
OCCUPATIONAL SPEECH AND THE FIRST AMENDMENT

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In May 2013, newspaper columnist John Rosemond received a cease-and-desist letter from the Kentucky Board of Examiners of Psychology informing him that his syndicated column — in which he answers readers’ questions about parenting — constitutes the unlicensed and, hence, criminal practice of psychology.¹ Although the Board concedes that Rosemond may publish general advice about parenting, it has taken the position that answering letters from parents about particular children is the exclusive province of state-licensed psychologists.²

As outrageous as this situation sounds, it is not unique. Rosemond is just one of the millions of Americans — from tour guides to lawyers — who earn their living in occupations that consist primarily, if not entirely, of speech. And, as he discovered, these “speaking occupations” are increasingly subject to occupational-licensing requirements. But this trend seems to be in serious tension with the First Amendment rule that “[g]enerally, speakers need not obtain a license to speak.”³

Surprisingly, despite the growing frequency with which occupational speech is licensed, the Supreme Court has said little about the intersection of occupational licensing and the First Amendment. This silence has had profound consequences, leading some lower courts to conclude, in conflict with virtually all established First Amendment principles, that occupational speech is entitled to no meaningful constitutional protection.⁴

This Commentary advocates the opposite approach, and argues that occupational speech, including even expert advice, is entitled to far more protection than lower courts have given it, and is likely enti-

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¹ See Letter from Jack Conway, Ky. Att’y Gen., to John Rosemond (May 7, 2013) (Declaration of John Rosemond in Support of Plaintiff’s Motion for Summary Judgment ex. 2, *Rosemond v. Markham*, No. 13-CV-42 (E.D. Ky. Nov. 12, 2014)) [hereinafter Letter]; see also Paul Sherman & Jeff Rowes, Op-Ed., *Sherman and Rowes: Psychological Warfare (Licensed) in Kentucky*, WALL ST. J. (July 16, 2013), <http://www.wsj.com/articles/SB10001424127887324879504578598354171175548>.

² See Letter, *supra* note 1; see also Defendants’ Reply to Plaintiff’s Response to Their Motion to Dismiss, or in the Alternative, Motion for Summary Judgment at 3–4, *Rosemond v. Markham*, No. 13-CV-42 (E.D. Ky. Dec. 17, 2014) (citing Rosemond’s provision of “personalized services to a client,” *id.* at 4).

³ *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988).

⁴ See, e.g., *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195 (11th Cir. 2014).

led to strict scrutiny. This conclusion flows directly from the straightforward application of the Supreme Court's case law, most notably *Holder v. Humanitarian Law Project*⁵ and *United States v. Stevens*.⁶

In Part I, I discuss the history of the Supreme Court's limited treatment of occupational speech and the way that lower courts have reacted to that treatment. In Part II, I explain why the predominant approach in the lower courts conflicts with the Supreme Court's most recent case law, and suggest that strict scrutiny is the appropriate standard of review for restrictions on occupational speech. In Part III, I defend this argument from common objections. In Part IV, I examine how this argument has been received in a number of recent First Amendment lawsuits. Finally, in Part V, I briefly discuss how adopting more robust protection for occupational speech is consistent with the Supreme Court's general approach toward First Amendment issues over the last twenty years.

I. OCCUPATIONAL SPEECH BEFORE 2010

The protection available to occupational speech "is one of the least developed areas of First Amendment doctrine."⁷ Until recently, the only significant Supreme Court guidance on occupational-speech licensing came from a three-Justice concurrence in *Lowe v. SEC*.⁸ Since that case, there have been only a handful of lower-court rulings considering the intersection of occupational licensing and the First Amendment, and an equally scant amount of scholarly literature. Below, I discuss the concurring opinion in *Lowe* and the ways it has shaped the debate over occupational speech in lower courts.

A. Justice White's Concurrence in *Lowe v. SEC*

In *Lowe*, the Securities and Exchange Commission (SEC) brought an enforcement action against Christopher Lowe, a disgraced former investment advisor who had lost his registration and been prohibited from acting as an investment advisor following a conviction on various felony offenses.⁹ Despite his conviction, Lowe continued to publish newsletters that provided investing advice.¹⁰ The SEC believed this to

⁵ 130 S. Ct. 2705 (2010).

⁶ 130 S. Ct. 1577 (2010).

⁷ David T. Moldenhauer, *Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 SEATTLE U. L. REV. 843, 843 (2006).

⁸ 472 U.S. 181, 211 (1985) (White, J., concurring in the result).

⁹ *Id.* at 183 (majority opinion).

¹⁰ *Id.* at 184.

be a violation of the securities laws and filed a complaint against Lowe in federal court.¹¹

The SEC lost before the district court, but prevailed before the Second Circuit,¹² after which the Supreme Court granted certiorari to consider “the important constitutional question whether an injunction against the publication and distribution of petitioners’ newsletters is prohibited by the First Amendment.”¹³ But the Court never reached this constitutional question. Instead, in an opinion by Justice Stevens, a majority of the Court concluded on statutory grounds that the registration requirement did not apply to newsletter publishers.¹⁴

Justice White, however, disagreed. Writing for himself, Chief Justice Burger, and Justice Rehnquist, Justice White concluded that it *was* necessary to reach the question of whether requiring newsletter publishers to register with the SEC violated the First Amendment.¹⁵ In doing so, he laid out a test that has had an outsized influence on the development of occupational-speech jurisprudence in lower federal courts.

While not a model of clarity, Justice White’s concurrence appears to distinguish between those who provide advice in a fiduciary or quasi-fiduciary context and those who provide advice outside that context.¹⁶ As Justice White saw it, “[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client’s individual needs and circumstances is properly viewed as engaging in the practice of a profession.”¹⁷ In this context, a professional’s speech is incidental to the conduct of his profession, “[j]ust as offer and acceptance are communications incidental to the regulable transaction called a contract.”¹⁸ Accordingly, Justice White saw no First Amendment problem with “generally applicable licensing provisions limiting the class of persons who may practice [a] profession,” even where the practice of that profession consists entirely of speaking.¹⁹

Justice White expressly contrasted these “professionals” with speakers who do not have a “personal nexus” with their clients and

¹¹ *Id.*

¹² *Id.* at 186.

¹³ *Id.* at 188–89.

¹⁴ *Id.* at 210–11.

¹⁵ *Id.* at 212–13 (White, J., concurring in the result).

¹⁶ *See, e.g., id.* at 231 (“Surely it cannot be said, for example, that if Congress were to declare editorial writers *fiduciaries* for their readers and establish a licensing scheme under which ‘unqualified’ writers were forbidden to publish, this Court would be powerless to hold that the legislation violated the First Amendment.” (emphasis added)).

¹⁷ *Id.* at 232.

¹⁸ *Id.*

¹⁹ *Id.*

who do not “purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted.”²⁰ In that latter setting, Justice White believed that “government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech” and instead “becomes regulation of speaking or publishing as such,” and, hence, subject to the First Amendment’s constraints.²¹

Justice White’s concurrence is unusual in at least two respects. The first is that his extended discussion of why the government may permissibly regulate occupational speech in which there is a “personal nexus” between speaker and listener was entirely unnecessary to the disposition of the case; there was no dispute that, with regard to the newsletters at issue, Christopher Lowe had no personal nexus with his readers. The second is that Justice White’s personal nexus test is drawn almost entirely from his own imagination. Justice White does not cite a single controlling opinion of the Supreme Court that supports the existence of a “personal nexus” exemption to the First Amendment. Instead, Justice White relies heavily upon Justice Jackson’s concurring opinion in *Thomas v. Collins*,²² in which Justice Jackson opined that “a rough distinction always exists”²³ between the permissible regulation of a vocation and the impermissible regulation of speech.²⁴ For Justice Jackson, that distinction was to be drawn based on the presence or absence of an (unidentified) “other factor which the state may regulate so as to bring the whole within official control.”²⁵ Justice White’s conclusion that the “other factor” that takes speech outside the First Amendment is the existence of a “personal nexus” between the speaker and listener is pure *ipse dixit*.

B. *The Aftermath of Lowe*

Since Justice White’s concurrence was published in 1985, its personal-nexus test has never been cited by the U.S. Supreme Court or, indeed, by any individual justice. Nevertheless, because it is the most clear statement that any justice has made on the intersection of occupational licensing and the First Amendment, it has had a disproportionate influence on lower courts, which, until recently, have tend-

²⁰ *Id.*

²¹ *Id.*

²² 323 U.S. 516 (1945).

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

²⁴ *Id.* at 544–48.

²⁵ *Id.* at 547.

ed to uncritically accept Justice White's personal-nexus test as the law.²⁶

Troublingly, this uncritical acceptance of Justice White's test has largely ignored his admonition that speech falls outside the First Amendment only when the speaker "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client."²⁷ As discussed above, this limitation seems to have been intended to protect consumers who enter into fiduciary relationships. Yet lower courts have generally found Justice White's test to be satisfied by the existence of any personal nexus between speaker and listener. As a result, rather than being applicable only to speakers in a fiduciary or quasi-fiduciary relationship with their listeners, Justice White's rule has been expanded to include, among other things, the aesthetic recommendations of interior designers²⁸ and even the predictions of fortune tellers.²⁹

This is not to say that the consequences of Justice White's concurrence have been wholly negative. Although Justice White was wrong, he was only half wrong: he was surely correct that Christopher Lowe's newsletters were fully protected speech. And that conclusion — as opposed to his more expansive dicta — has had some positive consequences. Lower courts have relied on this portion of Justice White's *Lowe* concurrence to strike down registration requirements for people who publish information about commodities trading³⁰ and requirements that "for sale by owner" websites be operated by licensed real estate brokers.³¹

What emerges from these two lines of cases is a fairly consistent rule: When speech is published to the public at large, requiring a speaker to secure a government-issued license to engage in that speech is prohibited by the First Amendment no matter how technical the speech's subject matter. But when speech consists of advice or recommendations made in the course of business and is in any way tailored to the circumstances or needs of the listener, licensing that

²⁶ See, e.g., *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988); *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 466–67 (D. Md. 2011); *Accountants' Ass'n of La. v. State*, 533 So. 2d 1251, 1254–55 (La. Ct. App. 1988); *In re Rowe*, 604 N.E.2d 728, 731 (N.Y. 1992); cf. *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1053–55 (9th Cir. 2000) (dismissing, based on Justice Jackson's concurrence in *Thomas v. Collins*, First Amendment challenge to California's licensing requirement for psychologists).

²⁷ *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the result).

²⁸ See *Locke v. Shore*, 682 F. Supp. 2d 1283, 1292 (N.D. Fla. 2010), *aff'd*, 634 F.3d 1185 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1004 (2012).

²⁹ See *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560, 568 (4th Cir. 2013).

³⁰ See *Taucher v. Born*, 53 F. Supp. 2d 464, 482 (D.D.C. 1999).

³¹ See *ForSaleByOwner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 876–79 (E.D. Cal. 2004).

speech raises no cognizable First Amendment claim.³² But, as explained in the following section, while this rule has been increasingly adopted by the lower courts, it cannot be reconciled with binding Supreme Court precedent.

II. JUSTICE WHITE'S *LOWE* CONCURRENCE IS IN SERIOUS CONFLICT WITH RECENT SUPREME COURT PRECEDENT

There are essentially two ways to understand Justice White's position on occupational speech. One is that occupational speech is not speech at all, but rather a form of conduct — the practice of a profession — that can be regulated without raising any First Amendment concerns. The other is that occupational speech — despite being literally speech — simply falls outside the scope of the First Amendment. Whatever merit these views may have had when Justice White wrote his concurrence, they are impossible to maintain in light of the Supreme Court's recent decisions in *Humanitarian Law Project* and *Stevens*.

A. *The Treatment of Occupational Speech as "Conduct"* *Conflicts with Holder v. Humanitarian Law Project*

The notion that there is a distinction between laws that regulate speech and laws that regulate conduct with merely an incidental effect on speech is well established. As the Supreme Court recently reaffirmed in *Sorrell v. IMS Health Inc.*³³: "It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."³⁴

But while this distinction is well established, it is important to understand, first, that this distinction is not implicated simply because an act of expression is "economic" in the sense that it is performed for pay. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."³⁵ Second, as *IMS Health* makes clear, this distinction exists only when the underlying conduct being regulated is not itself expressive. So, for example, prohibiting a business from posting a "White Applicants Only" sign may burden the business

³² Exceptions to this general trend include a handful of cases striking down bans on fortune telling. See, e.g., *Argello v. City of Lincoln*, 143 F.3d 1152 (8th Cir. 1998).

³³ 131 S. Ct. 2653 (2011).

³⁴ *Id.* at 2664.

³⁵ *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988).

owner's speech, but that burden is incidental to a valid regulation on the nonexpressive conduct of hiring employees.³⁶

The general First Amendment rule is different, however, when the "conduct" being regulated is itself expressive. As Professor Eugene Volokh has explained:

When the government restricts professionals from speaking to their clients, it's restricting speech, not conduct. And it's restricting the speech precisely because of the message that the speech communicates, or because of the harms that may flow from this message. The restriction is not a "legitimate regulation of professional practice with only incidental impact on speech"; the impact on the speech is the purpose of the restriction, not just an incidental matter. Such regulation may be valid because of the harm that negligent speech can cause, the potential value of the mandated speech to the patient or to third parties, or the risk that the speech may exploit the patient's psychological dependency on the speaker — but not because the regulated speech is somehow conduct.³⁷

Attorney Robert Kry reaches a similar conclusion in one of the few law review articles to discuss the First Amendment implications of occupational licensing: "When a professional does no more than render advice to a client, the government's interest in protecting the public from fraudulent or incompetent practice is quite obviously directed at the expressive component of the professional's practice rather than the nonexpressive component (if such a component even exists)."³⁸

This commonsense argument — that the licensing of speaking occupations burdens speech, rather than conduct — is supported by the Supreme Court's recent ruling in *Humanitarian Law Project*. That case involved an as-applied challenge to a federal statute that "prohibited the provision of 'material support or resources' to certain foreign organizations that engage in terrorist activity."³⁹ "Material support or resources" was defined to include both "training," defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and "expert advice or assistance," defined as "advice or assistance derived from scientific, technical or other specialized knowledge."⁴⁰

The plaintiffs in *Humanitarian Law Project* included two U.S. citizens and six domestic organizations that wished, among other things,

³⁶ See *IMS Health*, 131 S. Ct. at 2664–65.

³⁷ Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1346 (2005) (footnotes omitted).

³⁸ Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 893 (2000).

³⁹ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010) (quoting 18 U.S.C. § 2339B(a)(1) (2012)).

⁴⁰ *Id.* at 2715 (quoting 18 U.S.C. § 2339A(b)) (internal quotation marks omitted).

to train members of the Kurdistan Workers' Party (PKK) "on how to use humanitarian and international law to peacefully resolve disputes"⁴¹ and to "teach[] PKK members how to petition various representative bodies such as the United Nations for relief."⁴² The plaintiffs challenged the prohibition against their doing so on First Amendment grounds.⁴³

The government defended the law by arguing that the material-support prohibition was aimed at conduct, not speech, and therefore only incidentally burdened the plaintiffs' expression.⁴⁴ Notably, in contrast with the approach that lower courts have taken in applying Justice White's concurrence, the government did not argue that this fact eliminated *all* First Amendment scrutiny.⁴⁵ Instead, the government argued that the material-support statute was subject to intermediate scrutiny under *United States v. O'Brien*.⁴⁶

The Supreme Court emphatically rejected the government's argument, holding that the material-support prohibition was a content-based regulation of speech subject to strict scrutiny.⁴⁷ In doing so, the Court explained that when "the conduct triggering coverage under [a] statute consists of communicating a message," the application of the statute to that conduct is properly viewed as a content-based regulation of speech.⁴⁸ Applying that rule to the case before it, the Court easily concluded that the law was content-based:

Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under § 2339B depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge" — for example, training on the use of international law or advice on petitioning the United Nations — then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.⁴⁹

This holding makes clear that burdens on individualized advice, including even individualized expert advice derived from specialized

⁴¹ *Id.* at 2716 (quoting *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 921 n.1 (9th Cir. 2009)) (internal quotation mark omitted).

⁴² *Id.* (quoting *Humanitarian Law Project*, 552 F.3d at 921 n.1) (internal quotation mark omitted).

⁴³ *Id.* at 2722–31.

⁴⁴ *See id.* at 2723.

⁴⁵ *See id.*

⁴⁶ 391 U.S. 367, 376–77 (1968).

⁴⁷ *Humanitarian Law Project*, 130 S. Ct. at 2723–24. Although the Court did not use the phrase "strict scrutiny" to describe its analysis, referring instead to "a more demanding standard," *id.* at 2724 (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989)) (internal quotation mark omitted), it has, in a subsequent decision, clarified that the analysis applied in *Humanitarian Law Project* was strict scrutiny, *see McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

⁴⁸ *Humanitarian Law Project*, 130 S. Ct. at 2724.

⁴⁹ *Id.* at 2723–24 (citation omitted) (quoting 18 U.S.C. § 2339A(b) (2012)).

knowledge, are restrictions on speech, and not, as Justice White believed, restrictions on “professional conduct.”

B. The Categorical Exclusion of Occupational Speech from First Amendment Protection Conflicts with United States v. Stevens

Because occupational speech is speech, not conduct, ordinary First Amendment principles counsel that the content-based regulation of occupational speech is subject to strict scrutiny. Indeed, the only way to avoid that conclusion is to hold that occupational speech falls outside the protection of the First Amendment. Of course, that’s effectively what Justice White’s rule does. But here again, that rule is at odds with the rest of the Court’s First Amendment jurisprudence.

Unlike every other category of speech that the Supreme Court has held to be outside the First Amendment — categories including defamation, fighting words, obscenity, incitement, and child pornography — it is not possible to claim that “occupational speech” is either immoral or inherently low value. Further, three years after *Low* was decided, a *majority* of the Court held that occupational licensing was not “devoid of all First Amendment implication[s].”⁵⁰

This conflict between Justice White’s concurrence and the rest of First Amendment jurisprudence has become all the more unsustainable in the wake of the Court’s recent ruling in *Stevens*. *Stevens* involved a federal law that criminalized the sale or possession of depictions of unlawful animal cruelty.⁵¹ The government defended the law on the grounds that depictions of unlawful animal cruelty were analogous to child pornography, and were therefore categorically outside the First Amendment’s protection.⁵² In rejecting this argument, the Court clarified the manner in which federal courts are to identify categories of unprotected speech.

As the Court explained, federal courts do not have a “freewheeling authority to declare new categories of speech outside the scope of the First Amendment”⁵³ on the basis of “an ad hoc balancing of relative social costs and benefits.”⁵⁴ Instead, the appropriate inquiry is whether the given category of speech has been historically treated as unpro-

⁵⁰ *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 802 n.13 (1988) (“Nor are we persuaded by the dissent’s assertion that this statute merely licenses a profession, and therefore is subject only to rationality review. Although Justice Jackson did express his view that solicitors could be licensed, a proposition not before us, he never intimated that the licensure was devoid of all First Amendment implication.” (citing *Thomas v. Collins*, 323 U.S. 516, 544–45 (1945) (Jackson, J., concurring))).

⁵¹ *United States v. Stevens*, 130 S. Ct. 1577, 1582 (2010).

⁵² *Id.* at 1584.

⁵³ *Id.* at 1586.

⁵⁴ *Id.* at 1585.

tected.⁵⁵ The Court found no evidence that this was the case for depictions of unlawful animal cruelty.⁵⁶ Accordingly, the federal law regulating those depictions was treated like any other content-based burden on fully protected speech.⁵⁷

Since deciding *Stevens*, the Court has twice reaffirmed the case's central holding — first in *Brown v. Entertainment Merchants Ass'n*,⁵⁸ which invalidated a ban on the sale or rental of violent video games to minors,⁵⁹ and then again in *United States v. Alvarez*,⁶⁰ which invalidated the federal Stolen Valor Act, a law that criminalized false claims about having received military honors.⁶¹ These decisions are significant because they confirm that courts must look narrowly at the specific type of speech in a given case to determine whether it falls into a historical exception to the First Amendment.⁶² So, for example, the fact that minors' access to sexual content may permissibly be restricted does not mean that minors' access to violent content may also be restricted.⁶³ This, in turn, suggests that even if there are some categories of occupational speech that have historically been considered outside the scope of the First Amendment, it is impossible to maintain — as Justice White's test seems to — that *all* categories of occupational speech are unprotected. Occupational licensing of any sort did not become widespread until the late nineteenth to early twentieth centuries,⁶⁴ and many speaking occupations, like dietetics, were unlicensed until much later.⁶⁵

C. Synthesizing the Rule

Taken together, these cases suggest that occupational speech should be treated just like any other content-defined category of speech. Laws that require an occupational license in order to provide advice to

⁵⁵ *Id.* at 1585–86.

⁵⁶ *Id.* at 1586.

⁵⁷ *Id.* at 1586–87.

⁵⁸ 131 S. Ct. 2729, 2734 (2011).

⁵⁹ *Id.* at 2732–33.

⁶⁰ 132 S. Ct. 2537, 2544 (2012) (plurality opinion).

⁶¹ *Id.* at 2542.

⁶² *See id.* at 2546–47; *Entm't Merchs. Ass'n*, 131 S. Ct. at 2733–34.

⁶³ *Entm't Merchs. Ass'n*, 131 S. Ct. at 2734–36.

⁶⁴ *See* MORRIS M. KLEINER, BROOKINGS INST., REFORMING OCCUPATIONAL LICENSING POLICIES 7 (2015), http://www.brookings.edu/~media/research/files/papers/2015/01/28-reforming-occupational-licensing-kleiner/reform_occupational_licensing_policies_kleiner_v4.pdf [<http://perma.cc/Q3XV-42ZZ>].

⁶⁵ Texas was the first state to enact a licensing scheme for dietitians, in 1983. *See* VA. COUNCIL ON HEALTH REGULATORY BDS., THE NEED FOR THE REGULATION OF DIETITIANS AND NUTRITIONISTS 39 (1987) [http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/5660852802738f6185255fda00752cbb/\\$FILE/HD23_1987.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/5660852802738f6185255fda00752cbb/$FILE/HD23_1987.pdf) [<http://perma.cc/D4KH-766N>].

a client about a specific subject impose a direct, not incidental, burden on speech based on the content of that speech.⁶⁶ Such content-based burdens on speech are subject to strict scrutiny.⁶⁷

It is at least theoretically possible that some subcategories of occupational speech may fall outside the scope of the First Amendment. But the Supreme Court has made clear that categorical exceptions to the First Amendment may only be recognized on the basis of evidence that the category of speech has been considered historically unprotected “[f]rom 1791 to the present.”⁶⁸ Moreover, the government bears the burden of producing this evidence.⁶⁹

Thus, where an occupational-licensing law burdens speech and the government can neither satisfy strict scrutiny nor provide evidence that the narrowly defined category of regulated speech has been considered historically unprotected, the law violates the First Amendment.

III. RESPONDING TO SOME COMMON OBJECTIONS

At a time when occupational licensing is ubiquitous, the rule laid out above may sound radical. But it is, in fact, nothing more than the rule that the Supreme Court has generally applied to content-based regulations of speech.⁷⁰ And the results of applying this rule to occupational speech are far less radical than might be supposed. This rule does not mean that all occupational-licensing laws — or all applications of occupational-licensing laws — are unconstitutional under the First Amendment. For example, it has no application to laws that require a license to engage in nonexpressive conduct like surgery or the investment of client funds. This rule would also be inapplicable to speech that has independent legal significance (for example, a doctor’s prescription) when laws are aimed at regulating the legal effect of that speech (for example, the creation of a legal entitlement to access a controlled substance) rather than the speech itself.⁷¹ Finally, the rule would be inapplicable to speech in special government-created forums, such as a lawyer’s oral argument before a court.⁷²

Even in the areas where this rule would apply, its application would mean only that the law must satisfy strict scrutiny, not that the law is *per se* unconstitutional. And although this is a high bar, it is

⁶⁶ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723–24 (2010).

⁶⁷ *Id.*

⁶⁸ *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)) (internal quotation marks omitted).

⁶⁹ *See id.*

⁷⁰ *See generally* *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803 (2000).

⁷¹ *See* *Conant v. Walters*, 309 F.3d 629, 635 (9th Cir. 2002).

⁷² *See, e.g., Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997) (“A courthouse — and, especially, a courtroom — is a nonpublic forum.”).

not insurmountable — indeed, the law under review in *Humanitarian Law Project* was ultimately upheld.⁷³

Further, this rule would not require the wholesale invalidation of any occupational-licensing scheme simply because some of its applications violate the First Amendment. Under the Supreme Court's overbreadth doctrine, that severe remedy is necessary only when "a substantial number of [an occupational-licensing law's] applications are unconstitutional [when] judged in relation to [its] plainly legitimate sweep."⁷⁴ Facial invalidation may sometimes be appropriate — such as when the government licenses the speech of tour guides⁷⁵ — but most licensing laws will have enough applications not triggered solely by speech such that facial invalidation would be inappropriate.

There are, nevertheless, a number of common objections to treating occupational speech as a fully protected category of speech. As explained below, however, each of the most common objections has been independently rejected by the Supreme Court.

The first common objection — and the most easily refuted — is that occupational speech should not be protected because it is economically motivated. But the Court has squarely rejected this argument.⁷⁶ As the Court has recognized, "a great deal of vital expression" results from such motives, and this fact does not deprive such speech of First Amendment protection.⁷⁷

A second objection is that *Humanitarian Law Project* isn't a particularly sound precedent. Dean Robert Post and Amanda Shanor suggest that *Humanitarian Law Project* is "an extraordinarily obscure and perplexing decision"⁷⁸ that, in essence, reveals that the Justices don't believe what they said.⁷⁹ But there's nothing at all perplexing or obscure about the Justices' conclusion that laws that are triggered by speech including particular content must be analyzed as content-based restrictions on speech and reviewed under strict scrutiny. The confusion, if any, relates not to whether strict scrutiny applies — all nine

⁷³ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2731 (2010).

⁷⁴ *Stevens*, 130 S. Ct. at 1587 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotation marks omitted) (internal quotation marks omitted)).

⁷⁵ See *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

⁷⁶ See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.").

⁷⁷ *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011).

⁷⁸ Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 179 (2015).

⁷⁹ See *id.* at 179-80 (2015).

Justices agreed that it did⁸⁰ — but whether the six-Justice majority in *Humanitarian Law Project* applied strict scrutiny correctly. Whatever one's view on that latter question, it is largely irrelevant to the question of whether occupational-licensing laws that burden speech based on its content should be reviewed with strict scrutiny. At most, it raises the question of whether the Court in *Humanitarian Law Project* meant to make strict scrutiny a more relaxed standard of review in future cases, a possibility that seems unlikely given the Court's more recent applications of that standard.⁸¹

A third objection is that *Humanitarian Law Project* is distinguishable because it involved a prohibition on speech, rather than a licensing requirement. But *Humanitarian Law Project* itself describes its reasoning as applicable to laws that “regulate[] speech on the basis of its content”; it did not limit its reasoning to outright prohibitions.⁸² Doing so would have been inconsistent with the Court's opinion in *Riley v. National Federation of the Blind of North Carolina, Inc.*,⁸³ which invalidated under the First Amendment a requirement that professional charitable solicitors obtain a license from the government before speaking.⁸⁴ It would also have been inconsistent with the well-established principles, reiterated by the Court in *IMS Health*, that “the ‘distinction between laws burdening and laws banning speech is but a matter of degree’ and that the ‘Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.’”⁸⁵

A fourth objection is that this rule would require the invalidation of malpractice laws,⁸⁶ which are widely viewed as being legitimate. But this result seems unlikely. First, medical malpractice (or its substantial equivalent) existed as a private cause of action for centuries before the enactment of the First Amendment,⁸⁷ and legal malpractice dates back at least to the Founding Era,⁸⁸ suggesting that the application of malpractice laws to incompetent medical or legal advice satis-

⁸⁰ See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2731 (2010) (Breyer, J., dissenting) (arguing that the Government has not shown that its material-support restrictions “serve[] [its] compelling interest in combating terrorism”).

⁸¹ See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738–41 (2011).

⁸² 130 S. Ct. at 2723 (emphasis added).

⁸³ 487 U.S. at 781 (1988).

⁸⁴ *Id.* at 801–02.

⁸⁵ *Sorrell v. IMS Health Inc.*, 131 S. Ct. at 2653, 2664 (2011) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000)).

⁸⁶ Cf. *Post & Shanor*, *supra* note 78, at 178.

⁸⁷ See Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1196–97 (tracing the history of medical malpractice actions to the fourteenth-century reign of Henry IV).

⁸⁸ See, e.g., *Stephens v. White*, 2 Va. (2 Wash.) 203 (1796).

fies the historical test set forth in *United States v. Stevens*.⁸⁹ Moreover, the mere fact that speech may be punished *after* it causes harm is different from saying that it may be prophylactically banned or licensed. This is a distinction that has long been drawn in other cases involving civil liability for speech, such as defamation actions, and it is a distinction that the Supreme Court recently reiterated in *United States v. Alvarez*, invalidating the Stolen Valor Act and its categorical prohibition on false claims of having been awarded military decorations. Writing for the plurality, Justice Kennedy acknowledged that “there are instances in which the falsity of speech bears upon whether it is protected,”⁹⁰ but nonetheless refused to accept a rule that would allow the government to categorically prohibit false speech in the absence of some “legally cognizable harm.”⁹¹

Finally, some commentators have forcefully argued that occupational speech is entitled to diminished First Amendment protection because it bears only a tenuous connection to democratic self-governance. This instrumental view of the First Amendment — which is commonly associated with Alexander Meiklejohn⁹² and Robert Bork⁹³ — has more recently been championed by Robert Post.⁹⁴ Of course, the self-governance theory is hardly the only theory of the First Amendment, and others have argued with equal force that the First Amendment is better understood as a broad, libertarian protection for the right to communicate on the topics of one’s choice, without regard to whether such communication furthers democratic competence.⁹⁵ And, over the last thirty years, the Supreme Court seems to have found this latter

⁸⁹ By contrast the *licensing* of professional advice did not become widespread until the twentieth century. See Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2583–85 (1999) (tracing origination of unauthorized-practice-of-law statutes to the early twentieth century).

⁹⁰ *United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012) (plurality opinion).

⁹¹ *Id.* at 2545; *accord id.* at 2554 (Breyer, J., concurring in the judgment) (noting that prohibitions on false speech “tend to . . . limit the scope of their application” to situations in which harm actually occurs or is likely to occur).

⁹² See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

⁹³ See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

⁹⁴ See Post & Shanor, *supra* note 78, at 171 (“We have the right to speak because we are entitled to engage in the great process of democratic self-determination . . .”); see also ROBERT POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 27–60 (2012) (arguing that expert speech is entitled to First Amendment protection only to the extent it promotes “democratic competence”).

⁹⁵ See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591 (1982) (rejecting the self-governance theory and advocating instead that the First Amendment protects “individual self-realization”).

view more persuasive.⁹⁶ Given the Court's willingness to extend First Amendment protection to dog-fighting videos, violent video games, pharmaceutical-detailing data, and even expert advice and assistance to designated foreign terrorist groups, it is difficult to imagine the Court reversing course and embracing the democratic-self-governance model when considering the constitutional status of expert advice on more mundane topics such as diet, parenting, or pet care.

IV. APPLYING THIS RULE TO CURRENT CONTROVERSIES

Since *Humanitarian Law Project* was decided, three federal appellate courts have issued decisions considering the argument laid out above. The first of these came in the consolidated cases *Welch v. Brown* and *Pickup v. Brown*.⁹⁷ These cases involved a First Amendment challenge to a California law that made it a crime for state-licensed mental-health practitioners to subject minor patients to "sexual orientation change efforts," that is, therapy designed to change a minor's sexual orientation.⁹⁸

Surprisingly, considering that one of the trial courts relied on *Humanitarian Law Project* to preliminarily enjoin the law,⁹⁹ the Ninth Circuit's initial decision¹⁰⁰ made no mention of *Humanitarian Law Project*. Instead, the panel concluded that talk therapy is not speech at all, but rather a form of medical treatment that raises no First Amendment issues.¹⁰¹

Following a motion for rehearing en banc,¹⁰² however, the panel amended its opinion to address *Humanitarian Law Project*. The court, per Judge Graber, purported to distinguish that case on the grounds that it involved "ordinary citizens" who were engaged in "political speech."¹⁰³ This argument drew a sharp dissent from Judge

⁹⁶ See Post & Shanor, *supra* note 78, at 167 n.13 (collecting cases in which the Supreme Court has provided robust protection for economically motivated speech with no connection to democratic self-governance).

⁹⁷ 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014) and 134 S. Ct. 2881 (2014).

⁹⁸ See *id.* at 1221.

⁹⁹ See *Welch v. Brown*, 907 F. Supp. 2d 1102, 1113 (E.D. Cal. 2012).

¹⁰⁰ See *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *amended on denial of reh'g en banc*, 740 F.3d 1208 (9th Cir. 2014).

¹⁰¹ *Id.* at 1055.

¹⁰² The Institute for Justice filed an amicus brief in support of rehearing en banc, setting forth the interpretation of *Humanitarian Law Project* discussed above. See Brief of Amicus Curiae Institute for Justice in Support of Plaintiffs-Appellees' Petition for Rehearing or Rehearing En Banc, *Welch v. Brown*, 740 F.3d 1208 (2014) (No. 13-15023), http://cdn.ca9.uscourts.gov/datastore/general/2013/10/24/13-15023_AmicusBrief_by_Institute_for_Justice.pdf [<http://perma.cc/DTG4-STCM>]; see also Paul Sherman & Robert McNamara, Op-Ed., *Protecting the Speech We Hate*, N.Y. TIMES, Oct. 9, 2013, <http://www.nytimes.com/2013/10/10/opinion/protecting-the-speech-we-hate.html>.

¹⁰³ *Pickup v. Brown*, 740 F.3d 1208, 1230 (9th Cir. 2014) (panel opinion).

O’Scannlain, who, writing for himself and two other judges, pointed out that the plaintiffs in *Humanitarian Law Project*, who included lawyers and judges, “certainly purported to be offering professional services.”¹⁰⁴ Moreover, Judge O’Scannlain noted that the Supreme Court itself had rejected the argument that the speech at issue in *Humanitarian Law Project* was purely political.¹⁰⁵ As Judge O’Scannlain saw it, the application of *Humanitarian Law Project* could not have been more clear:

[L]egislatures cannot nullify the First Amendment’s protections for speech by playing this labeling game. [California’s ban on sexual orientation change efforts] prohibits certain “practices,” just as the statute in *Humanitarian Law Project* prohibited “material support”; but with regard to those plaintiffs as well as the plaintiffs here, those laws targeted speech. Thus, the First Amendment still applies.¹⁰⁶

Judge O’Scannlain’s dissent did not carry the day in *Pickup*, but it formed a significant basis for the Third Circuit’s later decision in *King v. Governor of New Jersey*.¹⁰⁷ *King* involved a virtually identical ban on sexual orientation change efforts aimed at minors.¹⁰⁸ But unlike the Ninth Circuit, the Third Circuit acknowledged that *Humanitarian Law Project* was not distinguishable.¹⁰⁹ The court further criticized “the enterprise of labeling certain verbal or written communications ‘speech’ and others ‘conduct’ [as] unprincipled and susceptible to manipulation.”¹¹⁰ Nevertheless, the court went on to conclude that occupational speech — while protected by the First Amendment — should only be protected at the same level as commercial speech.¹¹¹ Thus, applying the intermediate scrutiny set forth in *Central Hudson Gas & Electric Co. v. Public Service Commission*,¹¹² the court held that New Jersey’s ban on sexual orientation change efforts was constitutional.¹¹³

Although the Third Circuit’s application of intermediate scrutiny, rather than the strict scrutiny called for by *Humanitarian Law Project*, is questionable, the Third Circuit’s opinion is, without question, the most protective occupational-speech decision ever issued by a federal appellate court. Not coincidentally, it is the only federal appellate decision that has come close to fully appreciating the implications of *Humanitarian Law Project*.

¹⁰⁴ *Id.* at 1217 (O’Scannlain, J., dissenting from denial of rehearing en banc).

¹⁰⁵ *Id.* (citing *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722 (2010)).

¹⁰⁶ *Id.* at 1218.

¹⁰⁷ 767 F.3d 216 (3d Cir. 2014).

¹⁰⁸ *Id.* at 220.

¹⁰⁹ *See id.* at 225 (applying *Humanitarian Law Project*).

¹¹⁰ *Id.* at 228.

¹¹¹ *Id.* at 232–33.

¹¹² 447 U.S. 557 (1980).

¹¹³ *King*, 767 F.3d at 233–40.

Another noteworthy decision is the Eleventh Circuit's recent ruling in *Wollschlaeger v. Governor of Florida*,¹¹⁴ which concerned a prohibition on doctors asking their patients about gun ownership when doing so was "unnecessary" to their medical care.¹¹⁵ The panel upheld the prohibition, ignoring *Humanitarian Law Project* and relying extensively on *Lowe* and *Pickup*.¹¹⁶ This approach drew a sharp dissent by Judge Wilson, who, unlike the Third or Ninth Circuit, drew a distinction between laws that regulate entry into an occupation, which he argued do not trigger meaningful First Amendment scrutiny, and laws that regulate speech once a speaker is licensed, which he argued do trigger such scrutiny.¹¹⁷ This argument is hard to square with the Supreme Court's long-held view that licensing laws are among the most onerous burdens that can be imposed on speech, though one might expect that this argument will hold some attraction for judges who wish to enhance the protection of occupational speech while still allowing the government discretion to choose who is qualified to engage in that speech.

A final decision, discussed at length in Post and Shanor's essay, is *Edwards v. District of Columbia*,¹¹⁸ in which the D.C. Circuit invalidated the District's licensing scheme for tour guides.¹¹⁹ The plaintiffs in *Edwards*, represented by my firm, the Institute for Justice, argued that requiring aspiring tour guides to pass a history test before they may speak to paying customers about the history and points of interest in Washington, D.C., was a content-based burden on speech.¹²⁰ Because the panel concluded that this law could not survive even under the intermediate scrutiny applicable to content-neutral regulations of the time, manner, and place of speech, it did not reach the question of whether the law was, in fact, content-based.¹²¹

There are, of course, other cases working their way through federal courts that raise these issues, and most of them are not as highly politically charged as *Pickup*, *King*, and *Wollschlaeger*. The Institute for

¹¹⁴ 760 F.3d 1195 (11th Cir. 2014).

¹¹⁵ *Id.* at 1203.

¹¹⁶ *Id.* at 1217–20, 1222–24.

¹¹⁷ *See id.* at 1250–51 (Wilson, J., dissenting).

¹¹⁸ 755 F.3d 996 (D.C. Cir. 2014).

¹¹⁹ *Id.* at 998.

¹²⁰ *Id.*

¹²¹ *Id.* at 1000. Contrary to Post and Shanor's suggestion, the court in *Edwards* did not conclude that the speech of tour guides is "commercial speech." *See* Post & Shanor, *supra* note 78, at 174–77. Although the plaintiff's speech was undoubtedly economically motivated, federal courts have consistently recognized that such speech is distinct from commercial speech, which is traditionally defined as speech that proposes a commercial transaction. *See, e.g.,* Argello v. City of Lincoln, 143 F.3d 1152, 1153 (8th Cir. 1998); *see also* *Edwards v. District of Columbia*, 765 F. Supp. 2d 3, 13 (D.D.C. 2011) (noting that the District's argument "fails to appreciate the distinction between speech-for-profit and commercial speech").

Justice currently represents newspaper columnist John Rosemond, whose conflict with the Kentucky Board of Examiners of Psychology was discussed briefly at the beginning of this Commentary.¹²² We also represent veterinarian Ron Hines, who has been instructed by the state of Texas that he may not give veterinary advice over the Internet, even to people living in foreign countries who do not otherwise have access to veterinary care, unless he has physically examined the animal to which the advice pertains.¹²³ If either of these cases makes its way to the Supreme Court, it will provide the Court with its first chance since *Lowe v. SEC* to address the First Amendment implications of occupational licensing, and an important opportunity to reaffirm the central holdings of *Humanitarian Law Project* and *Stevens*.

V. CONCLUSION

As I have tried to explain above, granting full First Amendment protection to occupational speech is the only position that is consistent with binding Supreme Court precedent. It is also the only position that is consistent, more broadly, with the general trend of the Supreme Court's First Amendment jurisprudence over the last 20 years, which has removed political speech from a position of privilege and now recognizes that speech on a wide variety of topics is entitled to robust constitutional protection. Whether that was, as Post and Shanor argue, a "radical[]" shift when it began in the 1990s,¹²⁴ it is now merely the long-established law.

To be sure, there are those who wish this shift had never occurred, but even its most ardent critics recognize that it *has* occurred.¹²⁵ Thus, whatever merit the democratic self-governance theory of First Amendment may have in the abstract, it is little help in resolving the actual First Amendment disputes that have plagued lower courts. Those courts, unlike academic commentators, are bound by precedent.

In any event, the Supreme Court's modern approach to the First Amendment has more to commend it than its status as binding precedent. In comparison to more instrumental theories, the Court's modern approach is unquestionably the more consistent with the First Amendment's uncompromising text, which contains no exemptions for commercial speech or occupational speech (or even lower-value speech like depictions of animal cruelty, violent video games, or lies about re-

¹²² See *Rosemond v. Conway*, INST. FOR JUST., <http://www.ij.org/kypsychspeech> (last visited Mar. 3, 2015) [<http://perma.cc/K5WH-BBAV>].

¹²³ See *Hines v. Texas State Board of Veterinary Medical Examiners*, INST. FOR JUST., <http://www.ij.org/txvetspeech> (last visited Mar. 3, 2015) [<http://perma.cc/L3HG-9BLE>].

¹²⁴ Post & Shanor, *supra* note 78, at 168.

¹²⁵ See *id.* at 167 n.13 (collecting cases that Post and Shanor believe are representative of this trend).

ceiving military honors). More than that, this approach to the First Amendment is rooted in a far more charitable view of the American people. It repudiates the paternalism that rests at the heart of so much regulation of speech, instead viewing Americans as capable of seeking out information on a wide variety of topics and of reaching their own conclusions about the merits of that information. This view is perhaps most eloquently stated in Justice Kennedy's majority opinion in *Citizens United v. FEC*¹²⁶:

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what dis-trusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.¹²⁷

Although Justice Kennedy was writing about political speech, his words are no less true for the sort of advice and information that countless Americans earn their living by providing. Speech can be important to its listeners without being political. For a parent struggling with the challenges of raising a teenager or an animal owner seeking advice on the care of a beloved pet, this speech may be far more valuable than anything related to lawmaking or elections. In a free society, listeners should be allowed to seek out that speech, and those who provide it should be afforded the full protection of the First Amendment.

¹²⁶ 130 S. Ct. 876 (2010).

¹²⁷ *Id.* at 908.