers should perform those services.” *Id.*

120. Rhode & Ricca, *supra* note 37, at 2607.

121. *Id.* (“[O]pening the practice to ‘un schooled nonlawyers’ is not the only alternative to lawyers’ monopoly over routine assistance. We advocate access to qualified licensed providers.”). *But see* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 96 (1981) (expressing preference for “voluntary certification or mandatory registration”). Rhode further notes that “as a policy matter, full-scale licensing structures are desirable only when harms are ‘demonstrated or easily recognizable.’ As a constitutional matter, however, such restraints are still a less restrictive and hence preferable alternative to unqualified prohibitions on lay practice.” *Id.* (footnote omitted).

122. Levin, *Monopoly Myth*, *supra* note 98, at 2615; *see also* Rigertas, *supra* note 71, at 2689 (suggesting that “regulating the delivery of legal services does not necessarily mean that only lawyers can deliver legal services” because “[d]ifferent types of practitioners could be regulated too”).

licensing. Rather, they advocate a different way of tailoring licensing regimes and the services provided by *other licensed professionals*.

Such ideas of diversifying and recalibrating professional licensing are proliferating in various forms and across various professions. One example is the licensing of Limited License Legal Technicians (“LLLTs”) in the state of Washington, the first state to introduce this legal service provider model.¹²³ In 2019, Utah will become the second state to do so.¹²⁴ Importantly, licensing is still tied to competence. As compared to legal service providers, the healthcare professions display a wider variety of licensed professions performing some tasks previously allocated primarily to physicians.¹²⁵ The emergence of physician assistants in the twentieth century serves as an example of this phenomenon.¹²⁶

In the end, the critics make a forceful argument for recalibrating existing regimes to better match licensing to competence and access. But they do not argue that weeding out bad providers ought to be left solely to ex post regulation by the tort regime, nor do they argue that professional licensing should be abandoned entirely.

C. *The New First Amendment Critique*

First Amendment attacks on professional licensing are newly popular.¹²⁷ Indeed, “plaintiffs across the country are increasingly invoking the Free Speech Clause as a shield against what a generation ago would have been viewed as ordinary economic regulation subject to

123. *Become A Legal Technician*, WASH. ST. BAR ASS’N (Sept. 13, 2018), <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians> [https://perma.cc/7K8U-S53M]; see also Levin, *Monopoly Myth*, *supra* note 98, at 2630–31 (explaining the scope of LLLTs’ professional activities and education and other licensing requirements); Rigertas, *supra* note 71, at 2699 (“Three states—Washington, California, and New York—are all currently examining the role that nonlawyers can play in the delivery of legal services. This suggests some growing recognition that a licensed attorney may not be needed for every legal issue.”). Other examples include certified legal document preparers in Arizona and legal document assistants in California. See Levin, *Monopoly Myth*, *supra* note 98, at 2615.

124. Debra Cassens Weiss, *First Paralegal Practitioners in Utah are Expected to be Licensed in 2019*, ABA J. (Aug 7, 2018, 9:04 AM), <http://www.abajournal.com/news/article/first-paralegal-practitioners-in-utah-are-expected-to-be-licensed-in-2019> [https://perma.cc/X5E3-J3EJ].

125. *Cf.* Rigertas, *supra* note 71, at 2699 (“Much like the delivery of healthcare services, there are potential benefits in stratifying the legal profession to train and regulate professionals with different types of legal training.”(footnote omitted)).

126. See, e.g., Reginald Carter, *Physician Assistant History*, 12 PERSPECTIVE ON PHYSICIAN ASSISTANT EDUC. 130 (2001) (providing a brief overview of the profession).

127. See *supra* note 2 and accompanying text. Many of these current and recent cases are litigated by the Institute for Justice, which makes a list of them available on its website. See *Cases, INST. FOR JUSTICE*, [http://ij.org/cases_\(last visited Oct. 8, 2018\)](http://ij.org/cases_(last visited Oct. 8, 2018)) [https://perma.cc/RP2Y-U4BM] (listing economic liberty and First Amendment cases).

lax, if any, constitutional review.”¹²⁸ One lawyer explains that “several trends in constitutional scholarship and doctrine suggest that a transformation of [occupational freedom] jurisprudence may be closer at hand than many would suppose.”¹²⁹ One of the indicators of change he cites is “[a] growing number of cases where the fundamental right to free speech meets the nonfundamental right to occupational freedom.”¹³⁰ The explicit goal is to unsettle the rational basis framework commonly applied to professional regulation¹³¹ and substitute the doctrinal framework of the First Amendment.¹³² Framing licensing challenges as First Amendment claims, in other words, is an attempt to heighten the level of scrutiny that would otherwise apply to economic regulation.

First Amendment challenges to licensing can take several forms. One approach contends that professional licensing imposes a prior restraint on speech. The Ninth Circuit in *National Ass’n for the Advancement of Psychoanalysis* held “that the psychology licensing laws are not a prior restraint on speech.”¹³³ The court explained in two short sentences: “Because this is a valid licensing scheme designed to protect the mental health of Californians, the state ‘may exercise some discretion in granting licenses.’ Because there is no allegation that the state is revoking or denying licenses ‘for arbitrary or constitutionally suspect reasons,’ there is no problem of prior restraint.”¹³⁴

Conversely, Robert Kry has argued that professional licensing does, in fact, raise First Amendment concerns precisely “because the license requirement arguably acts as a prior restraint on speech.”¹³⁵ Professional licensing regimes, he suggests, are especially troublesome as a form of prior restraint because they “impose significant burdens on the speaker” and “grant administrative officials broad discretion in evaluating applications.”¹³⁶ I will later return to the question of prior restraint.¹³⁷ To preview my conclusion, professional licensing is indeed a prior restraint on a professional’s speech, but in the professional

128. Shanor, *supra* note 11, at 316.

129. Neily, *supra* note 1, at 305.

130. *Id.*

131. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (“[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.”).

132. Neily, *supra* note 1, at 311 (“Applying the various forms of heightened scrutiny typically associated with free speech claims to cases involving occupational speech creates interesting and potentially fruitful doctrinal tensions.”).

133. 228 F.3d 1043, 1056 (9th Cir. 2000).

134. *Id.* (citation omitted).

135. Kry, *supra* note 7, at 889.

136. *Id.* at 890.

137. See *infra* Section IV.A.2.

context, it is permissible for the reasons set forth in the intervening analysis.¹³⁸

The tour guide cases—challenging various cities’ requirements that tour guides be licensed—provide examples of additional First Amendment claims.¹³⁹ Plaintiffs relied on the First Amendment to argue that the licensing schemes were impermissible content-based regulations of speech.¹⁴⁰ In addition, they argued that even if the regulations were content neutral, there was no evidence of harm that supported creating licensing requirements for tour guides.¹⁴¹

The Fifth Circuit in the New Orleans tour guide case explained that applicants for a license “must pass an examination testing knowledge of the historical, cultural and sociological developments and points of interest of the city, must not have been convicted of a felony within the prior five years, pass a drug test, and pay a . . . fee.”¹⁴² The court reasoned that the city had an interest in benefitting its visitors by identifying tour guides with licenses as being “reliable, . . . knowledgeable about the city and trustworthy, law-abiding and free of drug addiction.”¹⁴³ The court held this to be a valid exercise of police powers that did not target the content of speech.¹⁴⁴ Thus, “New Orleans, by requiring the licensees to know the city and not be felons or drug addicts, has effectively promoted the government interests, and without those protections for the city and its visitors, the government interest would be unserved.”¹⁴⁵

Conversely, the D.C. Circuit found “the record wholly devoid of evidence supporting the burdens the challenged regulations impose on . . . speech.”¹⁴⁶ Assuming that the regulations were content neutral,¹⁴⁷ the court nonetheless still held them to fail intermediate scrutiny and pointed out “the substantial mismatch” between the regulation and its goals.¹⁴⁸ Requiring tour guides to take an exam, in

138. *See infra* Parts II & III.

139. *See* *Edwards v. District of Columbia*, 755 F.3d 996, 1000 (D.C. Cir. 2014) (holding that even if a D.C. tour guide licensing regime was content neutral, it failed intermediate scrutiny); *Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir. 2014) (finding that a tour guide licensing law was content neutral); *Billups v. City of Charleston*, 194 F. Supp. 3d 452, 475 (D.S.C. 2016) (involving a First Amendment challenge to the city’s tour guide licensing law).

140. *Edwards*, 755 F.3d at 1000.

141. *Id.*

142. *Kagan*, 753 F.3d at 561 (noting that the fee for the initial application is fifty dollars and the renewal fee is twenty dollars “when renewing after two years”).

143. *Id.*

144. *Id.* at 561–62.

145. *Id.* at 562.

146. *Edwards*, 755 F.3d at 998.

147. *Id.* at 1001.

148. *Id.* at 1008.

the court's view, was not "an appropriately tailored antidote," even if the District's goal was to prevent potential harms to visitors.¹⁴⁹

Finally, in the Charleston tour guide case, the district court initially denied a preliminary injunction against the licensing regulations.¹⁵⁰ The court followed a similar line of reasoning as the Fifth Circuit in determining the regulation to be content neutral.¹⁵¹ Applying intermediate scrutiny, the district court determined that the D.C. Circuit's approach "provide[d] a somewhat better illustration of the analysis required."¹⁵² Although in the district court's view the demands for showing evidence of harm were less stringent than the D.C. Circuit articulated, it held that Charleston was required to provide some evidence of harms that the licensing requirement prevents.¹⁵³ After a bench trial, the court decided that the licensing regime was unconstitutional under the First Amendment.¹⁵⁴

The Charleston tour guide case was decided after the Supreme Court's decision in *Reed v. Town of Gilbert*,¹⁵⁵ a case involving a municipal sign ordinance. Taken literally, the *Reed* decision imposed a strict and sweeping requirement of content neutrality.¹⁵⁶ Indeed, the district court framed its First Amendment analysis in terms of *Reed*'s requirement of content neutrality,¹⁵⁷ initially rejecting¹⁵⁸ but ultimately leaving open its application in the Charleston case.¹⁵⁹ By contrast, the Eleventh Circuit in *Wollschlaeger v. Governor of Florida*, a case concerning a Florida statute that prohibited doctors from asking about gun ownership as a matter of course, applied the content-neutrality framework of *Reed* to professional speech regulation.¹⁶⁰ Whether the requirement of content neutrality applies in the area of professional licensing or professional speech regulation is an unresolved question of

149. *Id.* at 1009.

150. *Billups v. City of Charleston*, 194 F. Supp. 3d 452, 467 (D.S.C. 2016).

151. *Id.* at 466–67.

152. *Id.* at 472.

153. *Id.* at 472–73.

154. *Id.* at 517–18.

155. 135 S. Ct. 2218, 2233 (2015).

156. See Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1986 (2016).

157. *Billups*, 194 F. Supp. 3d at 461–65.

158. *Id.* at 464 (noting that the *Reed* Court "cannot have meant that every law restricting conduct also imposes a content-based restriction on speech made in the course of such conduct" because it "would effectively remove the distinction between speech and conduct, and require almost every regulation to pass strict scrutiny under the First Amendment," an "untenable" result).

159. *Id.* at 511 ("The court does not need to determine whether the licensing law is content-based . . .").

160. 848 F.3d 1293, 1302–03, 1307–08 (11th Cir. 2017).

First Amendment doctrine. The Supreme Court's majority opinion in *National Institute of Family & Life Advocates ("NIFLA") v. Becerra* suggests that it does,¹⁶¹ while the dissent cautions against an overly broad understanding of the doctrine of content neutrality.¹⁶² I have argued elsewhere that content neutrality should be rejected in this context.¹⁶³

In addition to tour guides,¹⁶⁴ First Amendment challenges target licensing requirements for such diverse occupations as fortune tellers¹⁶⁵ and interior decorators.¹⁶⁶ Notably, these cases are frequently discussed alongside cases involving professionals such as psychologists, doctors, and lawyers.¹⁶⁷ But doing so obscures an important point: not all professional licensing schemes are the same. For one, "not all occupations pose equivalent threats to health and safety."¹⁶⁸ Amanda Shanor, in illustrating the critics' argument, raises a useful example that clarifies how the concept of the professions as knowledge communities influences the analysis:

If I am your doctor, and I recommend we amputate your leg (when, based on prevailing professional norms, we certainly should not), and you later sue me for malpractice, the claim is no less based on words than a tour guide who "speaks" for a living. "But," you might say, "the malpractice example has a real-world harm—you cut off my leg!" Of course, you would be right. But that harm does not have any analytically different relationship to speech than the sorts of harms – health and safety, say – that licensing

161. See 138 S. Ct. 2361, 2374 (2018) ("The dangers associated with content-based regulations of speech are also present in the context of professional speech.").

162. *Id.* at 2380 (Breyer, J., dissenting):

Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation.

163. See Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 YALE L.J. FORUM 150, 151 (2017) (rejecting the Eleventh Circuit's content-neutrality approach in *Wollschlaeger*); see also *infra* Section IV.A.1.

164. See *supra* notes 139–153 and accompanying text.

165. See *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 562–65 (4th Cir. 2013).

166. See *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011).

167. See, e.g., *NIFLA*, 138 S. Ct. at 2375 ("As defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others."); see also Neily, *supra* note 1, at 310 (citing cases involving psychologists: *Pickup v. Brown*, 740 F.3d 1208, 1221–22 (9th Cir. 2014); and *King v. Governor of New Jersey*, 767 F.3d 216, 246 (3d Cir. 2014)); Shanor, *supra* note 11, at 315 (noting that previously, "[r]egulations requiring you to get a license before working as a doctor, a lawyer, or a candlestick maker (not to mention a tour guide or a securities trader), were . . . part of the vast swath of non-constitutionalized economic life"); Kleiner, *supra* note 26, at 12–14 (discussing healthcare professions alongside TV repair servicers, construction contractors, florists, and teachers).

168. Kleiner, *supra* note 26, at 5.

seeks to address in the first instance. The harms that may flow from fraud or malpractice are no less related to the “speakingness” of a “speaking occupation.”¹⁶⁹

But understanding professional advice and its relationship to a knowledge community leads to an analytical distinction between the speech of a doctor—rightly subject to malpractice liability¹⁷⁰—and the speech of a tour guide. Under a professional speech theory based on an understanding of the professions as knowledge communities, speech that does not convey professional knowledge is not protected as professional speech. The analytical shift I propose is from the speech itself as the form of communication to the specific kind of speech—that is, professional speech communicating the knowledge community’s insights to the client within a professional-client relationship. If a professional’s speech merely conveys information—the content of the tour guide’s speech could just as well be gleaned from Google Maps or a guidebook—it is not personalized advice that communicates the knowledge community’s insights. And licensing is still permissible for reasons unrelated to speech. Imagine a guided Segway tour; a licensing requirement might ensure that the Segway does not cause injuries.

Professional speech is a distinctive type of speech that is more than the conveyance of raw information. Its content is instead individualized to the situation of the client,¹⁷¹ it is tied to a body of disciplinary knowledge from which it gains authority, and it occurs within a social relationship that is defined by knowledge asymmetry between speaker and listener, reliance on the speaker’s advice, and trust in the accuracy of that advice.¹⁷²

The key to a conceptual solution for the First Amendment-versus-licensing puzzle lies in understanding the underlying normative concerns. If we reconceptualize professionals as members of knowledge communities, First Amendment interests in the professional context reinforce—rather than undermine—the goals of licensing. The shared interest is to ensure that competent advice flows from the knowledge community through the conduit of the individual professional to the client. To support this claim, Part II provides a thicker account of the nature of, and interests involved in, professional advice-giving.

169. Shanor, *supra* note 11, at 321.

170. See Haupt, *supra* note 4, at 1285–87 (discussing professional malpractice liability).

171. Cf. *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the result) (“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.”).

172. Haupt, *supra* note 4, at 1250–54.

D. Identifying the Object of Licensing

Thus far, the discussion has focused on the subjects of licensing—ranging from tour guides, psychics, and interior decorators to doctors, lawyers, therapists, and pharmacists. But a more useful question concerns the object of licensing, and I suggest that shifting focus to the object brings the central role of professional knowledge to the fore. This different perspective also reflects a move in the sociology of the professions literature away from the question of “what is a profession?”¹⁷³ The object of licensing across professions may be different, accounting for conceptual slippage. In other words, knowledge is not always the object of licensing in the professions discussed. One key question is whether professional advice-giving or the delivery of a service is the primary objective of the professional-client relationship. Another question is whether information—as in the tour guide cases—or professional knowledge is conveyed.

The most salient justification for professional licensing is ensuring the professional’s competence; thus, the object of licensing is the professional’s knowledge. Licensing so understood ties the individual professional to the knowledge community by requiring a link between the ability to speak as a professional and the communication of knowledge as defined by the profession. This concept necessarily excludes a number of occupations. Where a professional’s activity does not consist of advice-giving, the link between advice and the knowledge community does not exist. Of course, this conceptualization results in line-drawing exercises that are difficult to exhaustively resolve in the abstract. But the existence of a fiduciary relationship or of a regime of professional malpractice liability can serve as a useful proxy.

As discussed in the tour guide examples, where information but not professional knowledge is communicated, the value of the professional’s speech is more like the delivery of a service. This accounts for the difference in the speech of the psychic or the tour guide on the one hand and the doctor or lawyer on the other hand.¹⁷⁴ It also points to the limits of licensing to protect professional advice. The framework applies to professions where the object of licensing is the content of a

173. *See infra* Section II.B.

174. *Cf.* Nat’l Inst. of Family & Life Advocates (NIFLA) v. Becerra, 138 S. Ct. 2361, 2375 (2018):

‘Professional speech’ is also a difficult category to define with precision. As defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others. One court of appeals has even applied it to fortune tellers.

(citations omitted).

professional knowledge community's insights.¹⁷⁵ This is not to collapse the speech/conduct distinction but rather to distinguish professional speech that communicates a knowledge community's expertise.

An important consequence of shifting the focus to professional knowledge is that the First Amendment critique of professional licensing fails when the object of licensing is professional knowledge. The values underlying First Amendment protection of professional speech and ensuring the competence of professionals, the objective of professional licensing, rather than being in conflict, are mutually reinforcing. The remainder of this Article provides a defense of this claim, and offers a new view of justifications for professional licensing that builds on this understanding.

II. EXPERT KNOWLEDGE AND PROFESSIONAL ADVICE

Fully appreciating the values underlying professional speech and professional licensing requires a thicker account of what professional knowledge is, how it is generated, and what its effects are. This Part offers a descriptive-analytical account of the nature of expert knowledge, its connection to professional advice-giving, and its societal effects by drawing on the sociology of knowledge and science and technology studies ("STS") literature regarding the epistemological foundations of expert knowledge. It then puts this body of literature into conversation with scholarship on the sociology of the professions. In so doing, it seeks to respond in part to Robert Post's call for developing a "constitutional sociology of knowledge."¹⁷⁶ This account reveals the distinctive nature of professional advice-giving and its link to the professional knowledge community's body of knowledge. It also explains why First Amendment doctrine should reflect the unique nature of professional speech.

The following discussion first distinguishes information and knowledge—a specific type of information communicated as professional advice. It then connects expert-knowledge formation to the dissemination of professional advice. Finally, through the lens of democratic theory, it traces the flow of professional expert knowledge from the knowledge community through the individual professional within the professional-client relationship to the client and back into public discourse.

175. *Cf. id.* at 2382–83 (Breyer, J., dissenting) (explaining how the majority's constitutional approach to content-based speech will obscure First Amendment goals).

176. POST, *supra* note 14, at 55.

A. Distinguishing Information and Knowledge

The hook for First Amendment challenges to professional licensing is that many professionals convey advice through language.¹⁷⁷ As one commentator notes, “In the information age, an increasing number of vocations involve nothing more than expressing ideas or transmitting information, rather than creating a physical product.”¹⁷⁸ Another critic of licensing asserts that while the Supreme Court has loosened commercial speech restrictions in the interest of “the free flow of information to the consumer,” it has yet “to fully realize the importance of the free flow of information to the recipient of professional advice.”¹⁷⁹

But conflating information and knowledge rests on an oversimplification. The listener’s perspective reveals the qualitative difference between them. A client or patient today may have access to virtually unlimited amounts of information through multiple channels. Yet, none of this information amounts to expert knowledge. To be flip, Dr. Google is not *really* your doctor.

Licensing regimes, like fiduciary duties, assume asymmetry between actors: “The professional-client relationship is typically characterized by an asymmetry of knowledge. The client seeks the professional’s advice precisely because of this asymmetry.”¹⁸⁰ But some question the accuracy of that assumption in an era of ever-increasing access to information.¹⁸¹ Discussing various forms of policy responses to information asymmetries, they contend that “[a]s information becomes more prevalent and systematic, earlier solutions to asymmetric problems will become less necessary.”¹⁸² Scholars of the legal profession likewise assert that “[t]he internet has provided consumers with increasing access to information about the law and to information about the quality of services provided.”¹⁸³ But do considerations underlying information asymmetries¹⁸⁴ translate to licensing healthcare providers? Some critics of licensing say yes, noting that “[f]or decades, asymmetric

177. See *supra* notes 165–167 and accompanying text.

178. Neily, *supra* note 1, at 310.

179. Kry, *supra* note 7, at 976.

180. Haupt, *supra* note 4, at 1243.

181. See, e.g., Alex Tabarrok & Tyler Cowen, *The End of Asymmetric Information*, CATO UNBOUND (Apr. 6, 2015), <https://www.cato-unbound.org/2015/04/06/alex-tabarrok-tyler-cowen/end-asymmetric-information> [<https://perma.cc/VM5G-LUX9>] (“A lot of economic theories about asymmetric information, while logically correct, have been rendered empirically obsolete.”).

182. *Id.*

183. Rigertas, *supra* note 71, at 2691.

184. See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (examining how information asymmetry affects markets).

information—the inability of consumers to judge medical professionals—has been the go-to defense for state-level licensing activities.”¹⁸⁵ Largely reciting the economic critiques of professional licensing,¹⁸⁶ these critics argue that “the asymmetric information argument has been used far too often to protect rents, including the protection of physicians and dentists from greater competition from nurse practitioners and dental hygienists.”¹⁸⁷ As already noted in the discussion of economic objections to licensing, these arguments primarily cut in favor of recalibrating, rather than abolishing, existing licensing regimes.

The larger question concerns the nature and formation of expert knowledge. Is expert knowledge still relevant in the information age? This requires a closer look at who is an expert to begin with, a foundational question in the sociology of knowledge literature. Who counts as an expert, and how far does the group of experts, however defined, extend into the public? Medical sociology, for instance, has observed a trend toward democratization as a result of a wider “challenge on the expertise of professionals.”¹⁸⁸ Discussions surrounding the term “lay expert” reflect the underlying concerns. Some scholars suggest that the lay public can, in fact, acquire relevant knowledge through various channels, including “having experiential knowledge of a condition” or otherwise acquiring knowledge “on a par with those who have scientific training.”¹⁸⁹ Others, however, discard this term as an oxymoron, instead suggesting that the real question concerns the “extension” of whose knowledge counts as expertise, not how individuals acquired their expertise.¹⁹⁰ Nonetheless, even those

185. Shirley V. Svorny, *Asymmetric Information and Medical Licensure*, CATO UNBOUND (Apr. 10, 2015), <https://www.cato-unbound.org/2015/04/10/shirley-v-svorny/asymmetric-information-medical-licensure> [https://perma.cc/7MSW-LU4T].

186. See *supra* Section I.B.2.

187. Alex Tabarrok & Tyler Cowen, *Symmetric Information Won't Be Perfect*, CATO UNBOUND (Apr. 20, 2015), <https://www.cato-unbound.org/2015/04/20/alex-tabarrok-tyler-cowen/symmetric-information-wont-be-perfect> [https://perma.cc/Z63E-8RAJ].

188. Lindsay Prior, *Belief, Knowledge and Expertise: The Emergence of the Lay Expert in Medical Sociology*, 25 SOC. HEALTH & ILLNESS 41, 43 (2003).

189. *Id.* at 45 (citing literature on AIDS); see also H.M. Collins & Robert Evans, *The Third Wave of Science Studies: Studies of Expertise and Experience*, 32 SOC. STUD. SCI. 235, 262 (2002) (“The AIDS-treatment controversy in the San Francisco gay community is an example where the non-certified experts succeeded in gaining an entrée to the scientific core. But they did not manage this until they gained interactional expertise – that is, until after they learned the language of the relevant science.” (footnote omitted)). The foundational sociological study is STEVEN EPSTEIN, *IMPURE SCIENCE: AIDS, ACTIVISM, AND THE POLITICS OF KNOWLEDGE* (1996).

190. Collins & Evans, *supra* note 189, at 238:

We say that those referred to by some other analysts as ‘lay experts’ are just plain ‘experts’ – albeit their expertise has not been recognized by certification; crucially, they are not spread throughout the population, but are found in small specialist groups.

employing the term note that “for the most part, lay people are not experts. They are, for example, rarely skilled in matters of (medical) fact gathering, or in the business of diagnosis. What is more they can often be plain wrong about the causes, course and management of common forms of disease and illness.”¹⁹¹

Returning to the relationship between increased access to information and expert knowledge, consider the example of access to health information. Various web-based, health-related platforms provide plenty of information—but self-diagnoses are still tricky business due to the problems associated with reliability of information and its interpretation.¹⁹² In the end, the simple but important insight is this: information and knowledge are qualitatively different. The next Section further investigates what accounts for that difference.

B. Expert Knowledge in Professional Advice-Giving

This Section explores two interrelated questions: First, how is expert knowledge formed within knowledge communities—this process of knowledge formation qualitatively distinguishes knowledge from information—and second, how is expert knowledge disseminated by professionals as professional advice?

The “modern idea of scientific expertise is compounded from two historically distinct elements: occupational expertise and the expertise claimed by scientists as privileged knowers of truths about the world.”¹⁹³ Historians trace the distinction between theoretical knowledge and practical uses “as far back as Plato and Aristotle,” pinpointing the Enlightenment as the moment “the connection between theory and practice receive its modern formulation when, in addition to designating a set of truths about nature, theory also became a social good, a bedrock of knowledge on which enlightened society could engineer its own progress.”¹⁹⁴ To that end, Post posits that “[a]ny

Instead of using the oxymoron, we will refer to members of the public who have special technical expertise in virtue of experience that is not recognized by degrees or other certificates as ‘experience-based experts.’

191. Prior, *supra* note 188, at 45.

192. See, e.g., Conant v. Walters, 309 F.3d 629, 644 (9th Cir. 2002) (“[I]nformation obtained from chat rooms and tabloids cannot make up for the loss of individualized advice from a physician with many years of training and experience.”); see also Tyler Falk, *This App Gives Free Medical Advice from Real Doctors*, ZDNET (Apr. 11, 2013, 5:30 PM), <http://www.zdnet.com/article/this-app-gives-free-medical-advice-from-real-doctors> [https://perma.cc/8X8P-PKVQ] (“But from message boards to websites like WebMD, all of that information can be overwhelming and confusing, leaving you wondering if you have the common cold or cancer and unsure which advice to trust.”).

193. Thomas Broman, *The Semblance of Transparency: Expertise as a Social Good and an Ideology in Enlightened Societies*, 27 OSIRIS 188, 188 (2012).

194. *Id.* at 192.

modern society needs expert knowledge in order to survive and prosper.”¹⁹⁵

Different experts contribute to this project, with varying implications depending on their identities. While some worry about opaque bureaucracies filled with obscure policymaking experts, others study “professionals whom we deal with often in a face-to-face way.”¹⁹⁶ From the vantage point of expertise and democracy, these two are different in the way audiences perceive them as legitimate; therefore, they should be distinguished.¹⁹⁷ My attention throughout this discussion is on the latter. The democracy problem of expert knowledge seems to be primarily one of political accountability rather than epistemic skepticism.¹⁹⁸ Who determines the empirical foundations guiding public policy is a more complex question in a democracy than who gives advice, within a professional-client relationship, to solve an individual’s problem. The two are related but not the same, though they may make use of the same body of expert knowledge.

It is worth noting that sociologists and others studying the processes of expert-knowledge formation themselves are engaged in a contested endeavor. STS scholarship arguably “has effectively deconstructed scientists’ claims that their research produces objective knowledge.”¹⁹⁹ How far this epistemic relativism extends, in turn, is debated within that field. On the one hand, there has been a shift over time from epistemological questions to social questions. On the other hand, while finding the “sociological turn” in the literature helpful, some suggest that going back to the epistemological questions is also useful if the focus on “truth” is replaced with a focus on “expertise and experience.”²⁰⁰ Sociologists have identified three waves of scholarship,

195. POST, *supra* note 14, at ix.

196. Stephen Turner, *What is the Problem with Experts?*, 31 SOC. STUD. SCI. 123, 128 (2001) (“Whether this difference is significant is a question that I will leave open for the moment. But it points to some difficulties with the concept of expertise itself that need to be more fully explored.”).

197. *Id.* at 131:

Thinking about the audiences of the expert – the audiences for whom the expert is legitimate and whose acceptance legitimates her claims to expertise – illuminates a puzzle in the discourse of the problem of expertise and democracy. Merton and Habermas, it appeared, were not talking about the same kind of experts. For Merton, the paradigm case was the physician, whose expert advice, say, to cut down on high-fat foods, we receive with ambivalence.

198. *Cf. id.* at 140 (suggesting that “the difficulties that have concerned theorists of democracy about the role of expert knowledge must be understood as arising not from the character of expert knowledge itself (and its supposed inaccessibility to the masses), but from the sectarian character of the kinds of expert knowledge that bear on bureaucratic decision-making”).

199. Broman, *supra* note 193, at 189.

200. Collins & Evans, *supra* note 189, at 236:

One of the most important contributions of the sociology of scientific knowledge (SSK) has been to make it much harder to make the claim: ‘Trust scientists because they have

the first having ended²⁰¹ and the second and third ongoing and interacting.²⁰² The focus of second wave scholarship is the deconstruction of knowledge, and the third wave's response is a normative reconstruction of expertise.²⁰³

Moreover, the contingency and dynamism of scientific knowledge is a complicating factor.²⁰⁴ For one, "around every core of 'expert' knowledge is a penumbra, a domain in which core competence is helpful but not definitive, in which competent experts may disagree, and disagree because the questions in this domain cannot be decided in terms of the core issues that define competence."²⁰⁵ I have elsewhere addressed related First Amendment problems that follow when we acknowledge that professional knowledge communities are not monolithic and there may be a range of professional insights that count as good advice.²⁰⁶ In addition, there is a temporal dimension. The knowledge community may have embraced new insights long before they are perceived as legitimate by the public. Or "the community may come to conclude that only a fragment of what was formerly held to be true was in fact true."²⁰⁷ Here, too, I have previously addressed the First Amendment issues concerning tested and refuted as well as emergent and untested knowledge.²⁰⁸

The next step, then, is to trace how expert knowledge is disseminated via professional advice. Sociologists have long explored what differentiates the professions. This endeavor has seen several iterations in which scholars refocused this question.²⁰⁹ Émile Durkheim's initial quest was to examine the role of the professions in

special access to the truth'. Our question is: 'If it is no longer clear that scientists and technologists have special access to the truth, why should their advice be specially valued?'

201. *Id.* at 239. They pinpoint the end of this wave to the publication of Thomas Kuhn's *The Structure of Scientific Revolutions* and its fallout. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

202. Collins & Evans, *supra* note 189, at 240.

203. *Id.* at 249–51.

204. See, e.g., Turner, *supra* note 196, at 141 ("To be sure many things may pass, in the eye of the public, for science. Scientific views, and scientific consensuses, may of course change, and the public may well legitimate and accept scientific communities whose views later appear to be wrong.").

205. *Id.* at 133.

206. See generally Haupt, *supra* note 10.

207. STEPHEN P. TURNER, *THE POLITICS OF EXPERTISE* 36 (2014).

208. Haupt, *supra* note 10, at 714–28.

209. For an overview, see Dana A. Remus, *Reconstructing Professionalism* 16–24 (UNC Legal Studies Research Paper No. 2676094, 2015), <https://ssrn.com/abstract=2676094> [<https://perma.cc/P4KF-VNZF>] (tracing the role of professionals in knowledge dissemination).

society.²¹⁰ Subsequent generations of scholars building on Durkheim's scholarship took a functionalist view and attempted to isolate the elements that are constitutive of the professions.²¹¹ Their core finding that self-regulation is necessary to develop and disseminate valuable professional expertise has been characterized as "portray[ing] the professions in an overwhelmingly positive light."²¹² Andrew Abbott's seminal work, *The System of Professions*,²¹³ in turn, is part of the shift from the question of what occupation is a "profession" to how a professional group gains a professional monopoly and social status.²¹⁴ Though much of the later literature focused on the shortcomings of the professions and problems associated with monopoly status and professional self-regulation,²¹⁵ the allocation of professional competence remains descriptively intact.

One distinction between the professions and other occupations used by sociologists²¹⁶ is the professions' fusion of theory and practice.²¹⁷ Beyond specialized education, "professions claim their education presents a coherent body of theoretical doctrine that they apply in their work."²¹⁸ This conceptualization provides a link between the knowledge community's insights and professional advice. The individual professional can be seen as the conduit between the knowledge community and the client.²¹⁹

Underlying this claim to authority is the presence of a shared methodology. In medicine and other professions, the scientific method is considered a guarantor for the validity of that profession's knowledge basis.²²⁰ Interestingly, some scholars single out law as an exception:

210. See generally ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (George Simpson trans., The Macmillan Company 4th ed. 1960).

211. Remus, *supra* note 209, at 21 (citing Talcott Parsons, *A Sociologist Looks at the Legal Profession*, in *ESSAYS IN SOCIOLOGICAL THEORY* (1964); and William J. Goode, *Community Within a Community: The Professions*, 22 *AM. SOC. REV.* 194, 195–96 (1957)).

212. *Id.* at 21.

213. ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988).

214. Remus, *supra* note 209, at 22.

215. See *id.* at 22–23.

216. See Broman, *supra* note 23, at 835:

[S]ociologists have distinguished professions from other occupational groups by a now-familiar set of criteria, which usually include (1) specialized and advanced education, (2) a code of conduct or ethics, (3) competency tests leading to licensing, (4) high social prestige in comparison to manual labor, (5) monopolization of the market in services, and (6) considerable autonomy in conduct of professional affairs.

217. *Id.* at 836.

218. *Id.*

219. Haupt, *supra* note 4, at 1254.

220. Broman, *supra* note 23, at 836 n.3 ("In many cases, the validity of a profession's theoretical knowledge is supposedly guaranteed by presenting it as the product of rigorous

“Lawyers also claim to base their practice on theory, but legal theory is not commonly regarded as ‘scientific.’”²²¹ Moreover, “university law schools are not uniquely privileged in the formation of legal theory. Courts and legislatures also play a central role in this process.”²²² However, the distinction may place too much emphasis on the “scientific” aspect. As I have noted elsewhere, knowledge communities have shared ways of knowing and reasoning, so the methodology claim works without a claim to scientific methodology. In the context of the legal profession, I have suggested that legal doctrine serves a methodological function.²²³

The link between expertise and authority extends to the professions in that “professional experts monopolize the ability to speak the truth, and indeed to define which statements can be examined as true or false. Needless to say, this gives experts tremendous authority in modern society.”²²⁴ Yet, scholars also suggest that “there has been insufficient attention to the fact that the link between theory and practice has to be forged in discourse as a condition for the existence of the modern professions.”²²⁵ The basis for justifying professional authority “derives uniquely from a set of claims that scientific theory can and does guide practice and the institutional and educational structures developed in accordance with those claims.”²²⁶ “Scientific” in this sense denotes “presenting its theoretical apparatus as scientific—that is, as empirical, objective, disinterested, methodologically rigorous, and so forth.”²²⁷

Notwithstanding the normative criticism of the professions’ economic monopoly, descriptively, the knowledge asymmetry holds true. Decoupling the economic monopoly from the expertise asymmetry

scientific method. This is most obviously the case with medicine, which boasts an enormous research establishment, but is also true of clinical psychology, engineering, economics, and a host of others.”)

221. *Id.*

222. *Id.* at 837 n.7.

223. See Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, 19 U. PA. J. CONST. L. ONLINE 1, 14–17 (2017) (discussing doctrine as methodology); see also Symposium, *Developing Best Practices for Legal Analysis*, 84 U. CHI. L. REV. 1 (2017).

224. Broman, *supra* note 23, at 837 (emphasis omitted).

225. *Id.*

226. *Id.*

227. *Id.* This is also where professional knowledge formation connects to knowledge production within the university. *Id.* at 837 n.7 (arguing “that university research departments constitute the core regions of professional discourse”). As I have noted elsewhere, “While outside of the professional-client relationship . . . the speech interests of professionals speaking to each other are similar to those underlying academic speech.” Haupt, *supra* note 4, at 1252 n.51.

in turn leads to a new view of licensing. Licensing, then, might be understood as a form of “public recognition of expertise.”²²⁸

C. The Democratic Dimension of Professional Advice

Licensing creates speaker inequality. Determining whether this seemingly undemocratic regulatory mechanism is compatible with democratic values demands a better understanding of the role of professionals, and more generally the role of expert knowledge they disseminate, in a democratic society. Issues surrounding the connection between democracy and professional expert knowledge are enduring and remain underexplored. Frederick Schauer contends that “[s]urprisingly little has been written about just what it is for a society (or any other collection of individuals) to know something, as opposed to what it is for an individual to know something.”²²⁹ As one political theorist puts it, “The role of those with specialized knowledge in modern democracy has been an unresolved issue since public intellectuals began to confront it in the Progressive Era.”²³⁰ And further, “[t]he professions have been neglected in political theory with negative consequences for the field in general and for the development of democratic theory in particular.”²³¹ The following discussion explores what it means to add professional knowledge as a source of knowing in society. This discussion builds on Post’s exploration of democracy and expertise,²³² with a specific focus on the professions.

We assume equality in public discourse, and since public discourse tends to be the default when we think about free speech more generally, there is a strong democratic notion underlying the First Amendment. First Amendment jurisprudence is firmly committed to speaker equality in public discourse where one person’s opinion counts the same as another person’s facts. Many have bemoaned the ensuing spread of “fake news,” “junk science,” outright lies, and other distortions of the “truth.”²³³ Facts in contemporary public discourse are under

228. Cf. Turner, *supra* note 196, at 138.

229. Schauer, *supra* note 19, at 902 n.25.

230. ALBERT W. DZUR, DEMOCRATIC PROFESSIONALISM: CITIZEN PARTICIPATION AND THE RECONSTRUCTION OF PROFESSIONAL ETHICS, IDENTITY, AND PRACTICE 4 (2008). For historical perspectives, see, for example, Eric H. Ash, *Expertise and the Early Modern State*, 25 OSIRIS 1 (2010); and Broman, *supra* note 193, at 195–99.

231. DZUR, *supra* note 230, at 6.

232. See generally POST, *supra* note 14.

233. See, e.g., Schauer, *supra* note 19.

siege; the Holmesian marketplace,²³⁴ it seems, has ceded to “post-truth.”²³⁵ Nonetheless, this traditionally strong notion of equality continues to pervade our understanding of the First Amendment. The justification is based in democratic theory: a fundamental belief in equality of speakers and opinions in public discourse is necessary for equal participation, which in turn forms the basis of democracy.²³⁶

But this assumption of speaker equality does not apply outside of public discourse where we continue to value facts and truth. One such area is professional speech. Most likely, patients and clients would want to talk to a “real” professional, trained and licensed to practice according to the standards of the profession, to obtain reliable advice.

Professional advice-giving in the strict sense—communicating the insights of the knowledge community, within the professional-client relationship, for the purpose of giving professional advice—is decidedly *not* part of democratic public discourse.²³⁷ Professional insights are not up for debate in the marketplace;²³⁸ unlike in the marketplace, there is such a thing as disciplinary truth.²³⁹ And this disciplinary truth is enforced by the professional malpractice regime, where failure to meet the profession’s standard of care is sanctioned.²⁴⁰ Tied back to licensing, this distinction between professional speech and speech in public discourse explains Eugene Volokh’s assertion that “licensing requirements for professionals who give personalized advice should

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

235. See, e.g., Amy B. Wang, “Post-truth” Named 2016 Word of the Year by Oxford Dictionaries, WASH. POST (Nov. 16, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries> [<https://perma.cc/WM6Y-83DA>].

236. See, e.g., MEIKLEJOHN, *supra* note 21, at 26 (“[T]he reason for this equality of status in the field of ideas lies deep in the very foundation of the self-governing process. When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger.”).

237. Cf. POST, *supra* note 14, at xii (“Because the practices that produce expert knowledge regulate the autonomy of individual speakers to communicate, because they transpire in venues quite distant from the sites where democratic public opinion is forged, they seem estranged from most contemporary theories of the First Amendment.”).

238. Compare *Nat’l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2374–75 (2018) (“[W]hen the government polices the content of professional speech, it can fail to ‘preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.’” (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014))), with *id.* at 2382–83 (Breyer, J., dissenting) (“[I]n suggesting that heightened scrutiny applies to much economic and social legislation, the majority pays those First Amendment goals a serious disservice through dilution.”).

239. POST, *supra* note 14, at 45.

240. See Haupt, *supra* note 4, at 1286 (describing malpractice standards in the medical and legal contexts).

probably be constitutionally permissible; a licensing requirement for writing self-help books should be unconstitutional.”²⁴¹

Nonetheless, an emerging body of literature—much of it focused on the legal profession—discusses the potential benefits of a more democratic approach to professional education and the provision of professional services.²⁴² Connecting the cost of professional services to access restrictions, some find professional monopolies increasingly difficult to justify.²⁴³ These considerations at first blush perhaps suggest that a new, more democratic and egalitarian approach might be desirable, and deregulation of professional licensing in the service of democratization might initially sound appealing to some. But “[w]hile many might laud the democratization of knowledge and the ideal of free and equal competition of ideas in the proverbial marketplace, there are certain lines that cannot be crossed if the sun is to continue to rise in the east.”²⁴⁴ In other words, “egalitarian principles cannot be allowed to run amok when it comes to how we understand truth or, if you will, expert knowledge.”²⁴⁵

To capture these parameters, the absence of speaker equality when it comes to expert knowledge might be described as “undemocratic.”²⁴⁶ When professional knowledge is sought, “there has to be some rupture, at some point, of egalitarian norms.”²⁴⁷ That does not mean that expert knowledge has no role in democratic public discourse. In fact, it informs public discourse in a manner that can lead to more informed decisions of citizens without expert knowledge by providing expertise where it otherwise would not exist. Thus, precisely by virtue of its undemocratic nature, it has the potential to advance democratic public discourse. On this view, the presence of expert knowledge is better for public discourse than its absence.²⁴⁸

241. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Unchartered Zones*, 90 CORNELL L. REV. 1277, 1343 (2005) (footnote omitted).

242. See, e.g., Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1 (2012); Renee Newman Knake, *Democratizing Legal Education*, 45 CONN. L. REV. 1281 (2013).

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

244. Ronald K.L. Collins & David M. Skover, *The Guardians of Knowledge in the Modern State: Post’s Republic and the First Amendment*, 87 WASH. L. REV. 369, 369 (2012).

245. *Id.*

246. See *id.* at 375.

247. *Id.* at 370.

248. As Schauer has noted, “It should be obvious that factual truth and knowledge of it are important, even if these are not the only things that are important, and even if their importance does not necessarily trump other valuable attributes.” Schauer, *supra* note 19, at 901. He

Asserting that the presence of expert knowledge is good for a democratic society, however, is somewhat of a controversial statement. One might equally see it as a threat that results from the inability of nonexperts to understand, participate in, and control expertise and expert discourse.²⁴⁹ The problem fundamentally is one of equality.²⁵⁰ To the extent that democracy depends on the polity's ability to decide for themselves what is true, the presence of expert knowledge creates either an abdication of popular control over expertise or a rejection of expert knowledge in favor of populism.²⁵¹ This prompts the question: "Should the opinions of the many prevail over the knowledge of the few?"²⁵² The unequal distribution of expert knowledge, moreover, may invite interventions, such as "egalitarianization through difference-obliterating education or difference-obliterating access to expertise, for example through state subsidy of experts and the dissemination of their knowledge and advice."²⁵³

This, in turn, challenges the neutrality of the liberal state.²⁵⁴ The resulting twin problems are the "character of expert knowledge, which undermines liberalism, and the problem of the inaccessibility of expert knowledge to democratic control."²⁵⁵ Another way to put it: "Should the political legitimacy of technical decisions in the public domain be maximized by referring them to the widest democratic processes, or should such decisions be based on the best expert advice? The first choice risks technological paralysis: the second invites popular opposition."²⁵⁶

elaborates as follows:

Yet, even though we do not accept that truth and knowledge of it have a lexical priority over all other values, it seems relatively uncontroversial to assert that, in general, truth is, *ceteris paribus*, better than falsity, that knowledge is, *ceteris paribus*, better than ignorance, and that a society with more true belief is, *ceteris paribus*, better than one with less belief in the truth or than one with more beliefs that are actually false.

Id. at 902.

249. Turner, *supra* note 196, at 123 ("In the writings of persons concerned with the political threat to democracy posed by the existence of expert knowledge, expertise is treated as a kind of possession which privileges its possessors with powers that the people cannot successfully control, and cannot acquire or share in.").

250. *Id.*

251. *Id.* at 124 (describing these alternatives as "the dilemma of capitulation to 'rule by experts' or democratic rule which is 'populist'—that is to say, that valorizes the wisdom of the people even when 'the people' are ignorant and operate on the basis of fear and rumor").

252. Collins & Skover, *supra* note 244, at 372.

253. Turner, *supra* note 196, at 124.

254. *See id.* ("Thus it is a violation of the basic neutrality of the state, of the impartiality the liberal state must exhibit in the face of rival opinions in order to ensure the possibility of genuine, fair and open discussion.").

255. *Id.* at 127.

256. Collins & Evans, *supra* note 189, at 235–36.

The First Amendment's answer to this is to turn expert knowledge in public discourse into opinion equal to other opinions.²⁵⁷ Does the state's imprimatur by way of granting a license to professionals create a problem on the same reasoning? Licensing indeed creates speaker inequality. But as the normative exploration in the next Part illustrates, that is actually a good thing.

III. LISTENER INTERESTS, SPEAKER INEQUALITY, AND FIDUCIARY DUTIES

Two dimensions of First Amendment theory are particularly relevant to professional advice-giving: the role of listener interests and the role of speaker inequality. As already noted, both operate in the opposite direction in public discourse. This Part addresses them in turn. Moreover, to offer a comprehensive theoretical framing of professional advice-giving, the discussion of listener interest and speaker inequality takes fiduciary duties into account. Fiduciary duties respond to knowledge asymmetries, and the professional-client relationship is a typical fiduciary relationship.²⁵⁸ As one scholar puts it, “[A] fiduciary relationship is appropriate when the fiduciary is more expert than the entrusting party.”²⁵⁹ Though this may initially sound like a circular argument—a professional is a fiduciary because she is a professional—the normative dimension proves that it is not. The professional is a

257. See POST, *supra* note 14, at 44.

258. See, e.g., Balkin, *supra* note 20, at 1207 (explaining that “doctors, lawyers, and accountants have special relationships of trust and confidence with their clients” and describing these as “fiduciary relationships”).

Fiduciary theory is on the rise in a wide range of areas. See generally Matthew T. Bodie, *Employment as Fiduciary Relationship*, 105 GEO. L.J. 819 (2017); Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993 (2017); Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009). In public law, see, for example, Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820 (2016); D. Theodore Rave, *Fiduciary Voters?*, 66 DUKE L.J. 331 (2016); and D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013). In international law, see, for example, Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331 (2009). With respect to the legal profession, see, for example, David J. Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337 (2017) (identifying fiduciary theory as an area that “may be fruitful for future legal ethics scholarship”). In the health law context, see, for example, Isaac D. Buck, *Furthering the Fiduciary Metaphor: The Duty of Providers to the Payers of Medicare*, 104 CALIF. L. REV. 1043 (2016); and Margaux J. Hall, *A Fiduciary Theory of Health Entitlements*, 35 CARDOZO L. REV. 1729 (2014).

259. Buck, *supra* note 258, at 1071.

fiduciary because the values underlying the relationship demand imposition of fiduciary duties.

Because fiduciary duties are incompatible with the values underlying the paradigmatic idea of speech in public discourse, they remain underexplored in the First Amendment context. One notable exception is Jack Balkin's exploration of "information fiduciaries."²⁶⁰ In the professional context, focusing on the flow of information from the professional to the client, we are dealing with "knowledge fiduciaries."²⁶¹ The values underlying the fiduciary relationship track and reinforce listener interests and speaker inequality in the professional context; they can thus be seen as normative corollaries.

A. Listener Interests

Conventionally, listener interests are not at the center of attention in First Amendment theory.²⁶² Though the commercial speech doctrine was originally concerned with listener interests,²⁶³ its primary focus over time has shifted to the speaker.²⁶⁴ Moreover, the values underlying professional speech and commercial speech are fundamentally different.²⁶⁵ But listener interests are vitally important to professional speech where the very purpose of the professional-client relationship is to give accurate, comprehensive, and reliable advice to the client.

Although the listener-centered perspective is not generally dominant, theoretical and doctrinal support for it does exist "when the expression occurs within a relationship in which content-based regulation can help improve the communicative discourse."²⁶⁶ A listener's deficit in "information, expertise, or power" vis-à-vis the speaker can create a relationship "where the speaker has greater (and sometimes even exclusive) informational access and listeners'

260. See Balkin, *supra* note 20, at 1205–20 (introducing the concept of information fiduciaries and examining fiduciaries and the First Amendment).

261. My focus is on the information the client receives from the professional while Balkin's is on the information the professional receives from the client. See *id.* at 1208. Nonetheless, the dynamics of the fiduciary relationship are the same.

262. See *supra* notes 13, 15 and accompanying text.

263. See Post & Shanor, *supra* note 7, at 172.

264. See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). For an account of the shift in focus from listener to speaker, see, for example, Shanor, *supra* note 8.

265. See Haupt, *supra* note 4, at 1264–68 (rejecting the analogy of professional speech to commercial speech); see also Post, *supra* note 8, at 23 ("Although the communication between a professional and her client might concern commercial matters, its regulation would almost certainly not be conceptualized as an issue of First Amendment commercial speech doctrine.").

266. Norton, *supra* note 13, at 37.

opportunities for counterspeech and exit may be constrained.”²⁶⁷ Among the examples for speech within such relationships is “speech by professionals and other fiduciaries to their clients and beneficiaries where speakers’ insincerity and inaccuracy threaten especially grave harms to their listeners.”²⁶⁸

Listener interests thus intersect in important ways with fiduciary duties. Anathema to the concept of public discourse, fiduciary duties exist between speaker and listener in professional speech: “The nature of the professional-client relationship gives rise to fiduciary duties. To bridge the knowledge gap, and to ensure the protection of the client’s decisional autonomy interests, the professional has to communicate all information necessary to make an informed decision to the client.”²⁶⁹

Balkin distinguishes between the *content* of information and “the *social relationships* that produce” information.²⁷⁰ In the professional speech context, Daniel Halberstam likewise emphasizes the distinctive social relationship.²⁷¹ My own approach diverges from Halberstam’s in the way I conceptualize the nature of expert knowledge as the formative element of the social relationship.²⁷² Beyond the “boundedness” of the relationship, the distinctive marker in Halberstam’s model,²⁷³ the content of the underlying knowledge transfer—that is, accurately and comprehensively conveying the insights of the knowledge community—matters.²⁷⁴ There is no fundamental disagreement between these positions; rather, it is a question of emphasis. Fiduciary duties between professional and client, however, exist as a key feature of the professional-client relationship under both approaches.²⁷⁵ In general terms, “a fiduciary is one who has special obligations of loyalty and trustworthiness toward another

267. *Id.*

268. *Id.* (further noting that “relationships matter for free speech purposes in ways that sometimes support the choice to privilege listeners over speakers when their First Amendment interests are in tension”).

269. Haupt, *supra* note 4, at 1271 (citation omitted); *cf.* *Lowe v. SEC*, 472 U.S. 181, 210 (1985) (speaking of “fiduciary, person-to-person relationships”).

270. Balkin, *supra* note 20, at 1205.

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

272. Haupt, *supra* note 4, at 1243 (“The professional-client relationship is typically characterized by an asymmetry of knowledge.”).

273. Halberstam, *supra* note 271, at 828–69 (discussing the constitutional status of “bounded speech practices”).

274. Haupt, *supra* note 4, at 1267 (arguing that Halberstam’s model of “bounded speech institutions” is incomplete because it “does not define the content of the boundedness”).

275. Halberstam, *supra* note 271, at 845; Haupt, *supra* note 4, at 1271.

person.”²⁷⁶ In this relationship, “[t]he fiduciary must take care to act in the interests of the other person” who “puts their trust or confidence in the fiduciary, and the fiduciary has a duty not to betray that trust or confidence.”²⁷⁷ This results in the twin fiduciary duties of care and loyalty: First, fiduciaries “must take care to act competently and diligently so as not to harm the interests of the principal, beneficiary, or client.”²⁷⁸ Secondly, they “must keep their clients’ interests in mind and act in their clients’ interests.”²⁷⁹

Studies of trust in professionals, like studies of professionalism, have followed an uneven path. Scholars in the healthcare context, for example, trace a shift from a focus of medical ethics on professionalism to later scholarship questioning professionals’ trustworthiness.²⁸⁰ This development maps onto the STS literature’s skepticism of expert knowledge.²⁸¹ The axiomatic proposition that “the physician-patient relationship is expected to be one of mutual trust”²⁸² was followed by an era marked by skepticism of experts and trust in them. But “[w]e are now witnessing a robust revival of trust as a topic in discussions of medical ethics and professionalism.”²⁸³ Views of trust in professional relationships are also influenced by the conception of the market in professional services where the position “that optimal levels of trust or distrust will emerge through private ordering, without the assistance of law,” competes with the position “that trust is preferable to extensive monitoring and that certain legal regimes are needed to maximize the beneficial role of trust.”²⁸⁴ These positions mirror the competing economic positions on licensing.²⁸⁵

Not all fiduciaries are professionals, as the corporate context shows.²⁸⁶ Although fiduciary duties exist between management and shareholders, there is no professional advice-giving relationship.²⁸⁷ Closer to the line might be the trustee-beneficiary relationship, another paradigmatic fiduciary relationship. Finally, financial advisors—

276. Balkin, *supra* note 20, at 1207.

277. *Id.*

278. *Id.* at 1207–08.

279. *Id.* at 1208.

280. Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 469 (2002).

281. *See supra* Section II.B.

282. Hall, *supra* note 280, at 469 n.18 (citing TALCOTT PARSONS, *THE SOCIAL SYSTEM* 463–65 (1951)).

283. *Id.* at 469.

284. *Id.* at 484.

285. *See supra* Section I.B.3.

286. *Cf.* Balkin, *supra* note 20, at 1207 (“Fiduciaries often perform professional services or else manage money or property for their principals, beneficiaries, or clients.”).

287. *Cf.* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligations*, 37 DUKE L.J. 879, 915–18 (1988) (examining fiduciary duties in corporate law).

fiduciaries in light of the new fiduciary rule²⁸⁸—likely cross the line into the professional advice-giving realm.²⁸⁹ And the attorney-client relationship,²⁹⁰ like the doctor-patient relationship,²⁹¹ is a paradigmatic professional-client relationship giving rise to fiduciary duties.

But just as not all fiduciaries are professionals, not all professionals are fiduciaries. The medical context usefully illustrates contemporary debates concerning the existence and scope of professionals' fiduciary duties. Under one account, based on "the existence of trust as a factual premise," the law attaches specific rules to the relationship.²⁹² Thus, the "various rights, responsibilities, and rules are premised on the strength and pervasiveness of trust in medical relationships."²⁹³ Building on the patient's trust in professionals and institutions, "the law seeks to enforce or promote physician or institutional behavior that meets the expectations that trusting patients bring to treatment relationships, and the law punishes violations of those trusting expectations."²⁹⁴ Normatively, it thus seeks to ensure that professionals and institutions act more in accordance with patient expectations.²⁹⁵ One way to distinguish among professionals is to ask about the trust the public typically places in them as a matter of fiduciary duty; another is to ask the same question with respect to the existence of a regime of professional malpractice liability.²⁹⁶ Both aim to ensure that trust in professionals is met by their behavior.

288. Tara Siegel Bernard, *Obama's Fiduciary Rule, After a Delay, Will Go Into Effect*, N.Y. TIMES (May 23, 2017), <https://nyti.ms/2qTorEg> [<https://perma.cc/527Y-3QQA>]; see Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, and 2550).

289. See, e.g., Tara Siegel Bernard, *Now, Your Financial Advisers Will Have to Put You First (Sometimes)*, N.Y. TIMES (June 8, 2017), <https://nyti.ms/2sZRxcx> [<https://perma.cc/QC39-RB7X>] ("When a doctor prescribes a drug, most people trust that it is the best course of treatment. The next time you seek financial advice, those professionals will be required to act in a way that approximates the patient-doctor relationship.").

290. See, e.g., DeMott, *supra* note 287, at 908 ("Paradigms of such [fiduciary] relationships include agent-principal, director-corporation, guardian-ward, lawyer-client, partner-fellow partner, and trustee-trust beneficiary relationships.").

291. Maxwell J. Mehlman, *Why Physicians are Fiduciaries for Their Patients*, 12 IND. HEALTH L. REV. 1, 2–3 (2015) (noting that physicians "have greater knowledge and experience" than their patients). For a list of court decisions holding that physicians are fiduciaries, see *id.* at 3 n.5.

292. Hall, *supra* note 280, at 486.

293. *Id.* at 487.

294. *Id.*

295. *Id.*

296. Without getting too far into current controversies in fiduciary theory, it is worth noting that there is some debate over "whether the duty of care and skill owed by a fiduciary is properly called a fiduciary duty." Lionel Smith, *Aspects of Loyalty 1* (July 27, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3009894> [<https://perma.cc/47UF-N5H8>].

The presence of both fiduciary duties and professional malpractice liability has interesting conceptual implications. Courts and scholars treat tort liability and breach of fiduciary duty in different ways. Most importantly for present purposes, the two regimes are concerned with different categories of harm.²⁹⁷ Whereas the malpractice regime is concerned with bad advice, the fiduciary regime addresses betrayals of trust, and although the duty of care to act competently may be duplicative of the duty imposed by the professional malpractice standard, the two categories do not necessarily overlap.²⁹⁸ In the end, despite the fact that some courts doubt the fiduciary relationship or allow only a cause of action for malpractice but not for breach of fiduciary duty, the doctor-patient relationship should not be a hard case as far as fiduciary duties are concerned.²⁹⁹

The listener's interests extend to both the content of advice—that is, its accuracy as determined by the professional knowledge community—and the ability to rely on that advice—that is, the trustworthiness of the professional dispensing that advice. Thus, the normative goals align: ensuring the professional's competence and the client's trust in the professional's competence are at the heart of the professional-client relationship.

B. Speaker Inequality

Though equal in public discourse, speakers are necessarily—and appropriately—unequal in the professional relationship. One marker of inequality is the tort regime imposing liability for bad advice. Such a liability mechanism is absent in public discourse. Recall that in public discourse “traditional First Amendment doctrine systematically transmutes claims of expert knowledge into assertions of opinion.”³⁰⁰ As a consequence, though listeners may be more likely to trust a professional than a nonprofessional on a matter to which expertise may be relevant,³⁰¹ they do not have the same recourse for harm caused by bad advice.³⁰² This also means that professionals are free to diverge

297. They also differ with respect to the distribution of the burden of proof and the available remedies. See Mehlman, *supra* note 291, at 28.

298. See Caroline Forell & Anna Sortun, *The Tort of Betrayal of Trust*, 42 U. MICH. J.L. REFORM 557, 565 (2009) (“Trust and loyalty are what distinguish fiduciary from non-fiduciary relationships.”).

299. See Mehlman, *supra* note 291, at 10 (noting with surprise the authorities “that cast doubt on or reject outright the fiduciary nature of the patient-physician relationship”).

300. POST, *supra* note 14, at 44.

301. *Cf.* Haupt, *supra* note 4, at 1256.

302. See Haupt, *supra* note 10, at 681–82 (discussing medical advice dispensed to a general audience by a physician on a television program).

from what the profession considers good advice—something they may not do within the confines of the professional-client relationship.³⁰³

Fiduciary duties normatively address the inequality between advice-giver and advice-recipient by aligning the professional's behavior with the client's expectations.³⁰⁴ While everyone is “treated as equally competent and equally able to fend for themselves in public discourse,” outside of public discourse, “the law drops its assumption that everyone is equally able, independent, and knowledgeable, and that everyone can equally fend for themselves.”³⁰⁵ This type of speaker inequality accounts for the knowledge asymmetry between professional and client. But there is another kind of speaker inequality: that between the professional speaker and the nonprofessional speaker.

Individuals cannot place the same reliance on advice given by nonprofessional speakers, and they cannot hold them liable for harm caused by bad advice. Licensing provides a mechanism to make this distinction readable *ex ante*. Even outside of public discourse, in relationships that might look like advice-giving relationships, individuals cannot usually place the same reliance on nonprofessional advice obtained through one-on-one relationships with nonprofessionals, though context matters. On this point, it is instructive to contrast conversion therapy with advice dispensed in crisis pregnancy centers (“CPCs”).

After the Ninth Circuit upheld California's law prohibiting licensed mental health providers from offering conversion therapy, or “sexual orientation change efforts,” for minors against a First Amendment challenge under the Free Speech Clause,³⁰⁶ the same court denied a challenge under the Free Exercise and Establishment Clauses brought by licensed individuals who wanted to offer this type of treatment as a form of religious counseling.³⁰⁷ The court noted that the law applies only to “licensed mental health professionals acting within the confines of the counselor-client relationship.”³⁰⁸ In addition to the text, the legislative history supports this conclusion as “the law was aimed at practices that occur in the course of acting as a licensed professional.”³⁰⁹ According to the court, only the counselor-client relationship is within the law's ambit: “The law regulates the conduct of state-licensed mental health providers only; the conduct of all other

303. *Id.* at 681.

304. *See supra* notes 292–295 and accompanying text.

305. Balkin, *supra* note 20, at 1215.

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

307. *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016).

308. *Id.* at 1044 (emphasis omitted) (quoting *Pickup*, 740 F.3d at 1229–30).

309. *Id.*

persons, such as religious leaders not acting as state-licensed mental health provider, is unaffected.”³¹⁰ Further, the court noted that “even the conduct of state-licensed mental health providers is regulated only within the confines of the counselor-client relationship; in all other areas of life, such as religious practices, the law simply does not apply.”³¹¹ The professional speaker, in short, is unequal from other speakers, and licensing signals this difference. Obtaining advice from an individual outside of the professional-client relationship may be a form of advice, but it is not *professional* advice.³¹²

But the social relationship may be configured so as to evoke trust and reliance in a way that ought to only apply in a professional-client relationship. In obtaining advice from CPC counselors, women are sometimes led to believe they can rely on advice rendered there in the same way as medical advice.³¹³ To avoid harm caused by such reliance, California enacted legislation that required CPCs to display certain disclosures.³¹⁴ The law regulated licensed and unlicensed pregnancy-counseling facilities. Specifically, it required licensed pregnancy-related clinics to disseminate a notice informing patients of the existence of publicly-funded family-planning services, including contraception and abortion,³¹⁵ and that the clinic was not licensed by the state of California.³¹⁶ CPCs may be licensed or unlicensed facilities.³¹⁷ The Ninth Circuit upheld the law against a First Amendment challenge,³¹⁸ but in its decision in *NIFLA v. Becerra*, the

310. *Id.* at 1045 (emphasis omitted). I have elsewhere criticized the *Pickup* court for characterizing the speech as “conduct.” See Haupt, *supra* note 4, at 1294 (“Under my account, the activity regulated by the SOCE legislation . . . is speech. But as professional speech, it is a specific kind of speech.”). This disagreement, however, does not impact the role of licensing in the court’s analysis in *Welch*.

311. *Welch*, 834 F.3d at 1045.

312. There are, of course, line-drawing problems associated with this conceptual stance. I have elsewhere addressed the fact that knowledge communities are not monolithic, and often there is more than one professional opinion that is acceptable as professional advice. See Haupt, *supra* note 10, at 675. Another problem concerns the line between different disciplines and professions with overlapping expertise on certain matters.

313. See, e.g., Aziza Ahmed, *Informed Decision Making and Abortion: Crisis Pregnancy Centers, Informed Consent, and the First Amendment*, J.L. MED. & ETHICS, Mar. 2015, at 51, 54; Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1350 (2014) (“Women who . . . are administered pregnancy tests by people in white lab coats are led to believe that medical professionals will give them accurate and impartial medical advice.”); B. Jessie Hill, *Casey Meets the Crisis Pregnancy Centers*, J.L. MED. & ETHICS, Mar. 2015, at 59, 66 (noting that “[t]he counseling transaction itself looks like . . . [a] one-on-one, fiduciary relationship”).

314. Reproductive FACT Act, CAL. HEALTH & SAFETY CODE §§ 123470–123473 (West 2016).

315. *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 828–29 (9th Cir. 2016), *rev’d sub nom.* *Nat’l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018).

316. *Id.* at 829.

317. *Id.*

318. *Id.* at 845.

Supreme Court subsequently held the statute as drafted unconstitutional under the First Amendment.³¹⁹

Two questions that were conflated in the *NIFLA* litigation by assuming the CPC disclosures were professional speech have to be kept separate. First, whether the speech in question is itself professional speech. (I have argued elsewhere that it is not.³²⁰) The second question is whether the state has a sufficient interest in informing women about the nature of the services rendered by CPCs. The normative relevance of both questions is that professional advice-giving both evokes and depends on client trust. The client must be able to trust that the professional gives competent, accurate, and comprehensive advice consistent with the insights of the knowledge community. Distinguishing between licensed and unlicensed providers accounts for the level of trust patients can reasonably place in the advice obtained. The *NIFLA* dissent correctly understands the role of licensing as an element of the larger regulatory framework governing professional advice-giving.³²¹ Similarly, the professional malpractice tort regime and fiduciary duties impose real consequences on some speakers and not others, making inequality among speakers legally relevant by tying advice to a body of professional knowledge generated by the knowledge community.

Speaker inequality as a normative matter, then, accounts for expert knowledge situated with advice-giving professionals whose competence licensing makes a prerequisite that is readable *ex ante*, and whose liability for bad advice *ex post* is ensured through professional malpractice liability and who are bound to further client interests by fiduciary duties. Thus normatively, in the end, the interests underlying all of them align.

319. 138 S. Ct. at 2378.

320. Claudia Haupt, *The Limits of Professional Speech*, 128 YALE L.J. FORUM 185, 189 (2018):

In classifying the CPC disclosures as professional speech, the Ninth Circuit defined professional speech too broadly. The content of the disclosures in *NIFLA* was too far removed from expert knowledge to be properly attributed to the realm of professional expertise. The disclosures dealt with publicly funded reproductive healthcare and state licensing, regulatory frameworks that are not themselves subject to expert knowledge.

321. 138 S. Ct. at 2382 (Breyer, J., dissenting):

Even during the *Lochner* era, when this Court struck down numerous economic regulations concerning industry, this Court was careful to defer to state legislative judgments concerning the medical profession. The Court took the view that a State may condition the practice of medicine on any number of requirements, and physicians, in exchange for following those reasonable requirements, could receive a license to practice medicine from the State. Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content of those reasonable conditions.

IV. RETHINKING PROFESSIONAL LICENSING

Having argued that professional speech protection and professional licensing are complementary rather than in conflict, this Part addresses how this theory of professional speech and professional licensing cashes out in terms of First Amendment doctrine before surveying the reconceptualized legal framework governing professional advice-giving and its application.

This Part then returns briefly to professional licensing reform. There may be good reasons yet to question currently existing professional licensing regimes. Simultaneously acknowledging the shortcomings of existing licensing regimes and recognizing the abstract need for licensing in general are not incompatible. But rather than attempting to alter licensing regulation through a First Amendment lens based on the theoretically feeble assertion that speech protection and licensing are irreconcilable, rethinking professional licensing should focus on the states' police powers. Licensing ought to be tailored so as to protect clients' health, safety, and welfare by ensuring professionals' competence.

A. Professionals and the First Amendment

Professional speech is a unique category of speech.³²² It is not the expression of opinions in public discourse, nor is it commercial speech. Professional speech reflects the shared knowledge of professionals belonging to a knowledge community that is communicated from professional to client within the confines of a professional-client relationship. Several implications for First Amendment doctrine and for the legal framework of professional advice-giving that change the analysis of professional speech and licensing cases follow from this theory, as this Section will demonstrate.

1. Doctrinal Implications

Under this theory of professional speech, several First Amendment doctrines applicable in public discourse do not apply in the context of professional speech. The requirements of content and viewpoint neutrality under *Reed v. Town of Gilbert*³²³ are inapplicable,

322. Haupt, *supra* note 4, at 1269. *But see* Ashutosh Bhagwat, *When Speech Is Not "Speech,"* 78 OHIO ST. L.J. 839, 882 (2017) (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).

323. 135 S. Ct. 2218 (2015).

as is protection of false speech under *United States v. Alvarez*.³²⁴ Moreover, in the professional speech context, there are justifications for prohibiting false and misleading speech, for imposing an informed consent requirement, and for compelled disclosures. And finally, prior restraint doctrine does not apply. I will briefly discuss these doctrinal consequences in turn.

Content and viewpoint neutrality are inapposite to professional speech.³²⁵ The Eleventh Circuit most recently disregarded the fundamental difference between public discourse and professional speech in its en banc decision in *Wollschlaeger v. Governor of Florida*.³²⁶ Despite reaching the correct result in striking down on First Amendment grounds a Florida law that prohibited doctors from asking their patients about gun ownership as a matter of course, the analytical approach applying the requirement of content neutrality³²⁷ misses the distinctive nature of professional speech. Rather, “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.”³²⁸ The client, in short, depends on a distinction between good and bad professional advice—a distinction that a strict regime of content and viewpoint neutrality would obliterate. But “the value of professional speech to the client critically depends on its content.”³²⁹ The tort regime of professional malpractice liability, to take a particularly salient example, is based on the content of speech, and the First Amendment provides no defense against malpractice claims.³³⁰ Thus, “content regulation . . . ensure[s] that professionals give their clients, to whom they owe a fiduciary duty, comprehensive and accurate advice.”³³¹ On the same reasoning, lies as well as false and misleading speech do not enjoy First Amendment protection in the context of professional speech.³³²

324. 567 U.S. 709 (2012).

325. Haupt, *supra* note 163, at 151.

326. 848 F.3d 1293 (11th Cir. 2017).

327. *Id.* at 1300 (framing the decision in terms of content neutrality).

328. Haupt, *supra* note 163, at 152.

329. *Id.* at 172.

330. Even the *NIFLA* majority agrees, though it argued that this is because professional malpractice is conduct. See Nat'l Inst. of Family & Life Advocates (*NIFLA*) v. Becerra, 138 S. Ct. 2361, 2373 (2018) (noting that torts for professional malpractice fall under the state's purview to regulate professional conduct).

331. Haupt, *supra* note 163, at 172.

332. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882–83 (1992) (explaining that the state can require

With respect to informed consent, “imposing an informed consent requirement does not technically restrict the professional’s First Amendment rights if appropriate disclosure is considered a part of medically necessary information flow within the doctor-patient relationship.”³³³ Scholars continue to explore the margins of what the state can require as a matter of informed consent.³³⁴ However, in light of the underlying interests, informed consent is necessary for the patient’s decisional autonomy. Thus, unlike in public discourse, the imposition of such a requirement is justified.³³⁵

In public discourse, compelled disclosure requirements are strongly disfavored “because such requirements are understood to infringe the autonomy of speakers in determining the content of their speech.”³³⁶ But in the professional speech context, autonomy interests operate differently than in public discourse: “The professional not only speaks for herself, but also as a member of a learned profession” which leads to “a unique autonomy interest in communicating her message according to the standards of the profession.”³³⁷ Consequently, compelled disclosures in the professional speech context do not implicate the same values as in public discourse.

Finally, a strong presumption against prior restraints on speech is a hallmark of public discourse.³³⁸ As already mentioned, the question of prior restraints created by professional licensing is the subject of considerable disagreement. Whereas the Ninth Circuit denied that licensing creates prior restraints,³³⁹ some scholars assert that licensing creates particularly troublesome prior restraints.³⁴⁰ But neither of those positions accurately captures the relationship between prior restraints and licensing. First Amendment scholars have long examined the values served by prior restraint doctrine.³⁴¹ The central concern is

that truthful and not misleading information be provided without running afoul of the First Amendment).

333. Haupt, *supra* note 4, at 1289.

334. See, e.g., Hill, *supra* note 313; Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939; Nadia N. Sawicki, *Informed Consent as Compelled Professional Speech: Fictions, Facts, and Open Questions*, 50 WASH. U. J.L. & POL’Y 11 (2016); Sonia M. Suter, *The First Amendment and Physician Speech in Reproductive Decision Making*, J.L. MED. & ETHICS, Mar. 2015, at 22.

335. As it does with professional malpractice, the *NIFLA* majority considers informed consent a form of conduct. See *NIFLA*, 138 S. Ct. at 2373.

336. Post, *supra* note 8, at 27.

337. Haupt, *supra* note 4, at 1272.

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

339. See *supra* notes 133–134 and accompanying text.

340. See *supra* notes 135–136 and accompanying text.

341. See, e.g., Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409

suppression of speech.³⁴² But bad professional advice is properly suppressed, since it serves neither the client's or patient's nor the professional's interests.³⁴³ The malpractice regime sanctions bad advice ex post, but ex ante suppression of speech equally furthers the values underlying the professional-client relationship. In other words, suppression of incompetent advice is normatively desirable in the professional context. And a licensing regime tailored to the goal of ensuring competent advice-giving serves this interest.

2. The Framework of Professional Advice-Giving

Because professional speech protection and professional licensing share the same goal—ensuring the availability of competent and reliable advice for clients or patients—state involvement in licensing supports the framework of professional advice-giving rather than undermines it. Key components of this framework are First Amendment protection of professional speech, professional malpractice liability, fiduciary duties within the professional-client relationship, and the permissibility of professional licensing.³⁴⁴

The entire regulatory framework has the goal of ensuring the flow of accurate and comprehensive advice from the knowledge community through the individual professional to the client.³⁴⁵ To that end, the First Amendment protects only good advice as determined by the standards of the profession, taking into account that a range of knowledge may constitute good advice.³⁴⁶ Professional speech protection and professional malpractice liability thus form two sides of the same coin.³⁴⁷

From the perspective of the client, the tort regime provides recourse for harm caused by bad advice.³⁴⁸ In this scenario, the First Amendment and the tort regime draw on the same body of knowledge.³⁴⁹ This conceptual point is relatively simple, but important: “Professionals may be held liable for ‘unprofessional’ speech—that is,

(1983); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

342. Post, *supra* note 8, at 33 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973)).

343. See Haupt, *supra* note 4, at 1270–73 (discussing professional and decisional autonomy interests).

344. See Haupt, *supra* note 4, at 1279 .

345. See *id.* at 1267.

346. Haupt, *supra* note 10, at 675.

347. Haupt, *supra* note 4, at 1285.

348. See Haupt, *supra* note 10, at 707–10 .

349. See Haupt, *supra* note 4, at 1279.

speech within the professional-client relationship, for the purpose of providing professional advice, that fails accurately to communicate the knowledge community's insights."³⁵⁰ This understanding is also consistent with contemporary torts scholarship.³⁵¹

Connecting disciplinary truth and malpractice liability in a sense is distinctly Foucauldian: "Discipline is on the one hand 'the maintenance of a set of rules and the punishment meted out for their infringement.' But at the same time it is also 'a branch of knowledge.'"³⁵² Professional speech protection and the imposition of malpractice liability are complementary.³⁵³ Only good advice ought to be protected by the First Amendment, and only bad advice is subject to malpractice liability. Fiduciary duties lend normative support to the design of the professional-client relationship. But this legal framework does not obviate the need for licensing. Most obviously, the temporal aspect is fundamentally different: licensing happens *ex ante*, tort liability *ex post*. In order for a tort claim to succeed, the client must have suffered harm. Licensing, by contrast, anticipates the abstract possibility of harm.³⁵⁴

Assessing the likelihood and potential extent of harm is a necessarily fact-specific and profession-specific inquiry. In *National Ass'n for the Advancement of Psychoanalysis*, the Ninth Circuit discussed harm to clients in its rational basis analysis.³⁵⁵ The court noted that the state "first regulated psychology because it 'recognized the actual and potential consumer harm that can result from the unlicensed, unqualified or incompetent practice of psychology.'"³⁵⁶ It then examined the law's provisions in relation to potential harms that may arise in the course of practice, concluding that "[r]egulating psychology, and through it psychoanalysis, is rational because it is within the state's police power to regulate mental health treatment."³⁵⁷ Similarly, scholars of the legal profession call for a focus on harm when

350. *Id.* at 1278–79.

351. *See, e.g.*, Alex Stein, *Toward a Theory of Medical Malpractice*, 97 IOWA L. REV. 1201, 1206 (2012).

352. Thomas Broman, *Rethinking Professionalization: Theory, Practice, and Professional Ideology in Eighteenth-Century German Medicine*, 67 J. MOD. HIST. 835, 837 (1995) (quoting Jan Goldstein, *Foucault Among the Sociologists: The 'Disciplines' and the History of the Professions*, 23 HIST. & THEORY 170, 178 (1984)).

353. *See* Haupt, *supra* note 4, at 1285 (discussing First Amendment protection and malpractice liability as two sides of the same coin).

354. *But see* Svorny, *supra* note 185 (arguing that instead of protecting patients, licensing increases the power of physicians to the detriment of patient care).

355. *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1052 (9th Cir. 2000).

356. *Id.* (citing CAL. BUS. & PROF. CODE § 2900 (West 2018)).

357. *Id.*

considering “full-scale licensing structures,” suggesting that they “are desirable only when harms are ‘demonstrated or easily recognizable.’”³⁵⁸

B. Professional Licensing Reform

It may well be desirable to refashion licensing regimes to establish a more immediate nexus between licensing and competence, with the goal of preventing harm to clients.³⁵⁹ But theoretically and doctrinally speaking, the First Amendment is not the way to get there. The states’ police powers, by contrast, provide a sound route toward a tighter fit between the regulatory regime and the potential harm to be averted. The Ninth Circuit’s decision in *National Ass’n for the Advancement of Psychoanalysis* provides one example.³⁶⁰ The D.C. tour guide case—though misguided in its First Amendment lens—illustrates this approach,³⁶¹ which was also endorsed by the district court in the Charleston tour guide case.³⁶² But fashioning a closer nexus between licensing and harm, to reiterate, is unrelated to First Amendment concerns.

A focus on the interplay of harm, the level of professional competence necessary to avoid it, and the demands of licensing requirements would likely result in a redesign of various existing regimes. As one commentator notes: “Because the use of occupational licensing varies across states for the same occupation, the large variations in licensing requirements suggest that this form of regulation is not always strictly related with safety or quality concerns over individuals’ ability to do the tasks related to the occupation.”³⁶³ Redesigning or better tailoring can potentially provide significant relief

358. Rhode, *supra* note 243, at 96 (quoting BENJAMIN SHIMBERG, BARBARA F. ESSER & DANIEL H. KRUGER, OCCUPATIONAL LICENSING: PRACTICES AND POLICIES 222 (1973)).

359. *Cf.* Bell, *supra* note 61, at 128 (suggesting that states should “promulgate substantive regulations that are reasonably related to braiding and natural styling”).

360. *See supra* notes 356–357 and accompanying text.

361. *See supra* notes 147–149 and accompanying text.

362. *See supra* note 152 and accompanying text.

363. Kleiner, *supra* note 26, at 11:

For example, only seven states license dental assistants and thirteen states license locksmiths. Even for states that do license the same occupation, the requirements to obtain a license can vary widely. Iowa requires 490 days of education and training to become a licensed cosmetologist, but the national average is 372 days, and New York and Massachusetts require only 233 days. Training requirements also are frequently unrelated to issues of health and public safety. To illustrate, training requirements in Michigan take 1,460 days for an athletic trainer, but only twenty-six days for an emergency medical technician.

to the problem. But it would be up to state legislatures in the first instance to act.

Critics of licensing suggest a range of “market” instruments that would replace licensure with solutions ranging from voluntary certification to customer review and ratings systems akin to Yelp.³⁶⁴ Certification involves an exam and subsequent certification of a specific level of skill or knowledge by a government agency or private actor.³⁶⁵ And as an even less restrictive alternative, registration requires application to be included in an official roster.³⁶⁶

For some occupations, this might make good sense—but some proposals go too far. In the medical context, one economist asserts: “The premise that patients’ health and safety are protected by state medical professional licensing is without basis. Instead, patients are protected by private credentialing, privileging, certification, brand name, medical professional liability insurance oversight, and other efforts to reduce liability.”³⁶⁷ However, as the previous discussion has shown, the medical example is particularly unlikely to provide a suitable basis to argue for deregulation since professional advice-giving is a core element of the doctor-patient relationship and there is a significant risk of causing considerable harm.³⁶⁸ A reliable *ex ante* mechanism of distinguishing competent from incompetent advice may not be necessary for all occupations, but it is necessary for healthcare

364. See *id.* at 21–22 (proposing that certification should substitute licensing for some occupations); Kry, *supra* note 7, at 891 (arguing for certification). The D.C. Circuit in the tour guides case concluded that “fatal to the District’s regulatory scheme is the existence of less restrictive means to accomplish its interests.” *Edwards*, 755 F.3d at 1009. Among those alternatives would be “a voluntary certification program—under which guides who take and pass the District’s preferred exam can advertise as ‘city-certified guides.’” *Id.* The district court in the Charleston tour guide case likewise contemplated various alternatives to licensing, including “reliance on the free-market, particularly given the public’s use of travel review websites” and “a voluntary certification program,” *Billups*, 194 F. Supp. 3d at 470, but ultimately dismissed these alternatives as insufficient. *Id.* at 477–78.

365. Kleiner, *supra* note 26, at 8:

For instance, in many states travel agents and car mechanics are certified but not licensed. This process allows for competition for services, as anyone can legally perform the work, but it protects the right of the title for those in the occupation. For example, only workers who have passed through a Chartered Financial Analyst program and exam can use that title, but others can provide financial advice for a fee as long as they do not use the title “chartered financial analyst.”

366. *Id.*

367. Svorny, *Beyond Medical Licensure*, *supra* note 60, at 29; see also Sawicki, *supra* note 76, at 287 n.7:

Economists, in particular, have long made similar arguments, questioning the value of licensure and self-regulation in highly insulated and self-protective professions, like medicine. These authors and others suggest that medical quality and patient safety could be better safeguarded through market-based solutions that close the information gap between physicians and consumers.

368. See *supra* notes 59–63 and accompanying text.

2019]

LICENSING KNOWLEDGE

559

providers. Thus, “it is highly unlikely that the current system of medical licensure would be abandoned in the foreseeable future.”³⁶⁹

The same is likely true for the legal profession, despite the fact that prominent scholars have contemplated alternatives to licensing. Rhode, for example, explores voluntary certification or mandatory registration.³⁷⁰ In addition, she raises the possibility that “a state could grant licenses to all lay practitioners who registered with an appropriate agency.”³⁷¹ But to the extent that these alternatives are offered to avoid conflict with the First Amendment, this discussion has demonstrated that this particular concern is largely unfounded.

CONCLUSION

Building on a concept of the professions as knowledge communities, this Article demonstrates that the interests underlying professional speech protection and professional licensing align. Both professional speech protection and professional licensing, properly conceptualized, ultimately share the goal of guarding the integrity of professional knowledge—as defined by the knowledge community—communicated by the professional to the client for the client’s benefit. The central role of listener interests and speaker inequality distinguishes professional speech from speech in public discourse. These interests are reflected in the fiduciary duties that exist between professional and client.

The First Amendment, it turns out, is a poor vehicle to challenge professional licensing regimes. Consequently, courts should reject novel litigation strategies seeking to enlist the First Amendment in deregulation of professional licensing. There may be good reasons to oppose licensing for some occupations, but asserting a violation of the First Amendment is not one of them.

369. Sawicki, *supra* note 76, at 287 n.7.

370. Rhode, *supra* note 243, at 96.

371. *Id.*