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CONVERSION THERAPY AND FREE SPEECH: A DOCTRINAL AND THEORETICAL FIRST AMENDMENT ANALYSIS

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ABSTRACT

This Article analyzes, from both a doctrinal and theoretical perspective, the First Amendment speech interests at stake before the U.S. Court of Appeals for the Ninth Circuit in *Welch v. Brown* and *Pickup v. Brown*. Those cases pivot on a controversial California law banning mental health providers from performing sexual orientation change efforts (also known as conversion therapy) on minors. Two district court judges reached radically different conclusions about the First Amendment questions. The Article explores how a trio of recent Supreme Court decisions involving seemingly disparate factual scenarios—*Brown v. Entertainment Merchants Association*, *United States v. Alvarez* and *Gonzales v. Carhart*—and three venerable theories of free speech—the marketplace of ideas, democratic self-governance and individual self-realization—might ultimately affect the outcome of the cases and others in the future involving conversion therapy.

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PREFACE

In August 2013, subsequent to the acceptance of this Article for publication, a unanimous three-judge panel of the U.S. Court of Appeals for the Ninth Circuit in *Pickup v. Brown*[1] upheld California Senate Bill 1172—the measure at the heart of this Article banning conversion therapy for minors—as "a regulation of professional conduct."[2] In doing so, the Ninth Circuit reasoned that SB 1172 "regulates only treatment"[3] and that "any effect it may have on free speech interests is merely incidental."[4]

The appellate court thus analyzed the law under the very deferential rational basis standard of review, rather than the more rigorous strict scrutiny test.[5] It concluded "that SB 1172 is rationally related to the legitimate government interest of protecting the well-being of minors."[6] In brief, the appellate court largely dodged the First Amendment free speech issues addressed in this Article.

On January 29, 2014, the same three-member panel, comprised of Chief Judge Alex Kozinski and Judges Susan P. Graber and Morgan

1. Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013).
2. *Id.* at 1048.
3. *Id.* at 1056.
4. *Id.*
5. *Id.* at 1056–57.
6. *Id.* at 1057.

Christen, issued an amended opinion replacing the August 2013 ruling but reaching the exact same result.[7] Writing for the panel, Judge Graber once again classified SB 1172 as "a regulation of professional conduct."[8] She added that the measure "bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients. Senate Bill 1172 merely prohibits licensed mental health providers from engaging in SOCE with minors."[9]

As with its August 2013 opinion, the panel found that the California law was "subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest."[10] It had little problem in finding that California had satisfied this burden, reasoning that the "overwhelming consensus" of the Golden State lawmakers was that sexual orientation change efforts are "harmful and ineffective."[11] The Ninth Circuit thus concluded that SB 1172 was "rationally related to the legitimate government interest of protecting the well-being of minors."[12]

The only substantive changes and/or additions in the amended January 2014 opinion were the panel's new: 1) consideration and rejection of the plaintiffs' argument that the U.S. Supreme Court's 2010 opinion in *Holder v. Humanitarian Law Project* supported their position;[13] and 2) reliance on the Supreme Court's 2006 ruling in *Rumsfeld v. Forum for Academic and Institutional Rights* to buttress the conclusion that "[b]ecause SB 1172 regulates a professional practice that is not inherently expressive, it does not implicate the First Amendment."[14]

Ted Lieu, the California lawmaker who sponsored SB 1172, dubbed the Ninth Circuit's January 29, 2014 decision a "cement over the nail in the coffin of the bogus practice of 'reparative' therapy."[15]

On the same day the Ninth Circuit issued its amended opinion turning back the First Amendment free-speech challenge in *Pickup* to SB 1172; it also denied a petition for rehearing en banc.[16] Yet, three judges—Diarmuid F. O'Scannlain, Carlos T. Bea, and Sandra

7. Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).
8. *Id.* at 1222.
9. *Id.* at 1229.
10. *Id.* at 1231.
11. *Id.* at 1233.
12. *Id.*
13. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).
14. Pickup v. Brown, 740 F.3d 1208, 1230 (9th Cir. 2014) (citing Rumsfeld v. Forum for Academic and Inst. Rights, 547 U.S. 47 (2006).
15. Cheryl Wetzstein, *Calif. 'Change' Therapy Ban Is Legal, Says Court*, WASH. TIMES, Jan. 30, 2014, at A6.
16. *Pickup*, 740 F.3d at 1208.

S. Ikuta—issued a strong dissent from the denial of rehearing that openly questioned the conclusion that SB 1172 regulates conduct and not speech.[17] Writing for the trio, Judge O'Scannlain tidily encapsulated their argument when he opined:

> The State of California, in the statute at issue here, has prohibited licensed professionals from saying certain words to their clients. By labeling such speech as "conduct," the [Ninth Circuit] panel's opinion has entirely exempted such regulation from the First Amendment. In so doing, the panel contravenes recent Supreme Court precedent, ignores established free speech doctrine, misreads our cases, and thus insulates from First Amendment scrutiny California's prohibition—in the guise of a professional regulation—of politically unpopular expression.[18]

Fleshing out this argument, O'Scannlain added that the Ninth Circuit panel that ruled against David Pickup and his fellow plaintiffs "provides no principled doctrinal basis for its dichotomy: by what criteria do we distinguish between utterances that are truly 'speech,' on the one hand, and those that are, on the other hand, somehow 'treatment' or 'conduct?'"[19]

On February 3, 2014, the Ninth Circuit stayed its ruling in *Pickup* for ninety days, pending resolution of a petition for writ of certiorari filed by the plaintiffs.[20] A petition for writ of certiorari was filed with the nation's high court on February 6, 2014.[21]

Regardless of the ultimate outcome in *Pickup*, the same First Amendment issues addressed in that case and in this Article are sure to arise again in the near future in other cases involving bans on conversion therapy. For instance, in November 2013 a federal district court in *King v. Christie*[22] upheld New Jersey's recently enacted law banning conversion therapy for minors. In that case, U.S. District Judge Freda L. Wolfson cited favorably the Ninth Circuit's August 2013 ruling in *Pickup* to similarly conclude that New Jersey's

17. *Id.* at 1215–21 (O'Scannlain, J., dissenting).

18. *Id.* at 1215.

19. *Id.* at 1215–16.

20. Order, Pickup v. Brown, No. 12-17681 (9th Cir. Feb. 3, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/02/03/12-17681_order_staying_mandate.pdf.

21. Petition for Writ of Certiorari, Pickup v. Brown, *available at* http://www.lc.org/media/9980/attachments/0214_pr_9th_appeals_ca_petition_change_therapy_ban_pickup.pdf; *see* Press Release, Liberty Counsel, Liberty Counsel Petitions Supreme Court on Change Therapy Ban (Feb. 6, 2014), *available at* http://www.lc.org/index.cfm?PID=14100&PRID=1404.

22. 2013 U.S. Dist. LEXIS 160035 (D. N.J. Nov. 8, 2013).

statute "regulates conduct, not speech."[23] That decision has yet to be considered by the U.S. Court of Appeals of the Third Circuit.

In 2014, a similar measure that would ban conversion therapy for minors was proposed in Virginia.[24] Liberty Counsel, which represents plaintiff David Pickup, wrote in a press release in February 2014 that "[c]hange therapy bans have also been proposed in Massachusetts, Maryland, New York, Virginia, and Washington. Liberty Counsel is communicating with legislators in those states as well. If legislation passes in other states and minors and counselors ask for our help, we will file similar lawsuits."[25]

The bottom line is that the First Amendment speech issues surrounding bans on sexual orientation change efforts for minors, including the most fundamental and foundational issue of whether speech is even at issue, are still very much unsettled and will be litigated for some time to come. Thus, the authors—with the blessing of the editors—have chosen not to disturb or change the original version of their analysis and arguments made when this Article was first accepted for publication. The Article, therefore, reads substantively as it was originally written, with this preface providing the latest status on the battle over California's law.

INTRODUCTION

> *No one should stand idly by while children are being psychologically abused, and anyone who forces a child to try to change their sexual orientation must understand this is unacceptable.*[26]

That was the sentiment expressed by Ted Lieu, a California state senator,[27] in September 2012 while lauding Governor Edmund

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23. *Id.* at *50.

24. Markus Schmidt, *Bill Would Ban Gay Conversion Therapy for Minors*, RICHMOND TIMES DISPATCH, Jan. 21, 2014, at A6.

25. Press Release, Liberty Counsel, Ninth Circuit Stays Ruling on California Change Therapy Ban (Feb. 4, 1014), *available at* http://www.lc.org/index.cfm?PID=14102&AlertID=1722.

26. Press Release, Senator Ted W. Lieu, New Calif. Law Bans 'Gay' to 'Straight' Therapy for Minors (Oct. 2, 2012) [hereinafter New Calif. Law], http://sd28.senate.ca.gov/news/2012-10-02-washington-blade-new-calif-law-bans-%E2%80%98gay-%E2%80%98straight-therapy-minors.

27. An attorney by educational training at Georgetown University, Lieu clerked for the U.S. Court of Appeals for the Ninth Circuit and later practiced law at Munger, Tolles & Olson. He currently represents California's 28th Senate District, which includes the Southern California cities of Carson, El Segundo, Hermosa Beach, Lomita, Manhattan Beach, Redondo Beach and Torrance, as well as portions of Long Beach, Los Angeles and

G. "Jerry" Brown, Jr., for signing into law a Lieu-sponsored measure, Senate Bill 1172.[28] The law prohibits mental health providers in the Golden State from engaging in sexual orientation change efforts (hereinafter SOCE)[29] with minors.[30] The statute is the first of its kind in the nation and, as the *New York Times* observed, has "been hailed by gay rights advocates and mainstream mental health groups that call therapies that try to alter the sexual orientation of youths potentially damaging." [31] Conversely, a number of individuals dubbed "ex-gay men," who "believe they have changed their most basic sexual desires through some combination of therapy and prayer," consider the California law "an assault on their own validity." [32]

Sometimes "known as sexual conversion or sexual reorientation therapy," [33] SOCE involves "assisting individuals to have sex with those to whom they do not erotically prefer. For some, this choice is motivated by the social attractiveness of heterosexuality. For others, it is more a desire to avoid punishment or other feared negative consequences." [34] The debate over SOCE, which was spawned in the 1950s out of "[a] combination of social factors, legal sanctions against homosexual behaviour and the rise of behaviourism," [35] today cuts across professional, political, religious, and cultural lines.[36]

A 2008 article published in *Ethics & Behavior* encapsulates the controversy well, noting that although "homosexuality has been

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San Pedro. *See Biography*, SENATOR TED W. LIEU, http://sd28.senate.ca.gov/biography (last visited Mar. 30, 2014) (providing this information and other biographical details about Lieu).

28. New Calif. Law, *supra* note 26.

29. The California law defines SOCE to encompass "any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." CAL. BUS. & PROF. CODE § 865(b)(1) (2013).

30. *Id.* § 865.1.

31. Erik Eckholm, *Clashing Rulings Complicate Path of Gay 'Conversion Therapy' Ban*, N.Y. TIMES, Dec. 5, 2012, at A16 [hereinafter Eckholm, *Clashing Rulings*].

32. Erik Eckholm, *'Ex-Gay' Men Fight Back Against View That Homosexuality Can't Be Changed*, N.Y. TIMES, Nov. 1, 2012, at A16 [hereinafter Eckholm, *Ex-Gay Men Fight Back*].

33. Elan Y. Karten & Jay C. Wade, *Sexual Orientation Change Efforts in Men: A Client Perspective*, 18 J. MEN'S STUD. 84, 84 (2010).

34. A. Lee Beckstead, *Can We Change Sexual Orientation?*, 41 ARCHIVE SEXUAL BEHAV. 121, 127 (2012).

35. Annie Bartlett et al., *The Response of Mental Health Professionals to Clients Seeking Help to Change or Redirect Same-Sex Sexual Orientation*, 9 BMC PSYCHIATRY 11 (2009).

36. *See* Jack Drescher, *Ethical Concerns Raised When Patients Seek to Change Same-Sex Attractions*, 5 J. GAY & LESBIAN PSYCHOTHERAPY 181, 183 (2001) ("The political nature of this issue has been addressed in professional journals . . . . [T]he reparative therapy debate has moved out of the professional arena and into the cultural one. It has included advertisements in major newspapers promoting religious 'cures' for homosexuality.").

declassified as a mental disorder for 30 years and despite various professional organizations' rejection of CT [conversion therapy] as an unethical, harmful, and empirically invalid practice . . . conversion or reparative techniques continue to receive both scholarly and clinical support." [37] In particular, as Craig Stewart points out, "Exodus International, an umbrella organization for 'ex-gay' ministries, and the National Association for Research and Therapy of Homosexuality (NARTH), a group representing 'reparative therapists,' maintain that homosexuality is a mental illness and can be treated, either through prayer or therapy." [38]

Given the long-standing debate over whether to ban or further develop SOCE,[39] it is anything but surprising that Senator Lieu's legislative crackdown on SOCE was met with stiff legal resistance in some quarters. In particular, two lawsuits were filed by conservative law groups claiming the California ban on SOCE for minors constitutes an unconstitutional infringement on, among other things, the freedom of speech.[40] One of those groups, the Pacific Justice Institute (hereinafter PJI),[41] issued a press release in which its president, Brad Dacus, explained the PJI's concerns with Lieu's law:

> This outrageous bill makes no exceptions for young victims of sexual abuse who are plagued with unwanted same-sex attraction, nor does it respect the consciences of mental health professionals who work in a church. We are filing suit to defend families, children, and religious freedom. This unprecedented bill is outrageously unconstitutional.[42]

On December 3, 2012—less than one month before Lieu's measure was to take effect on January 1, 2013—U.S. District Judge William

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37. Robert J. Cramer et al., *Weighing the Evidence: Empirical Assessment and Ethical Implications of Conversion Therapy*, 18 ETHICS & BEHAV. 93, 94 (2008).

38. Craig O. Stewart, *A Rhetorical Approach to News Discourse: Media Representations of a Controversial Study on 'Reparative Therapy,'* 69 W.J. COMM. 147, 153 (2005).

39. *See* A. Lee Beckstead & Susan L. Morrow, *Mormon Clients' Experiences of Conversion Therapy: The Need for a New Treatment Approach*, 32 COUNSELING PSYCHOLOGIST 651, 651 (2004) ("A long-standing debate has addressed the pros and cons of sexual reorientation therapy—specifically, whether to ban or further develop such treatments.").

40. Erik Eckholm, *Gay 'Conversion Therapy' Faces Test in Courts*, N.Y. TIMES, Nov. 28, 2012, at A18.

41. *See About Us*, PAC. JUSTICE INST., http://www.pacificjustice.org/about-us.html (last visited Mar. 30, 2014) (describing the PJI as "a non-profit 501(c)(3) legal defense organization specializing in the defense of religious freedom, parental rights, and other civil liberties. Pacific Justice Institute works diligently, without charge, to provide its clients with all the legal support they need").

42. Press Release, Pac. Justice Inst., It's Official: Gov. Brown Signs Gay Therapy Ban; PJI Filing Suit (Sept. 30, 2012), http://www.pacificjustice.org/1/post/2012/09/its-official-gov-brown-signs-gay-therapy-ban-pji-filing-suit.html.

Shubb in *Welch v. Brown*[43] issued a preliminary injunction, on behalf of several providers of SOCE, stopping its enforcement. Judge Shubb initially determined the law was subject to the strict scrutiny standard of judicial review[44] that is traditionally applied to content-based regulations of speech[45] under First Amendment[46] jurisprudence. He then held that California could not, pursuant to the U.S. Supreme Court's 2011 ruling in *Brown v. Entertainment Merchants Association* involving another content-based statute from California,[47] demonstrate proof of causation of harm to minors caused by SOCE.[48]

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43. Welch v. Brown, 907 F. Supp. 2d 1102 (E.D. Cal. 2012).

44. *Id.* at 1105 (holding that "SB 1172 is subject to strict scrutiny"); *see* United States v. Alvarez, 132 S. Ct. 2537, 2548–49 (2012) (using the term "'exacting scrutiny'" in place of strict scrutiny, and noting that to satisfy this test the government must do more than merely recite a "compelling" interest. It must also demonstrate that the "chosen restriction on the speech at issue be 'actually necessary' to achieve its interest" and prove "a direct causal link between the restriction imposed and the injury to be prevented"); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) (observing that a law "passes strict scrutiny" only if "it is justified by a compelling government interest and is narrowly drawn to serve that interest"); United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000) (opining that a content-based speech restriction "can stand only if it satisfies strict scrutiny," and noting that "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest"); *see also* Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 598 (2003) ("The entire class of content-based restrictions—whether or not they also discriminate according to viewpoint—receive strict scrutiny."); Joel Timmer, *Violence as Obscenity: Offensiveness and the First Amendment*, 15 COMM. L. & POL'Y 25, 28 (2010) ("Under strict scrutiny, the government must show that a restriction is necessary to achieve a compelling government interest *and* that the restriction is narrowly drawn to achieve that end.").

45. *See* Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 444 (1996) (asserting, prior to her promotion to the U.S. Supreme Court as an associate justice, that "in most contexts, a strict scrutiny standard applies to content-based action of all kinds").

46. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

47. *Brown* involved a California statute that "prohibits the sale or rental of 'violent video games' to minors, and requires their packaging to be labeled '18.'" Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2732 (2011).

48. The Supreme Court in *Brown* held that a government entity must demonstrate causation of harm, rather than a mere correlation between speech and harm, and that "ambiguous proof will not suffice." *Id.* at 2739. *See* Clay Calvert et al., *Social Science, Media Effects & the Supreme Court: Is Communication Research Relevant After Brown v. Entertainment Merchants Association?*, 19 UCLA ENT. L. REV. 293 (2012) (addressing the various opinions in *Brown* as they relate to proof of harm caused by speech).

Judge Shubb reasoned that California's proffered "evidence that SOCE 'may' cause harm to minors based on questionable and scientifically incomplete studies that may not have included minors is unlikely to satisfy the demands of strict scrutiny." [49] Zeroing in on California's apparent "inability to distinguish between harm caused by SOCE versus other factors," [50] Judge Shubb emphasized that "[t]he few and arguably incomplete studies addressing harms of SOCE do not appear to have assessed whether the harms reported after undergoing SOCE were caused by SOCE as opposed to other internal or external factors and thus would have been sustained regardless of SOCE." [51] Putting the slight delay of the law's enforcement wrought by the injunction into historical context, Judge Shubb noted that "California has arguably survived 150 years without this law and it would be a stretch of reason to conclude that it would suffer significant harm having to wait a few more months to know whether the law is enforceable as against the three plaintiffs in this case." [52]

But the very next day, a different federal judge in *Pickup v. Brown*[53] refused to enjoin California's law prohibiting SOCE on minors.[54] The plaintiffs in *Pickup* included both mental health professionals and minor patients seeking SOCE.[55] In diametric opposition to the result reached by Judge Shubb, Judge Kimberly Mueller concluded that a First Amendment speech issue was not even raised by the law because SOCE therapy "is conduct." [56] Judge Mueller reasoned that "plaintiff therapists have not shown they are likely to succeed in bearing their burden of showing that the First Amendment applies to SOCE treatment; they have not shown that the treatment, the end product of which is a change of behavior, is expressive conduct entitled to First Amendment protection." [57]

Playing on this critical speech-conduct dichotomy,[58] Judge Mueller concluded that because the mental health professional plaintiffs did not have a fundamental right—namely, a First Amendment speech

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49. Welch v. Brown, 907 F. Supp. 2d 1102, 1120 (E.D. Cal. 2012).
50. *Id.*
51. *Id.*
52. *Id.* at 1122.
53. Pickup v. Brown, 2012 U.S. Dist. WL 6021465 (E.D. Cal. 2012).
54. *Id.* at *26.
55. *Id.* at *1.
56. *Id.* at *10.
57. *Id.*
58. *See* Editorial, *A Divide on 'Conversion' Therapy Law*, L.A. TIMES, Dec. 10, 2012, at A17 (observing that Judge Shubb and Judge Mueller "differed on a crucial question: Does the law regulate speech or conduct?"); *see* Edward J. Eberle, *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV. 1191, 1216–20 (2011) (providing an excellent analysis of the speech-conduct dichotomy in First Amendment jurisprudence).

interest—at stake, the California law was only subject to the highly deferential rational basis[59] level of scrutiny.[60] She quickly concluded that, as to the mental health professional plaintiffs, "SB 1172 passes the rational basis test."[61]

As to the alleged First Amendment speech interests of the minor plaintiffs in *Pickup* to be "able to receive or hear about SOCE,"[62] Judge Mueller initially made two observations seemingly favorable to them:

- "The First Amendment protects listeners' right to receive information,"[63] and
- "Communication between doctors and patients can implicate patients' rights to free speech."[64]

Judge Mueller then quickly rejected the minors' First Amendment arguments, reasoning that she had "already concluded that SB 1172's restrictions on SOCE do not implicate the First Amendment right to free speech in analyzing plaintiff therapists' claim. The minors' claim is but the 'flip side of that coin.'"[65] Perhaps unsurprisingly for a case fraught with political implications, the *Los Angeles Times* wryly pointed out that Judge Mueller was appointed to the federal bench by President Barack Obama, while Judge Shubb was appointed by former President George H. W. Bush.[66] Judge Mueller's decision upholding the law was immediately appealed to the United States Court of Appeals for the Ninth Circuit[67] which,

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59. John Nowak and Ronald Rotunda explain rational basis review as:
> the test used in cases that do not involve a fundamental right and wherein the Court does not find a classification of persons for whom there should be special judicial protection (such as racial, national origin, gender or illegitimacy classifications). The rationality test is easy to state: the classification only has to have a rational relationship to any legitimate government interest in order to comply with the equal protection guarantee.

JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 755 (8th ed. 2010).

60. Pickup v. Brown, 2012 U.S. Dist. WL 6021465, at *12 (E.D. Cal. Dec. 4, 2012).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* (quoting Conant v. Walters, 309 F.3d 629, 643 (9th Cir. 2002) (Kozinski, J., concurring)).

66. *See* Maura Dolan, *Gay 'Conversion' Ban Faces Uncertain Outcome*, L.A. TIMES, Dec. 16, 2012, at A41 (noting that California's law "has divided the lower courts. A federal judge in Sacramento appointed by President Obama found that the law did not violate free speech rights; her colleague, appointed by the first President Bush, concluded that it did").

67. Cheryl Wetzstein, *Fight Over Sex-Change Therapy Escalates; Conservative Group to Make Emergency Appeal to Block New Law*, WASH. TIMES, Dec. 5, 2012, at A8.

given its "reputation of ideological division and conflict," [68] seemed a fitting venue for such a politically and culturally charged issue.

On December 21, 2012, a three-judge panel of the Ninth Circuit granted the plaintiffs' request for an emergency injunction in *Pickup*, thus stymieing Judge Mueller's opinion and stopping the law from taking effect pending a full appellate hearing before a different group of three judges sometime in 2013.[69] The Liberty Counsel,[70] which backs the *Pickup* plaintiffs, lauded the decision in a press release, referring to the statute as "politically motivated to interfere with counselors and clients. Liberty Counsel is thankful that the Ninth Circuit blocked the law from going into effect. This law is an astounding overreach by the government into the realm of counseling and would have caused irreparable harm." [71]

Thus, by late December of 2012, the controversy rested upon two days and two counterposed district court opinions, followed by an emergency appellate-court injunction and heated, and roiling emotions in legal challenges. The *Sacramento Bee*, in a front-page story, asserted this "could become landmark litigation." [72] Indeed,

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68. Corey Rayburn Yung, *Beyond Ideology: An Empirical Study of Partisanship and Independence in the Federal Courts*, 80 GEO. WASH. L. REV. 505, 535 (2012); *see* Marsha S. Berzon, *Introduction*, 41 GOLDEN GATE U.L. REV. 287, 287 (2011) (stating, from her position as Ninth Circuit judge, that "the judges of the Ninth Circuit are a wildly diverse lot, and we produce opinions that reflect that diversity").

Some, including conservative politicians, believe the Ninth Circuit is too liberal. *See* John P. Freeman, *Protecting Judicial Independence*, 6 CHARLESTON L. REV. 511, 515 (2012) (noting that during the 2012 race to become the Republican nominee for President of the United States, two of the leading candidates—Newt Gingrich and Rick Santorum—"sought to pander to right-wing groups by calling publicly for abolition of the Ninth Circuit Court of Appeals").

69. Order, Pickup v. Brown, 728 F.3d 1042 (No. 12-17681) (E.D. Cal. 2012), *available at* http://coop.ca9.uscourts.gov/datastore/general/2012/12/21/Pickup_Injunction.pdf; *see* John King, *Conversion Therapy Ban Put on Hold*, S.F. CHRON., Dec. 22, 2012, at C1 (noting that the "three-judge panel gave no reason for its decision Friday stating only that appellants' emergency motion for an injunction pending appeal is granted' and that the already-established schedule for the appeal would remain in place").

70. The organization describes itself as:

> an international nonprofit litigation, education, and policy organization dedicated to advancing religious freedom, the sanctity of life, and the family since 1989, by providing pro bono assistance and representation on these and related topics. With offices in Florida, Virginia and Washington, D.C., and an outreach in Israel, Liberty Counsel has hundreds of advocates around the world.

About Us, LIBERTY COUNSEL, http://www.lc.org/index.cfm?pid=14096 (last visited Mar. 30, 2014).

71. Press Release, Liberty Counsel, Ninth Circuit Court of Appeals Blocks California's Ban on Change Therapy (Dec. 21, 2012), http://www.lc.org/index.cfm?PID=14100&PRID=1266.

72. Denny Walsh & Sam Stanton, *Battle Over Ban on 'Gay Therapy,'* SACRAMENTO BEE, Dec. 17, 2012 at 1A.

PJI President Brad Dacus publically proclaimed that his organization stands ready in *Welch* "'to fight this battle all the way to the Supreme Court, if necessary.'" [73] On the other side of the battle in *Pickup*, California Attorney General Kamala Harris vowed to vigorously defend the law in the face of the Ninth Circuit's emergency injunction.[74]

It is far from easy to tell what the ultimate result in the case will be as it plays out before the Ninth Circuit and possibly the Supreme Court. As legal analyst Jeffrey Toobin observed:

> What makes this case so hard is that the therapy is speech. It's easy to regulate giving injections or doing surgery, because obviously, there's no speech component to that. But medical treatment that is by the use of speech, includes both free speech and the practice of medicine, and that's what the state of California, they tried to navigate here.[75]

The implications may stretch far beyond California, with U.S. Rep. Jackie Speier, a California Democrat, introducing in November 2012 a "Stop Harming Our Kids Resolution" denouncing SOCE.[76] Furthermore, two New Jersey bills that would ban SOCE on minors in the Garden State were pending in early 2013.[77]

In both *Welch* and *Pickup*, the First Amendment freedom of speech is caught in the cross-hairs of an apparent cultural, political and religious war.[78] At the micro level, that war centers on SOCE. At the macro level, however, it pivots on the tolerance and acceptance—or lack thereof—of homosexuality in the United States.[79]

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73. Eckholm, *Clashing Rulings*, *supra* note 31.

74. *See* King, *supra* note 69 (quoting Lynda Gledhill, Kamala Harris's press secretary, for the proposition that "'California was correct to outlaw this unsound and harmful practice, and the attorney general will vigorously defend this law'").

75. *Anderson Cooper 360 Degrees* (CNN television broadcast Dec. 4, 2012) (transcript available on LexisNexis Academic database).

76. H.R. Res. 141, 112th Cong. (2012). The resolution provides, in relevant part, that "[i]t is the sense of Congress that sexual orientation and gender identity or expression change efforts directed at minors are discredited and ineffective, have no legitimate therapeutic purpose, and are dangerous and harmful." *Id.* at sec. 2(a); *see* Cheryl Wetzstein, *Congress Implored to Denounce Sexual-Orientation Therapy*, WASH. TIMES, Nov. 29, 2012, at A1 (reporting on the resolution).

77. A.B. 3371, 215th Leg. 2012 Sess. (N.J. 2012–2013); S.B. 2278, 215th Leg. 2012 Sess. (N.J. 2012–2013).

78. *See* Welch v. Brown, 907 F. Supp. 2d 1102, 1112 (E.D. Cal. 2012); *see also* Pickup *v. Brown*, 2012 U.S. Dist. WL 6021465, at *2 (E.D. Cal. Dec. 4, 2012).

79. *See* AM. PSYCHOLOGICAL ASS'N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 92 (2009) [hereinafter APA Report], *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf ("The debate surrounding SOCE has become mired in ideological disputes and competing political agendas . . . . Other policy concerns involve

Specifically, the second decade of the twenty-first century is a crucial period, with the nation's high court poised in 2013 to consider the validity of the Defense of Marriage Act[80] and California's Proposition 8,[81] both of which affect same-sex marriage.

This Article wades into these choppy constitutional waters to explore more fully the First Amendment interests and issues at stake in *Welch* and *Pickup*. The Article does so through the lens of traditional free speech theories rather than simply via free speech doctrines such as strict scrutiny and rational basis review that are, after all, designed to implement the objectives attributed to free speech theories.[82] If two judges considering the exact same statute in just two days cannot even agree on the threshold question of whether First Amendment speech interests are at stake in conversion therapy, much less whether strict scrutiny or rational basis review should apply, then it seems important to take a step back to analyze how free speech theories may or may not support those individuals and groups now challenging California's ban on SOCE for minors.

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religious or socially conservative agendas where issues of religious morality conflict with scientific-based conceptions of positive and healthy development.").

80. As codified, the Defense of Marriage Act (DOMA) provides in relevant part that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2012). The case the Supreme Court chose to hear involving DOMA is *United States v. Windsor*, 133 S. Ct. 2675 (2013). *See Questions Presented*, U.S. SUPREME COURT, http://www.supremecourt.gov/qp/12-00307qp.pdf (identifying the questions presented in *Windsor* on which certiorari was granted, including whether DOMA "violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State").

81. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); *see Questions Presented*, U.S. SUPREME COURT, http://www.supremecourt.gov/qp/12-00144qp.pdf (identifying the two questions on which certiorari was granted in *Hollingsworth* as "[w]hether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman," and "[w]hether petitioners have standing under Article III, §2 of the Constitution in this case"); *see also* Adam Liptak, *Justices to Hear Two Challenges on Gay Marriage*, N.Y. TIMES, Dec. 8, 2012, at A1 (reporting that the U.S. Supreme Court announced in December 2012 that "it would enter the national debate over same-sex marriage, agreeing to hear a pair of cases challenging state and federal laws that define marriage to include only unions of a man and a woman"); David G. Savage, *Gay Marriage Goes to Justices*, BALT. SUN, Dec. 8, 2012, at 5A (reporting that the Supreme Court in December 2012 agreed to "hear appeals of decisions striking down California's gay marriage ban and the federal law denying benefits for legally married couples").

82. *See* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 153, 153 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) ("First Amendment doctrine veers between theory and the exigencies of specific cases. The *function of doctrine is both to implement the objectives attributed by theory to the Constitution* and to offer principled grounds of justification for particular decisions.") (emphasis added).

Part I of the Article includes two sections, initially providing further background on the terms of California's SOCE law and then describing the legislative history behind it.[83] Part II then examines, in richer detail, the district court rulings in both *Welch* and *Pickup*, focusing on the judges' analyses of the purported free speech interests at stake in the twin cases.[84] Next, Part III turns to the heart of the Article, analyzing how both the enumerated right to speak and the unenumerated right to receive speech[85] in conversion therapy settings are supported or hindered by what First Amendment scholar Vincent Blasi dubs as a venerable "trilogy of rationales" [86] for free speech protection—the marketplace of ideas, democratic self-governance and human dignity/autonomy.[87] More specifically, this part uses the SOCE issue to analyze the following research question that assumes, *arguendo*, that SOCE involves not simply conduct but, per Judge Shubb's ruling,[88] speech:

> What level of proof should the government be required to satisfy before ideas like SOCE, which purport to directly affect an individual's interest in self-realization and human dignity[89] while simultaneously being bound up in larger political battles of the day, amount to "empirically disprovable falsehoods" [90] and

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83. *Infra* Parts I.A–B.

84. *See infra* notes 131–208 and accompanying text.

85. *See* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (addressing the First Amendment right to receive information); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (observing that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, *the right to receive*, [and] the right to read") (emphasis added); Martin v. Struthers, 319 U.S. 141, 143 (1943) (asserting that the First Amendment "freedom embraces the right to distribute literature . . . and necessarily *protects the right to receive it*") (emphasis added) (internal citation omitted); ACLU v. Alvarez, 679 F.3d 583, 592 (7th Cir. 2012) (describing the "derivative" right to receive speech and calling it "well established"); Randall P. Bezanson, *Artifactual Speech*, 3 U. PA. J. CONST. L. 819, 826 (2001) (asserting that a minority view of the purpose of the First Amendment "rests on the premise that the speech right belongs to the audience. This is the view articulated by the 'right to receive ideas' school of First Amendment thought," and adding that, in this view, the purpose of the First Amendment "is to encourage the dissemination of information and views and communicative stimuli to the audience, the viewers or receivers, or the public").

86. Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 61, 61 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

87. *See infra* Part III.

88. *See infra* Part II.A and accompanying text (describing Shubb's ruling in *Welch*).

89. *See* THOMAS I. EMERSON, THE SYSTEM OF FREE EXPRESSION 6 (1970) (observing that "freedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and potentialities a human being").

90. Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 10 (2008).

> "demonstrably untrue" [91] notions such that they may be jettisoned via legislative action from the marketplace of ideas without violating First Amendment interests in speech?

This issue is particularly ripe and relevant for scholarly analysis based on a trio of reasons stemming from recent rulings by the nation's high court. First, the Supreme Court's 2012 plurality opinion in *United States v. Alvarez* made it clear that simply because speech is false does not necessarily or automatically preclude it from some level of First Amendment protection.[92] This indicates that even though SOCE may be false, at least in terms of what it promises for gay men, it might still be shielded from censorship by the U.S. Constitution.

The second reason is the Supreme Court's 2011 majority opinion in *Brown v. Entertainment Merchants Association* requiring a direct causal relationship between speech and harm before speech can be censored due to its content.[93] It was a point reiterated by the *Alvarez* plurality, with Justice Anthony Kennedy asserting that "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." [94] In light of free speech theories, should this proof-of-causation doctrine apply when the speech takes the form of counseling minors regarding the ability to change sexual orientation?

The third reason, however, seems to conflict with the notions that some false speech merits protection and that only a direct causal connection between speech and harm justifies its censorship. In particular, in the context of considering the constitutionality of a federal statute affecting partial-birth abortion, the U.S. Supreme Court observed in 2007 that "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." [95] This clearly militates in favor of California banning SOCE despite ongoing debate, at least in some quarters, about its benefits or the lack thereof.

This Article does not pretend to definitively resolve the question posed above. It does, however, attempt to bridge First Amendment

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91. *Id.* at 3.

92. United States v. Alvarez, 132 S. Ct. 2537, 2546–47 (2012) ("As our law and tradition show, then, there are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be. This opinion does not imply that any of these targeted prohibitions are somehow vulnerable. But *it also rejects the notion that false speech should be in a general category that is presumptively unprotected*.") (emphasis added).

93. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738–39 (2011).

94. *Alvarez*, 132 S. Ct. at 2549.

95. Gonzales v. Carhart, 550 U.S. 124, 163 (2007).

theory with recent doctrinal rulings regarding protected-versus-unprotected speech, using SOCE as an important and timely real world issue to ground the theoretical discussion. Finally, Part IV concludes by acknowledging and addressing some of the limitations of this Article, as well as its efforts to link theory with doctrine.[96]

I. CALIFORNIA'S ANTI-SOCE LAW AND ITS LEGISLATIVE HISTORY: A BRIEF OVERVIEW

This Part initially introduces the terms of California's now-enjoined SOCE law, including details about the types of treatments it does and does not cover. It then describes some of the events that gave rise to the law.

A. An Overview of California's Anti-SOCE Law

Senate Bill 1172, now codified in sections of California's Business and Professions Code, defines SOCE as "any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex."[97] The term "any practices," as addressed later, appears broad enough to sweep up both pure speech in the form of counseling and physical treatment such as electroshock therapy.[98] Indeed, as mentioned in the Introduction[99] and as elaborated on in Part II of this Article, one federal judge found the law regulated speech, while another determined it prohibited only conduct.[100]

Despite this ambiguity, the California law makes clear the serious repercussions facing mental health providers who flaunt it by performing SOCE on individuals under the age of eighteen years. Specifically, violations are classified as "unprofessional conduct" and violators are subject "to discipline by the licensing entity for that mental health provider."[101]

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96. *See infra* notes 214–317 and accompanying text.

97. CAL. BUS. & PROF. CODE § 865.1(b)(1) (2013).

98. Elaine M. Maccio, *Self-Reported Sexual Orientation and Identity Before and After Sexual Reorientation Therapy*, 15 J. GAY & LESBIAN MENTAL HEALTH 242, 243 (2011) (noting that SOCE used in the past have included "aversion techniques, such as administering electric shock and nausea-inducing drugs," and that SOCE now are "administered primarily via psychoanalysis and psychodynamic psychotherapy").

99. *See supra* note 57 and accompanying text.

100. *See infra* Part II.

101. CAL. BUS. & PROF. CODE § 865.2 (2013).

Although the law eliminates SOCE therapies for minors, it allows "licensed therapists [to] still talk with patients about their sexuality."[102] Specifically, the law provides that SOCE do *not* encompass:

> psychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation–neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation.[103]

When viewed collectively, these include-and-exclude provisions make it apparent that while counseling designed to *support and facilitate* a minor's exploration of his or her sexual orientation is permitted, counseling designed to *thwart or change* a minor's exploration of his or her sexual orientation is prohibited. Put more bluntly and provocatively, speech in only one direction is permissible.

The restrictions placed upon therapists by Senate Bill 1172 immediately created controversy in the psychiatric community. For instance, the American Psychiatric Association issued a position statement in May 2000, in which it "recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation, keeping in mind the medical dictum to First, [sic] do no harm."[104] Yet in July 2012, Rhea Farberman, an APA spokeswoman, told a journalist that the APA "does not approve or ban" therapies and, instead, leaves such decisions up to individual states.[105] Mat Staver, head of the Liberty Council, one of the organizations seeking to block the law, deployed this distinction when conveying his views about SOCE during an October 2012 interview with Senator Lieu on the National Public Radio show, *Tell Me More*.[106]

Responding to Lieu's assertion that the APA *prohibit*s conversion therapy, Staver insisted this was "absolutely incorrect" because the APA only possesses the power to proffer *suggestions* for ethical

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102. Kim Reyes, *Bill Limits Gay Conversion Therapy*, ORANGE COUNTY REG., July 29, 2012, at A1.

103. CAL. BUS. & PROF. CODE § 865.1(b)(2) (2013).

104. AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON THERAPIES FOCUSED ON ATTEMPTS TO CHANGE SEXUAL ORIENTATION (REPARATIVE OR CONVERSION THERAPIES): SUPPLEMENT (May 2000), *available at* http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2000_ReparativeTherapy.pdf.

105. Reyes, *supra* note 102.

106. *Tell Me More: Ca. Bans Therapy Meant to Turn Gay Kids Straight* (National Public Radio broadcast Oct. 4, 2012) (transcript available on LexisNexis Academic database) [hereinafter *Tell Me More*] (providing an interview with Senator Ted Lieu and Mat Staver, chairman of the Liberty Counsel).

practices.[107] The heated, on-air conversation between Staver and Lieu demonstrates the ongoing strife surrounding the law's mandates, now under fire for alleged constitutional infringements. The law, however, was controversial before it was enacted by the California legislature and signed by Governor Jerry Brown.

The next section describes the events leading up to the bill's enactment, detailing the legislative and political lines separating the constituencies in favor of and against the measure.

B. The Legislative History of Senate Bill 1172

In February 2012, Senator Ted Lieu introduced Senate Bill 1172, dubbed a "patient-protection plan."[108] At the time, the Southern California Democrat asserted he drafted the measure "partly in remembrance" of abused victims of SOCE.[109]

Specifically, Lieu was convinced such therapy was "evil" after "watch[ing] a show on television"[110] in 2011—presumably Anderson Cooper's scathing CNN exposé on reparative therapy[111]—which discussed the story of Kirk Murphy, who went through so-called "sissy boy experiments"[112] as a youth and later committed suicide at age thirty-eight.[113] Such experiments refer to those performed by University of California, Los Angeles's Dr. George Rekers,[114] who developed "behavioral treatment procedures"[115] meant to "[correct] pathological gender identity development in boys."[116]

In early 2012, a LGBT legislative advocacy group called Equality California[117] approached Lieu with an idea on reparative therapy, and

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107. *Id.*

108. Press Release, Senator Ted W. Lieu, Senate Sends to Governor First-in-Nation Crackdown on Bogus 'Ex-gay Cures' for Minors (Aug. 30, 2012), http://sd28.senate.ca.gov/news/2012-08-30-senate-sends-governor-first-nation-crackdown-bogus-%E2%80%98ex-gay-cures-minors.

109. *Id.*; Cheryl Wetzstein, *Lawsuit Filed vs. Calif. Ban on Change-Gays Therapy*, WASH. TIMES, Oct. 2, 2012, at A6 (quoting Lieu as stating "[s]ome victims, such as Kirk Murphy, committed suicide. . . . This law is partly in remembrance of Kirk").

110. *Tell Me More*, *supra* note 106.

111. *Anderson Cooper 360 Degrees* (CNN television broadcast Jun. 7, 2011) (transcript available on LexisNexis Academic database).

112. *Tell Me More*, *supra* note 106.

113. Sarah Anne Hughes, *Family of Kirk Murphy Says 'Sissy Boy' Experiment Led to His Suicide*, WASH. POST (June 10, 2011), http://www.washingtonpost.com/blogs/blogpost/post/family-of-kirk-murphy-says-sissy-boy-experiment-led-to-his-suicide/2011/06/10/AGYfgvOH_blog.html.

114. *Id.*

115. George Rekers et al., *The Behavioral Treatment of a "Transsexual" Preadolescent Boy*, 2 J. ABNORMAL CHILD PSYCHOL. 99, 99 (1974).

116. *Id.* at 100.

117. *See About Us*, EQUALITY CALIFORNIA, http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4025493 (last visited Mar. 30, 2014) (describing Equality California as "[t]he

he "jumped at the opportunity to carry the bill."[118] Senate Bill 1172 received support from its inception, drawing other cosponsors as well as backing from gay-friendly organizations.[119]

Despite the contention that the bill potentially conflicted with another California statute,[120] Senate Bill 1172 gained immediate popularity in the California legislature.[121] Its controversial nature quickly became obvious, however, as the issue split cleanly along partisan lines. Votes throughout the bill's senate and assembly hearings reflect a clear rift, with 100 percent of Democrats voting in its favor and a unified opposition from Republicans.[122]

Externally, this distinction was not so obvious. The bill encountered instant backlash from some organizations that later found themselves jumping the fence from the oppositional field to join the supporting forces. The California Psychological Association (CPA), for instance, originally believed the "bill would micromanage the work of individual therapists," rejected the initial breadth of its language, and, thus, would not back it unless amended.[123] Several months into

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largest statewide LGBT advocacy organization in California working to secure full and lasting equality for and acceptance of LGBT people. Over the past decade, Equality California has partnered with social justice advocates, businesses, grassroots supporters and legislative leaders to strategically move California from a state with extremely limited legal protections for LGBT people to a state with some of the most comprehensive human rights protections in the nation").

118. *Tell Me More*, *supra* note 106.

119. *See* Ted W. Lieu, *Senate Bill 1172 Sexual Orientation Change 'Therapy' Fact Sheet*, *available at* http://sd28.senate.ca.gov/sites/sd28.senate.ca.gov/files/SB%201172%20Fact%20Sheet.pdf (last visited Mar. 30, 2014) [hereinafter Lieu Fact Sheet].

120. *See* Pickup v. Brown, 2012 U.S. Dist. WL 6021465, at *5 (E.D. Cal. Dec. 4, 2012) ("During committee hearings, the Legislature addressed a potential conflict with California Health & Safety Code § 124260, which allows minors who are twelve years of age or older to consent to mental health treatments without parental approval. The Legislature ultimately concluded that Section 124260 was meant to allow minors to access only helpful treatment and thus that SB 1172's goal of protecting minors from harmful treatment was not in conflict.").

121. *See Activity Votes for SB 1172*, OPEN STATES CALIFORNIA, http://openstates.org/ca/bills/20112012/SB1172/ (listing vote results by dates, including: 1) April 23, 2012 Senate: five Democratic "yes" votes and three Republican "no" votes; 2) May 8, 2012 Senate: three Democratic "yes" votes and two Republican "no" votes; 3) May 30, 2012 Senate: twenty-three Democratic "yes" votes and thirteen Republican "no" votes; 4) June 26, 2012 Assembly: six Democratic "yes" votes and two Republican "no" votes; 5) July 5, 2012 Assembly: fifty-three Democratic "yes" votes and twenty-five Republican "no" votes; 6) August 8, 2012 Assembly: twelve Democratic "yes" votes and five Republican "no" votes; and 7) August 30, 2012 Senate: twenty-three Democratic "yes" votes and thirteen Republican "no" votes).

122. *Id.*

123. *Healing Arts: Sexual Orientation Change Efforts Hearing on SB 1172 Before the Comm. on Business, Professions and Economic Development*, 2012 Leg. 9 (Cal. 2012), *available at* http://sd28.senate.ca.gov/sites/sd28.senate.ca.gov/files/SB%201172%20Sen%20B&P%20Analysis.pdf.

the legislative process, however, the CPA shifted its support in favor of Senate Bill 1172, assisting Senator Lieu with revisions.[124]

Following these amendments, several organizations that once teetered as to their support finally tipped in favor of the bill.[125] The California Association of Marriage and Family Therapists (CAMFT) explained that it reversed its initial rejection of Senate Bill 1172 after the measure underwent "many amendments and iterations, including criminal sanctions, informed consent requirements, restrictions on higher education teachings, cause of action language, and unprofessional conduct ramifications."[126]

The opposition—driven primarily by religious and moral promotional goals[127]—was wary of Senate Bill 1172's First Amendment implications from its inception, deeming it "one of the most . . . speech-chilling bills . . . ever seen in California."[128] Unlike the concerns originally voiced by the CPA or CAMFT, which were addressed by amendments, it was not until after Governor Brown signed the measure into law that the First Amendment issues were forced to the judicial forefront.

The next Part of this Article analyzes the two district court opinions, *Welch v. Brown* and *Pickup v. Brown*, that came down on opposite sides of the free speech argument and that expose the underlying ideological rifts associated with categorizing SOCE as either conduct or speech.

II. CONFLICTING DISTRICT COURT RULINGS IN *WELCH* AND *PICKUP*: AN OVERVIEW

This Part summarizes the December 2012 opinions in *Welch v. Brown* and *Pickup v. Brown* that were handed down within a 24-hour span by different federal judges in the Eastern District of California. The conclusions in *Welch* and *Pickup* are remarkably

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124. Press Release, Cal. Psychological Ass'n, California Psychological Association Voices Support for SB 1172 (Lieu) Banning the Use of Sexual Orientation Change Efforts (SOCE) with Minors (Aug. 17, 2012), http://www.cpapsych.org/displaycommon.cfm?an=1&subarticlenbr=393.

125. Lieu Fact Sheet, *supra* note 119.

126. *Legislative Update*, CA. ASSOC. MARRIAGE & FAMILY THERAPISTS (June 12, 2012), http://www.camft.org/AM/Template.cfm?Section=Home&template=/CM/HTMLDisplay.cfm&ContentID=12312.

127. *See* Lieu Fact Sheet, *supra* note 119 (listing opposition to SB 1172 to including organizations, such as Catholic Medical Association, Church State Council, NARTH, etc.).

128. Press Release, Pac. Justice Inst., Bill Seeks to Limit Counseling Against Gay Attraction; Are Parents Next Target? (Apr. 25, 2012), http://www.pacificjustice.org/1/post/2012/04/bill-seeks-to-limit-counseling-against-gay-attraction-are-parents-next-target.html.

different, first as to whether SOCE should be categorized as speech or conduct and, second, as to the appropriate standard of judicial review—strict scrutiny or rational basis—for measuring the validity of California's anti-SOCE law.

Section A below addresses the opinion in *Welch*, while Section B analyzes the decision in *Pickup*. Specifically, these sections concentrate on the First Amendment speech interests asserted in those cases by mental health providers, rather than on the interests asserted by patients, prospective patients, or the parents of patients.[129]

Subsequent to these twin rulings, on December 21, 2012 the U.S. Court of Appeals for the Ninth Circuit granted the plaintiffs' emergency motion for an injunction in *Pickup*, stopping enforcement of the law until it could hear the case.[130] Argument before the Ninth Circuit was slated to occur the week of April 15, 2013.[131]

A. Welch v. Brown

On October 1, 2012, a trio of plaintiffs—a therapist, a psychiatrist, and a patient[132]—filed suit[133] to stop California from enforcing its law prohibiting medical health professionals from administering SOCE to minors.[134] Lead plaintiff Donald W. Welch, a licensed marriage and family therapist and an ordained minister for the Skyline Church in southern California,[135] claimed the statute was

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129. *See infra* note 189 and accompanying text (noting that in *Pickup* there were several plaintiffs in addition to mental health providers).

130. Pickup v. Brown, 2012 U.S. App. WL 6869637 (9th Cir. Dec. 21, 2012).

131. *See* Welch v. Brown, 2013 U.S. Dist. WL 496382, at *1 (E.D. Cal. 2013) ("The Ninth Circuit has set an expedited briefing schedule and the appeal is set to be heard the week of April 15, 2013, along with the appeal in the case of *Pickup v. Brown*.").

132. The plaintiffs are: 1) Donald Welch, a licensed marriage and family therapist in California and an ordained minister with the Skyline Wesleyan Church; 2) Anthony Duk, a medical doctor and board certified psychiatrist who works with patients including minors "struggling with" homosexuality and bisexuality; and 3) Aaron Bitzer, an adult who once underwent SOCE and who now plans "on becoming a therapist specifically to work with individuals having same-sex attractions and to help men like himself." Welch v. Brown, 907 F. Supp. 2d 1102, 1105 (E.D. Cal. 2012).

133. Complaint at ¶¶ 1–3, Welch v. Brown, 2012 U.S. Dist. WL 4762008 (E.D. Cal. Oct. 1, 2012) (No. 02-484) [hereinafter *Welch* Complaint].

134. *Id.* ¶ 142. The lawsuit sought to enjoin the SOCE law, which was signed by Governor Edmund G. "Jerry" Brown, Jr., on September 29, 2012, before it was to take effect on January 1, 2013.

135. *Id.* ¶ 1. On the website for Family Consultation Services, which Welch now owns and directs, Welch writes:

> I have been counseling couples, families, and individuals in various settings for approximately thirty years. As a California Licensed Marriage and Family Therapist, ordained minister, professor, and President, Founder and CEO of Enriching Relationships, Inc. (a biblically-based research and professional

unconstitutional and that compliance with it would jeopardize his employment.[136] Specifically, Welch and fellow plaintiffs Anthony Duk and Aaron Bitzer asserted "violations of their rights to freedom of speech under the First Amendment."[137]

Among other things, the complaint alleges that California's anti-SOCE law not only constitutes a content-based restriction on speech, but also:

> is viewpoint-based in that it does not purport to ban all professional speech toward minors concerning sexual orientation, same-sex attraction, or gender expression, but only at such speech that is deemed "change efforts" and not affirming or supportive. Thus, the distinction in the statute rests on the speaker's viewpoints of sexual orientation, same-sex attraction, and gender expression.[138]

The plaintiffs' argument here amounts to playing the First Amendment trump card because viewpoint-based restrictions on expression are anathema under free speech jurisprudence. As Duke Law School Professor Joseph Blocher recently observed, "The first rule of free speech theory and doctrine is that the government may not discriminate against a particular viewpoint based simply on its disagreement with that viewpoint."[139] Saint Louis University Professor Dan Kozlowski points out that while the U.S. Supreme Court "has devised tests to review content-based and content-neutral regulations (strict scrutiny for content-based regulations, a more lenient

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> counseling seminar company), and owner/director of Family Consultation Services, Inc. I frequently speak about relationship issues at churches, conferences, retreats, and seminars throughout the United States. I have worked as a family therapist staff member at Charter Behavioral Health System of Kansas City, a psychiatric hospital where substance abuse and addictions were treated utilizing Alcoholics Anonymous, 12-Step programming, medical pharmacological balancing, and mental health care. I frequently work directly with psychiatrists, physicians, pastors, counselors, teachers and other care-givers while treating my patients.

Meet Our Therapists, FAMILY COUNSELING SERVS., http://www.fcssandiego.com/donald.html (last visited Mar. 30, 2014); *see* Christopher Cadelago, *S.D. Pastor Contesting Ban on Therapy for Gay Youths*, SAN DIEGO UNION-TRIB., Oct. 3, 2012, at A-10 (describing Welch as a San Diego pastor and the Skyline Church as "one of the oldest Christian counseling centers in the area").

136. *Welch*, 907 F. Supp. 2d at 1105 (E.D. Cal. 2012). Specifically, according to Welch, his church teaches that "human sexuality . . . is to be expressed only in a monogamous lifelong relationship between one man and one woman with the framework of marriage." *Id.*

137. *Id.* at 1102.

138. *Welch* Complaint, *supra* note 133, ¶¶ 83–84.

139. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 703 (2011).

intermediate scrutiny for those regulations deemed content neutral) . . . it has said that *viewpoint-based regulations are unconstitutional*."[140]

Because the California statute subjects them to professional discipline if they engage in SOCE with minors, the plaintiffs assert that it "intentionally and actually chills speech."[141] Furthermore, because the plaintiffs espouse views that conflict with the statute's terms, the plaintiffs contend "they are . . . in imminent danger of state-sanctioned punishment for [their] First Amendment expression."[142]

On December 3, 2012, Senior U.S. District Judge William Shubb issued a preliminary injunction in the plaintiffs' favor, holding the law *may* inhibit the First Amendment rights of therapists.[143] Shubb practiced First Amendment law before joining the bench[144] and formerly served for seven years as chief judge in the Eastern District before assuming senior status in November 2004.[145]

In temporarily blocking the law's application as to the three plaintiffs, Shubb weighed what he called the public's "interest in the protection and mental well-being of minors"[146] against "the public's interest in preserving First Amendment rights."[147] He ultimately had "no difficulty in concluding that protecting an individual's First Amendment rights outweighs the public's interest in rushing to enforce an unprecedented law."[148]

Before reaching this pro–free speech result, however, Judge Shubb first considered and rejected two key arguments made by California regarding the doctrinal rules he should apply to analyze the validity of the law.[149] Specifically, California contended its anti-SOCE statute was not subject to the rigorous strict scrutiny standard of review[150] because the measure: a) constitutes "a regulation of professional conduct;"[151] and b) "regulates conduct, not speech."[152]

As to the first argument, Judge Shubb acknowledged that "some courts have . . . applied a lower level of review to professional

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140. Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL'Y 131, 131–32 (2008) (emphasis added).

141. *Welch* Complaint, *supra* note 133, ¶ 86.

142. *Id.* ¶ 88.

143. Welch v. Brown, 907 F. Supp. 2d 1102, 1121–23 (E.D. Cal. 2012) (emphasis added).

144. Denny Walsh, *Gay 'Conversion' Ban Put on Hold*, SACRAMENTO BEE, Dec. 4, 2012, at 3A.

145. *See Senior District Court Judge William B. Shubb (WBS)*, E. DIST. CAL., http://www.caed.uscourts.gov/caed/staticOther/page_510.htm (last visited Mar. 30, 2014).

146. *Welch*, 907 F. Supp. 2d at 1122.

147. *Id.*

148. *Id.*

149. *Id.* at 1109–12.

150. *See supra* note 44 and accompanying text (describing strict scrutiny).

151. Welch v. Brown, 907 F. Supp. 2d 1102, 1109 (E.D. Cal. 2012).

152. *Id.* at 1111.

regulations addressing the speech of a professional."[153] However, Shubb cited Ninth Circuit precedent for his own conclusion that "a content- or viewpoint-based professional regulation is subject to strict scrutiny"[154] and that "even if [Senate Bill] 1172 is viewed as a professional regulation, it is subject to strict scrutiny if it is content- or viewpoint-based."[155]

Regarding whether the statute regulates conduct and not speech, Judge Shubb opined that "[e]ven if SB 1172 is characterized as primarily aimed at regulating conduct, it also extends to forms of [sexual-orientation change efforts] that utilize speech and, at a minimum, regulates conduct that has an incidental impact upon speech."[156] On this point, he reasoned that "at least some forms of SOCE, such as 'talk therapy,' involve speech and the Ninth Circuit has stated that the 'communication that occurs during psychoanalysis is entitled to First Amendment protection.'"[157] Shubb added that the plaintiffs "have indicated that they wish to engage in SOCE through speech."[158]

Having determined both that the law at issue involves speech and that content-based restrictions imposed on the expression of professionals, including mental health providers, are subject to strict scrutiny, Judge Shubb then faced the critical question of whether California's law is content based or content neutral. Shubb wrote that he would be "hard-pressed to conclude that SB 1172 is content- and viewpoint-neutral."[159] He reasoned that the measure:

> draws a line in the sand governing a therapy session and the moment that the mental health provider's speech "seek[s] to change an individual's sexual orientation," including a patient's behavior, gender expression, or sexual or romantic attractions or feelings toward individuals of the same sex, the mental health provider can no longer speak.[160]

The judge added that the personal viewpoints of the plaintiffs on homosexuality are also restricted by the law because "messages about homosexuality can be inextricably intertwined with SOCE."[161]

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153. *Id.* at 1110.
154. *Id.*
155. *Id.* at 1111.
156. *Id.* at 1112.
157. Welch v. Brown, 907 F. Supp. 2d 1102, 1112 (quoting Conant v. Walters, 309 F.3d 629, 637 (9th Cir. 2002)).
158. *Id.* at 1113.
159. *Id.* at 1117.
160. *Id.* at 1115.
161. *Id.* at 1117.

Viewed collectively, these observations not surprisingly led Judge Shubb to conclude that the California law likely "must ultimately be assessed under strict scrutiny."[162]

In determining whether California's anti-SOCE law would pass this level of judicial review, Shubb relied heavily on *Brown v. Entertainment Merchants Association*, a 2011 Supreme Court opinion that struck down a California law limiting minors' access to violent video games and analyzed the alleged effects of such games on minors.[163] In *Brown*, Justice Antonin Scalia wrote for the majority that strict scrutiny was "a demanding standard"[164] that required California both to identify an "actual problem in need of solving"[165] and to prove a "direct causal link"[166] between playing violent video games and harm suffered by minors. As Scalia wrote, "ambiguous proof will not suffice."[167] Thus, without unambiguous evidence of direct causation of harm, California would not be able to demonstrate the requisite "compelling interest"[168] under strict scrutiny to support its video-game statute.

Applying this standard, the *Brown* majority struck down the law because, in part, the studies offered to support it could "show at best some *correlation* between exposure to violent entertainment and minuscule real-world effects."[169] Highlighting the pivotal distinction between causation and correlation, Justice Scalia added that California's studies did "not prove that violent video games *cause* minors to *act aggressively*."[170]

Deploying this rigorous version of strict scrutiny from *Brown*,[171] Judge Shubb determined that California had demonstrated only that "SOCE *may* cause harm to minors."[172] In reaching this determination, he scrutinized[173] the scientific data available to and reviewed by the American Psychological Association in its 2009 "Report of the American Psychological Association Task Force on Appropriate

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162. *Id.*
163. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).
164. *Id.* at 2738.
165. *Id.* at 2730.
166. *Id.* at 2738.
167. *Id.* at 2739.
168. *Id.* at 2738.
169. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2739 (2011) (emphasis added).
170. *Id.*
171. *See* R. George Wright, *Judicial Line-Drawing and the Broader Culture: The Case of Politics and Entertainment*, 49 SAN DIEGO L. REV. 341, 344–45 (2012) (characterizing *Brown*'s approach as "a highly demanding strict scrutiny test" that leads to a "rigorous application of strict scrutiny").
172. Welch v. Brown, 907 F. Supp. 2d 1102, 1119 (E.D. Cal. 2012) (emphasis added).
173. *Id.* at 1119–20.

Therapeutic Responses to Sexual Orientation."[174] Shubb cited the following passage from the report to support the injunction against the law:

> We conclude that there is a *dearth of scientifically sound research* on the safety of SOCE. Early and recent research studies provide *no clear indication of the prevalence of harmful outcomes* among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so. Thus, *we cannot conclude how likely it is that harm will occur from SOCE*. However, studies from both periods indicate that attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts.[175]

In addition, while the California statute at issue in *Welch* prohibited SOCE from being performed on minors, Judge Shubb emphasized that "the studies discussed and criticized as incomplete in the 2009 APA Report do not appear to have focused on harms to minors."[176] He opined that it was "unclear whether the reports of harm referenced in the 2009 APA Report were made exclusively by adults."[177] In summary, for Judge Shubb there simply was not sufficient evidence of harm to minors to justify the anti-SOCE law.

Turning next to the public policy implications of enjoining the law in the face of growing public acceptance of gay rights, Shubb borrowed language from a 2000 U.S. Supreme Court opinion:

> That public perception in favor of this law may be heightened because "it appears that homosexuality has gained greater societal acceptance . . . is scarcely an argument for denying First Amendment protection to those who refuse to accept these views. The First Amendment protects expression, be it of popular variety or not."[178]

In granting a preliminary injunction until he could have more time to make a broader ruling on the merits, Shubb believed that deciding the constitutional implications of this law outweighed the costs of not having it enforced immediately.[179]

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174. *See* APA Report, *supra* note 79.

175. *Welch*, 907 F. Supp. 2d at 1119 (quoting APA Report, *supra* note 79, at 42 (emphasis added)).

176. *Id.* (referring to APA Report, *supra* note 79).

177. *Id.*

178. *Id.* at 1122 (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 660 (2000)).

179. *Supra* note 33 and accompanying text.

Although the ruling was a setback for the law's supporters, the Judge softened the impact of his decision by holding that the injunction applied only to the three plaintiffs—Welch, Duk and Bitzer.[180] Nonetheless, PJI asserted that Shubb's ruling might keep licensing boards that regulate mental-health professionals from targeting other practitioners.[181] "'We know we will have to have another hearing on the merits, but to be able to get a preliminary injunction at this stage is very telling as to the final outcome, and I'm very encouraged by it,'" said PJI President Brad Dacus.[182] On the other hand, Shannon Minter, director of the National Center for Lesbian Rights, asserted that her organization was "'confident that as the case progresses, it will be clear to the court that this law is fundamentally no different than many other laws that regulate health care professionals to protect patients.'"[183]

In February 2013, Judge Shubb granted Governor Brown and California's motion to stay the case pending the outcome of the Ninth Circuit's ruling in the case of *Pickup v. Brown*, which is discussed below.[184]

B. Pickup v. Brown

Just one day after *Welch* and only several chambers down the hall in Sacramento,[185] U.S. District Judge Kimberly J. Mueller ruled that the law did not infringe on mental health providers' constitutional guarantee of free speech.[186] It certainly was a high-profile ruling for Mueller,[187] who joined the federal bench fewer than two years prior, after working in private practice and serving as a member of the Sacramento City Council.[188]

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180. Welch v. Brown, 2013 U.S. Dist. WL 496382, at *1 (E.D. Cal. Feb, 7, 2013).

181. Lisa Leff, *Judge Temporarily Blocks Calif. Gay Therapy Law*, ASSOC. PRESS (Dec. 4, 2012), http://www.usatoday.com/story/news/nation/2012/12/04/judge-blocks-calif-gay-therapy-law/1744773/.

182. *Id.*

183. *Id.*

184. *Welch*, WL 496382 at *1.

185. Both Judge Shubb and Judge Mueller work in the Sacramento Division of the Eastern District of California. *See Judge Information*, E. DIST. CAL., http://www.caed.uscourts.gov/caed/staticOther/page_498.htm (last visited Mar. 30, 2014).

186. Pickup v. Brown, 2012 U.S. Dist. WL 6021465, at *24–26 (E.D. Cal. Dec. 4, 2012).

187. Her name appeared in relation to her *Pickup* ruling in newspapers across the country. *See, e.g.*, Maura Dolan, *Decision on Gay 'Conversion Therapy' Depends on Other Rulings*, L.A. TIMES, Dec. 15, 2012, at A41; Cheryl Wetzstein, *Ban on Gay-to-Straight Therapy for Children Halted*, WASH. TIMES, Jan. 3, 2012, at A6.

188. *District Judge Kimberly J. Mueller (KJM)*, E. DIST. CAL., http://www.caed.uscourts.gov/caed/staticOther/page_1563.htm (last visited Mar. 30, 2014).

The plaintiffs in *Pickup* are four licensed health professionals; two minors, who are patients of one of the mental health professionals, along with the minors' parents; the National Association for Research and Therapy of Homosexuality; and a professional association of Christian counselors.[189] Judge Mueller distilled the free speech argument of the mental health providers down to the assertion that the law "violates plaintiff therapists' rights by discriminating based on viewpoint and/or content."[190] In refusing to grant the injunction, Judge Mueller rejected the argument that Senate Bill 1172 unconstitutionally discriminates on the basis of viewpoint or content, finding instead that "the SOCE therapy regulated by SB 1172 is conduct."[191] In brief, she cut the First Amendment argument off at its knees by playing on the speech-conduct dichotomy.

Although Mueller acknowledged that the First Amendment sometimes protects expressive conduct that amounts to symbolic expression,[192] she distinguished those cases[193] from the one at hand, thereby avoiding much of the First Amendment analysis. To support her argument, she relied on several other court decisions, finding that the provision of healthcare of other forms of treatment was not expressive conduct.[194] Citing another court's opinion, Mueller wrote: "'Giving or receiving health care is not a statement in the same sense as wearing a black armband or burning a flag.'"[195]

Thus, in direct opposition to Judge Shubb's decision, Mueller wrote that the therapists in this case had "not shown that the treatment, the end product of which is a change of behavior, is expressive conduct entitled to First Amendment protection."[196] "The state's insistence that the statute bars treatment only, and not the mention of [the treatment] or a referral to a religious counselor or out-of-state practitioner," Mueller wrote, "is consistent with a fair reading

189. *Pickup*, WL 6021465, at *1.

190. *Id.* at *7.

191. *Id.* at *9.

192. For instance, former Justice Sandra Day O'Connor observed, in recognizing cross burning as a type of speech, that "the First Amendment protects symbolic conduct as well as pure speech." Virginia v. Black, 538 U.S. 343, 360 n.2 (2003). First Amendment scholar Rodney Smolla refers to this as "the symbolism principle." RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 48 (1993).

193. *See* Pickup v. Brown, 2012 U.S. Dist. WL 6021465, at *10 (E.D. Cal. Dec. 4, 2012) (citing cases such as the flag-burning decision of Texas v. Johnson, 491 U.S. 397 (1989), and the upside-down-hung, peace-symbol-affixed flag case of Spence v. Washington, 418 U.S. 405 (1974)).

194. *Pickup*, WL 6021465, at *10.

195. *Id.* (citing O'Brien v. United States Dep't of Health & Human Servs., 2012 WL 4481208, at *12 (E.D. Mo. Sept. 28, 2012)).

196. *Pickup*, WL 6021465, at *10.

of the statute itself."[197] According to Mueller, the Supreme Court has approved legislation aimed at protecting the physical and emotional well-being of young people, "even when the laws have operated in the sensitive area of constitutionally protected rights."[198] For instance, Mueller noted that minors and their parents have viable alternatives to SOCE treatment, and California providers are able to refer patients to counselors not covered by the measure.[199]

In determining the standard to be applied, Mueller thus noted that "[a]s SOCE therapy is subject to the state's legitimate control over the professions, [Senate Bill] 1172's restrictions on therapy do not implicate fundamental rights and are not properly evaluated under strict scrutiny review, but rather under the rational basis test."[200] Because this level of judicial review only requires the government to present a legitimate "reason for acting as it did," Mueller found that Senate Bill 1172 did, indeed, pass muster.[201] Although the First Amendment may be implicated in the regulation of speech between a doctor and a patient, the Supreme Court has allowed the government to burden a child's right to free speech in the creation of "legislation aimed at protecting [their] physical and emotional well-being."[202] Here, the government's interest in the well-being of children "exist[ed] apart from the government's interest in supporting parents' efforts to protect their children."[203] Thus, for Mueller, "the court need not engage in an exercise of legislative mind reading to find the California Legislature and the state's Governor could have had a legitimate reason for enacting SB 1172."[204]

In late January 2013, Judge Mueller granted the joint motion of the parties in *Pickup* to stay the case until the Ninth Circuit could resolve the constitutional questions upon hearing the case in April 2013.[205]

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197. *Id.* at 9.
198. *Id.* at 12 (quoting New York v. Ferber, 458 U.S. 747, 757 (1982)).
199. Pickup v. Brown, 2012 U.S. Dist. WL 6021465, at *12 (E.D. Cal. Dec. 4, 2012).
200. *Id.*
201. *Id.*
202. *Id.* (quoting New York v. Ferber, 458 U.S. 747, 757 (1982)).
203. *Pickup*, WL 6021465, at *12.
204. *Id.* at *26.
205. Pickup v. Brown, 2013 U.S. Dist. WL 411474 (E.D. Cal. Jan. 29, 2013). In granting the stay, Judge Mueller reasoned there was

> no indication that a stay pending resolution of the preliminary injunction appeal would harm any of the parties, especially because they have jointly requested the stay. Moreover, because the preliminary injunction appeal will resolve issues related to the constitutionality of SB 1172 that this court will need to address in order to move forward, it will achieve efficiencies to await the outcome of the Ninth Circuit proceedings.

Id. at *1.

Falling in line with decisive division apparent in the legislative context, the split in these opinions falls likewise along party lines. As noted in the Introduction, Judges Shubb and Mueller were appointed by a Republican president and a Democratic president, respectively.[206] Party loyalty aside, it ultimately seems as if the outcome in each case is largely determined by whether SOCE is characterized as conduct or speech.

With this background on *Welch* and *Pickup* in mind, the next Part assumes, for the sake of argument, that SOCE is speech in order to address the central question posed in the Introduction through the lens of both First Amendment doctrine and theory.[207]

III. BRIDGING FIRST AMENDMENT DOCTRINE & THEORY IN THE DEBATE OVER BANNING SOCE FOR MINORS: AN INITIAL FORAY TO PROBLEMATIZE THE ISSUES

This Part addresses the research question posed in the Introduction[208] by attempting to bridge the gap between doctrine and theory as they relate to California's anti-SOCE law. It features three sections. Initially, Section A delves into a trio of Supreme Court rulings—*Brown v. Entertainment Merchants Association*,[209] *United States v. Alvarez*[210] *and Gonzalez v. Carhart*[211]—that provide possible doctrines for measuring the validity of California's law. Section B then analyzes California's law in light of three influential theories of free speech: the marketplace of ideas, democratic self-governance and human dignity/autonomy. Next, Section C attempts to synthesize the doctrines and theories, although it makes no pretense of resolving the complex questions the Ninth Circuit must now address.

Given the clear split of authority between the district court rulings in *Welch* and *Pickup* described earlier,[212] as well as the fact

206. *See supra* note 66 and accompanying text.

207. *See supra* notes 89–92 and accompanying text (setting forth the research question).

208. As framed in the Introduction, the research question, which assumes that SOCE constitutes speech, is:

> What level of proof should the government be required to satisfy before ideas like SOCE, which purport to directly affect an individual's interest in self-realization and human dignity while simultaneously being bound up in larger political battles of the day, amount to "empirically disprovable falsehoods" and "demonstrably untrue" notions such that they may be jettisoned via legislative action from the marketplace of ideas without violating First Amendment interests in speech?

Supra notes 89–92 and accompanying text (citations omitted).

209. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

210. United States v. Alvarez, 132 S. Ct. 2537 (2012).

211. Gonzalez v. Carhart, 550 U.S. 124 (2007).

212. *See supra* Part II.

that the issues are now pending in the Ninth Circuit (and might well eventually reach the Supreme Court), such a macro-level effort to link theory and doctrine seems both timely and relevant.

A. Supreme Court Doctrine: A Trio of Potentially Key Cases

The Introduction identified three recent high court rulings that might supply relevant doctrine for the Ninth Circuit to apply to the anti-SOCE controversy in *Welch* and *Pickup*. Each section below briefly explains the doctrines in those cases and relates them to the issue of conversion therapy.

1. Brown v. Entertainment Merchants Association*: Proving Direct Causation of Harm*

As described in Part II, the Supreme Court's 2011 opinion in *Brown v. Entertainment Merchants Association*[213] involved a California law regulating the sale of violent video games to minors.[214] Noting the unlikelihood that such a content-based restriction would ever be permissible,[215] the majority applied the "demanding standard" [216] of strict scrutiny to hold that California failed to offer evidence proving the requisite compelling interest.[217] As opposed to the decision in *Carhart* discussed below, the Court in *Brown* rejected California's assertion that it did not need to prove a "direct causal link" between minors' violent video game exposure and the alleged harm because of the legislature's "predictive judgment that such a link exists." [218] Despite the numerous scientific studies offered to demonstrate negative effects of violent games on minors, the Court held that California had not identified an "'actual problem' in need of solving" [219]—which,

213. *Brown*, 131 S. Ct. at 2732 (2011).

214. CAL. CIV. CODE § 1746.1 (West 2011).

215. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011). The Court noted that although there are exceptions, "[t]he Free Speech Clause exists principally to protect discourse on public matters" and that "'as a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002)). The *Brown* Court found that California's law did "not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children." *Id.* at 2735.

216. *Id.* at 2738.

217. *Id.* at 2738–39 ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.").

218. *Id.* at 2738.

219. *Id.*

according to the majority, required that the "curtailment of free speech must be actually necessary to the solution." [220]

The *Brown* majority found that the social science evidence was not compelling enough—that it did not possess the "high degree of necessity" required[221]—to demonstrate the games caused minors to act aggressively.[222] Thus, the Court held that California's evidence demonstrated, at best, a correlation—not causation—between the games and harm to minors.[223]

The decision, however, left open both the *type of evidence* and the *amount of evidence* necessary for California to prove harm to minors. Regarding *Brown,* one law journal article asserts that:

> When it comes to the relevance of social science data in supporting a compelling interest to restrict free speech rights, a five-justice majority of the Court in *Brown* adopted an extremely rigorous standard that demands both causation and certitude, as well as large effects that actually possess real-world significance.[224]

Indeed, Justice Samuel Alito questioned in his dissent whether the standard endorsed by the majority was too high, explaining the "State must surmount a formidable (and perhaps insurmountable) obstacle if it wishes to prevent children from purchasing the most violent and depraved video games imaginable." [225]

In a recent article, University of Virginia Professor Frederick Schauer notes the *Brown* Court's dismissiveness of the empirical evidence proffered by California.[226] According to Schauer, "having established such a heightened standard of justification it seems clear that even substantially better empirical evidence than California, in the majority's view, was able to offer would still have been insufficient." [227] In so doing, Schauer also questions whether the Court is in the best position "to make proper use of sophisticated empirical research." [228] Ultimately, Schauer suggests that *Brown* raises many

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220. *Id.*
221. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2741 (2011).
222. *Id.* at 2739.
223. *Id.*
224. Calvert, *supra* note 48, at 310.
225. *Brown*, 131 S. Ct. at 2747.
226. Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 92–93.
227. *Id.* at 93.
228. *Id.* at n.53. According to Professor Schauer:
> Although everyone who is paying attention in Statistics 101 can parrot the flaw of necessarily inferring causation from correlation, few of the studies at issue suffered from that problem. Many had problems of construct and

questions regarding the evaluation of harm in First Amendment jurisprudence: "What is the relevance of empirical social science research, how should it be located, and by what standards should it be evaluated?" [229] Despite such lingering issues, what was clear in *Brown*, Schauer observes, is "that California could not even come close to meeting such a high standard of justification." [230]

For now, the bottom line seems apparent—the harm doctrine articulated in *Brown* imposes a very steep burden on California in *Welch* and *Pickup* to support its anti-SOCE law. Under *Brown*, California must demonstrate clear empirical proof that speech-based SOCE therapy directly causes harm to minors.[231] Whether the Ninth Circuit chooses to apply *Brown*, however, remains to be seen. It might be that the Ninth Circuit distinguishes *Brown* by confining it to factual disputes involving harm purportedly caused by media artifacts, not to situations involving spoken words in the form of counseling. Additionally, the Ninth Circuit might conclude that *Brown* does not apply in the context of a heavily regulated profession like medicine.

2. United States v. Alvarez*: Protecting False Speech*

In *United States v. Alvarez*, the Supreme Court considered the constitutionality of a portion of the Stolen Valor Act that made it a crime to lie about receiving the Congressional Medal of Honor and other military honors.[232] Justice Anthony Kennedy authored a plurality opinion that announced the Court's judgment[233] striking down the law after considering its First Amendment implications.

> external validity, but a controlled laboratory experiment . . . is designed precisely to focus on causation. That does not, of course, mean that the causation located is necessarily relevant to the ultimate question . . .. [T]he ease with which the Ninth Circuit and the *Entertainment Merchants* majority accepted this questionable claim should give pause to those who would too easily trust the Court to make proper use of sophisticated empirical research.

Id.

229. *Id.* at 110.

230. *Id.* at 93.

231. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738–39 (2011).

232. *See* United States v. Alvarez, 132 S. Ct. 2537 (2012). The section of the Stolen Valor Act at issue in *Alvarez* provided that:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

18 U.S.C. § 704(b) (2011).

233. *See Alvarez*, 132 S. Ct. at 2542 (noting that Kennedy was joined by Chief Justice John Roberts and Associate Justices Ruth Bader Ginsburg and Sonia Sotomayor).

Of particular significance for this Article is Justice Kennedy's observation that "falsity alone may not suffice to bring the speech outside of the First Amendment" [234] and the plurality's conclusion "reject[ing] the notion that false speech should be in a general category that is presumptively unprotected." [235] This observation could impact the law at issue in *Welch* and *Pickup*. It possibly could mean that although SOCE may be false in terms of effectiveness for "curing" gay men and women and false in terms of the theories about mutable sexual orientation that underlie it, speech-based SOCE may nonetheless receive constitutional protection. Put more bluntly, the fact that SOCE may be both a false speech-based therapy and a false theory does *not* mean that it automatically is stripped of all First Amendment protection.

It is unlikely that SOCE occurring through speech-based counseling would be banned as a new category of unprotected expression. The Court traditionally protects against content-based restrictions, with the exception of certain "historically unprotected" [236] categories of speech. These, as Justice Kennedy observed in *Alvarez*, include "advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent." [237]

In *Alvarez*, the Supreme Court held that "[t]he Government has not demonstrated that false statements should constitute a new category." [238] Kennedy stressed that for the Court to exempt a new category of speech from First Amendment protection, there must be "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." [239] In the case of the Stolen Valor Act, as with California's anti-SOCE law, there is no historical precedent for banning the false speech at issue.

As with similar cases, the recommended remedy of the plurality in *Alvarez* against false speech is counter-speech.[240] This same solution arguably should be used by people objecting to SOCE, thus avoiding the need for government regulation. Staging a public relations campaign, for instance, to educate the public about the alleged

234. *Id.* at 2545.
235. *Id.* at 2546–47.
236. *Id.* at 2540.
237. *Id.* at 2544 (internal citations omitted).
238. *Id.* at 2547.
239. United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012).
240. *Id.* at 2549.

harms and supposed dangers of SOCE on minors might be one possible form of counter-speech.

Coupling *Brown* with *Alvarez*, it appears that California must now demonstrate to the Ninth Circuit not only that SOCE is a false therapy, but also that it directly causes harm to minors. Parsed colloquially, California needs to prove falseness plus dangerousness. Significantly, the Court in *Alvarez* reiterated and deployed *Brown*'s rigorous proof-of-causation doctrine, with Justice Kennedy writing that "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented."[241] This indicates that *Brown*'s causation standard may not be so easily distinguished by the Ninth Circuit in *Welch* and *Pickup* as only applicable to cases involving media artifacts like video games.

3. Gonzales v. Carhart*: Medical Uncertainty & Politicization*

While *Alvarez* and *Brown* might well provide doctrinal precedent for deeming California's SOCE law unconstitutional, the Supreme Court's ruling in *Gonzales v. Carhart* provides ample support for the California legislature's actions. As noted in the Introduction, *Carhart* examined the constitutionality of the Partial-Birth Abortion Act of 2003.[242] Justice Anthony Kennedy delivered the majority opinion upholding the Act.[243]

The majority reasoned Congress had "wide discretion" to pass the Act because there are areas of "medical and scientific uncertainty" about "whether the Act creates significant health risks for women."[244] Justice Kennedy cited for support the Court's 1974 ruling in *Marshall v. United States* in which it determined that "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation."[245] This language has, in turn, been interpreted to stand for the proposition that judicial deference must be given to legislative bodies when "difficult social, political, and medical issues are involved."[246] SOCE, of course, involves all three of those "difficult" issues, given the hot-button topic of gay rights.

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241. *Id.*

242. Gonzales v. Carhart, 550 U.S. 124, 161 (2007); 18 U.S.C. § 1531 (2006).

243. *Carhart*, 550 U.S. at 131 (noting that Kennedy was joined by Chief Justice John Roberts and Associate Justices Antonin Scalia, Clarence Thomas and Samuel Alito).

244. *Id.* at 161 n.20.

245. Marshall v. United States, 414 U.S. 417, 427 (1974).

246. Nat'l Org. for Reform Marijuana Laws v. Bell, 488 F. Supp. 123, 137 (D.D.C. 1980).

Bruce Kessler explains that in *Carhart* the "medical uncertainty arose" because "Congressional findings that the procedure is never medically necessary contradicted medical evidence in the lower courts that in some cases the banned procedure is necessary." [247] As noted earlier, Judge Shubb in *Welch* found similar evidentiary ambiguity regarding whether SOCE causes harm to minors.[248] *Carhart* suggests that such ambiguity should be tolerated by the Ninth Circuit if the California legislature acted reasonably in its decision to ban SOCE for minors.

An argument clearly can be made that the legislature did act reasonably, given the assertion on appeal to the Ninth Circuit by several groups, including the California Division of American Association for Marriage and Family and the California Psychological Association, that "[t]he vast majority of mental health professional organizations agree that homosexuality is not a mental disorder and have advised against practices that attempt to change an individual's sexual orientation. The vast majority of these organizations have advised that such attempts can cause long-term harm." [249]

A second similarity between *Carhart* and the SOCE cases is their politicization. Stephen Dinan wrote in the *Washington Times* shortly after the ruling in *Carhart* that:

> Elections matter, and had John Kerry been elected president a couple of years ago I think it's clear that his judges would have been much more liberal than the two that [President Bush] appointed to court. . . . I think those who are pro-life and tend to be more conservative about values should be pleased that their hard work made a difference. Had the left won a couple of years ago, I think you would have seen a different decision here.[250]

The same could be said about the different rulings provided by Judges Shubb and Mueller. Section B of Part I mentioned the clashing opinions by the political parties in the California legislature.[251] The political nature of SOCE arguably is evidenced by the split between Republicans and Democrats on the issue, even at the level

247. Bruce Kessler, *Recent Development in Health Law: Select Recent Court Decisions: Abortion: Supreme Court Upholds Partial-Birth Abortion Ban Act Against Facial Challenge*—Gonzales v. Carhart, 33 AM. J.L. & MED. 523, 525 (2007).

248. *See supra* notes 50–52 and accompanying text.

249. Brief for American Association for Marriage and Family Therapy–California Division et. al. as Amici Curiae Supporting Defendants-Appellees Urging Affirmance at 28, Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013) (No. 12-17681).

250. Stephen Dinan, *Partial-Birth Abortion Ban Upheld; High Court First for Prohibiting Specific Method*, WASH. TIMES, Apr. 19, 2007, at A01.

251. *See supra* notes 123–29 and accompanying text.

of the judiciary. Judge Shubb, nominated by a Republican president, takes the stance held by the Republicans in California's legislature, while Judge Mueller, selected by a Democratic president, clearly sides with the Democrats.[252] That might just be a coincidence, but it is hard to ignore when such politically charged laws are in play.

In summary, the Court's ruling in *Carhart* suggests the Ninth Circuit must defer to the judgment of California lawmakers in enacting the law at issue in *Welch* and *Pickup*. Yet *Brown* indicates the Ninth Circuit still must closely scrutinize the evidence of causation of harm stemming from SOCE.[253] Further, if *Alvarez* is correct, then the mere fact that the speech behind SOCE is false is not sufficient, standing alone, to remove it from the realm of First Amendment protection. It must also cause harm.[254]

B. First Amendment Theories: A Trio of Rationales

This section reflects on three key First Amendment theories that might be used by the Ninth Circuit to determine the constitutionality of California's anti-SOCE law if the appellate court treats SOCE as speech rather than conduct. Unsurprisingly, the plaintiffs-appellants in *Pickup* argue in their opening brief to the Ninth Circuit that SOCE is sufficiently imbued with speech to fall under the umbrella of the First Amendment.[255] Although not mutually exclusive, the theories described below are meant to provide context, if not complete answers, to the research question posed in the Introduction.

1. The Marketplace of Ideas

The marketplace of ideas theory is, as Professor Matthew Bunker writes, "one of the most powerful images of free speech." [256] The theory holds "that truth will emerge in the long run as long as the marketplace remains free from government intervention and all ideas." [257] It

252. *See supra* note 66 and accompanying text.

253. *See supra* text accompanying note 219.

254. United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012).

255. The plaintiffs-appellants in *Pickup* argue that:

> The *raison d'etre* for SOCE counseling is to convey messages regarding how to address unwanted same-sex attractions, behavior or identity and meet the therapeutic goals of clients who want to resolve underlying issues and conflicts. The purpose of the counseling is to communicate a message that will be understood by the client who wants to hear that message.

Plaintiffs-Appellants' Opening Brief at 25–26, Pickup v. Brown, 728 F.3d 1042 (2013) (No. 12-17681) (internal citations omitted).

256. MATTHEW D. BUNKER, CRITIQUING FREE SPEECH 2 (2001).

257. Nancy J. Whitmore, *Facing the Fear: A Free Market Approach for Economic Expression*, 17 COMM. L. & POL'Y 21, 26 (2012).

was first advanced in First Amendment jurisprudence by Justice Oliver Wendell Holmes, Jr. in his dissenting opinion in *Abrams v. United States*,[258] as Yale Law School Dean Robert Post notes.[259] In *Abrams*, Holmes wrote:

> The ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[260]

That language, as First Amendment scholar Rodney Smolla recently observed, "has come to be thought of in our history as the place where the marketplace of ideas metaphor first took hold in American life." [261] Indeed, Professor Ashutosh Bhagwat asserts that the marketplace theory "has heavily influenced the subsequent development of free speech jurisprudence." [262]

Under the marketplace theory, the Ninth Circuit in *Welch* and *Pickup* might consider whether medical and public debate regarding SOCE has sufficiently played out or run its course, as it were, such that speech-based SOCE today is demonstrably proven as a *false* therapy. Put differently, is it the *truth* that SOCE not only do not work, but also cause harm to minors? What is the *truth* about SOCE?

According to the American Psychological Association's 2009 report, "[r]esearch on SOCE (psychotherapy, mutual self-help groups, religious techniques) *has not answered basic questions* of whether it is safe or effective and for whom." [263] The APA report, in fact, "found no empirical research on adolescents who request SOCE." [264] The report adds that "results of current research are complicated by the belief system of many of the participants whose religious faith and beliefs may be intricately tied to the possibility of change." [265]

If the APA's report is correct, then all that courts like the Ninth Circuit arguably are left with at this point in time are *opinions*—not

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

259. Post, *supra* note 82, at 153–57; *see* Barak Orbach, *Political Discourse, Civility, and Harm: On Hubris, Civility, and Incivility*, 54 ARIZ. L. REV. 443, 446 (2012) (observing that "Justice Oliver Wendell Holmes formulated the 'marketplace of ideas'").

260. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

261. Rod Smolla, *Free Speech and Civil Discourse in the 21st Century: Keynote Address*, 5 CHARLESTON L. REV. I, at iv (2011).

262. Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 2 (2012).

263. APA Report, *supra* note 79, at 90 (emphasis added).

264. *Id.* at 73.

265. *Id.* at 91.

facts—about SOCE. Viewed in this light, the marketplace theory would seem to support continuing debate about SOCE rather than its prohibition as to minors.

It is helpful here to look back before Holmes's dissent in *Abrams* to some of John Stuart Mill's arguments in *On Liberty* that serve as the backbone for the marketplace theory.[266] One important concept for Mill was the "assumption of infallibility."[267] This essentially means that those who suppress opinions because they believe them to be false assume they are infallible in their own beliefs.[268] Mill understood that for those engaged in discussions of public issues "[t]o refuse a hearing to an opinion because they are sure that it is false is to assume that *their* certainty is the same thing as *absolute* certainty."[269] When applying this theory to California's anti-SOCE law, Mill might accuse California lawmakers of falling prey to the "assumption of infallibility." As Professor Bunker writes, "[t]he core insight of marketplace theory—fallibilism—leads us to exercise great caution before silencing viewpoints with which we disagree."[270] Speech-based SOCE arguably are infused with the viewpoints of therapists regarding not only SOCE's effectiveness or lack thereof, but also homosexuality in general.

Even if one considers self-professed success stories of people who claim to have been helped by SOCE to be distorted or wrongheaded,[271] Mill asserted that "[t]here is the greatest difference between presuming an opinion to be true because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation."[272] California lawmakers, along with other critics of SOCE, clearly have the right to let the public know their opinion that conversion therapy is harmful and ineffective. In fact, if they do not do so, Mill might claim they were cowards for not acting on what they believe is "honestly . . . dangerous to the welfare of mankind."[273]

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266. JOHN STUART MILL, ON LIBERTY 61, 76 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

267. *Id.* at 77.

268. *Id.*

269. *Id.* (emphasis in original).

270. BUNKER, *supra* note 256, at 8.

271. A group called Parents and Friends of Ex-Gays & Gays (PFOX) filed a friend-of-the-court brief in February 2013 in *Welch* asserting there are "many thousands of others who have successfully made this transition" and now "are well-adjusted ex-gays." Brief for Parents and Friends of Ex-Gays & Gays (PFOX) as Amicus Curiae in Support of Plaintiffs and Appellees, Supporting Affirmance at 6, Welch v. Brown, 728 F.3d 1042 (9th Cir. 2013) (No. 13-15023).

272. MILL, *supra* note 266, at 79.

273. *Id.* at 78.

Another key for Mill is the so-called harm principle,[274] under which "the state has no legitimate authority to restrict the actions of an individual except when those actions produce harm to others."[275] The question, of course, is whether or not speech-based SOCE causes harm to others, namely minors. The APA report noted above indicates that still has to be resolved.[276]

Professor Steven Gey in 2008 explored the idea of "socially worthless untruths,"[277] which some might contend include SOCE, and why the First Amendment nonetheless often protects such speech in the marketplace of ideas.[278] Gey also addressed First Amendment protection for "empirically disprovable falsehoods,"[279] such as speech denying the Holocaust. In exploring these concepts, Gey made a key distinction between normative disagreements and factual disagreements.[280] Today, there not only are normative disagreements about SOCE grounded in religious and political concerns about homosexuality, but also apparent factual disagreements regarding whether it is harmful, as reflected in the APA report's findings. To use Gey's term, SOCE seemingly is not yet an empirically disprovable falsehood.

Thus, a possible danger from a marketplace of ideas perspective is that normative beliefs regarding SOCE—not factual ones—held by the legislative majority in California are being used to silence expression in the form of speech-based SOCE on minors. Put differently and certainly cynically, California lawmakers arguably are asserting their version of the truth about SOCE based on their political and religious values, *not* factual findings. This would be troubling for Gey, who asserted that "government has no authority to enforce through legal proscriptions any ideology or use the law to protect any set of favored ideas."[281] As Gey put it, "[p]oliticians are not scholars, and politicians' claims of factual veracity should never be taken at face value."[282]

Someday, factual evidence may be clear that speech-based SOCE is socially worthless and, in fact, false and harmful. The Ninth Circuit

274. *See id.* at 68 (asserting that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others").

275. Frederick Schauer, *On the Relation Between Chapters One and Two of John Stuart Mill's* On Liberty, 39 CAP. U. L. REV. 571, 571 (2011).

276. APA Report, *supra* note 79, at 42.

277. Gey, *supra* note 90, at 16–22.

278. *Id.* at 6–9.

279. *Id.* at 10.

280. *Id.* at 8–9.

281. *Id.* at 20.

282. *Id.* at 22.

will need to determine whether that day now has come or whether debate should continue before it is driven from the field of free speech.

2. Democratic Self-Governance

There is little disagreement that the First Amendment protects political speech. The Supreme Court wrote nearly fifty years ago that the ability to criticize the government is "the central meaning of the First Amendment." [283] The theory of democratic self-governance is premised on the belief that free expression is necessary for the proper functioning of government and democracy.[284] It holds that "the essential objective of the First Amendment is to promote a rich and valuable public debate." [285] A necessary corollary of the theory is that it rests "upon the enlightenment of society and its elected representatives." [286] Philosopher and educator Alexander Meiklejohn asserted that "[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express." [287]

A principle related to the sovereignty of the people is that government officials are servants rather than rulers.[288] According to First Amendment theorist Thomas Emerson, "[o]nce one accepts the premise . . . that governments 'derive their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of the expression both in forming individual judgments and in forming the common judgment." [289]

The speech at issue in *Welch* and *Pickup*—assuming *arguendo* that SOCE constitutes speech—is bound up in politics. As the APA's 2009 report states:

> The debate surrounding SOCE has become mired in ideological disputes and competing political agendas. Some organizations opposing civil rights for LGBT individuals advocate SOCE. Other policy concerns involve religious or socially conservative agendas

283. New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964).

284. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and Reform of the Public Discourse*, 64 U. COLO. L. REV. 1109, 1111–12 (1993).

285. *Id.*

286. Robert Bork, *Neutral Principle and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971).

287. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

288. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 35–36 (1982).

289. EMERSON, *supra* note 89, at 7.

> where issues of religious morality conflict with scientific-based conceptions of positive and healthy development.[290]

It thus may well be that political agendas are the primary driving forces both for and against California's anti-SOCE law, and it certainly seems difficult to separate the political aspects of SOCE from therapeutic ones. As noted earlier, California lawmakers divided along party lines in supporting and opposing the measure.[291]

The question remains whether or not the political nature of speech-based SOCE be untangled from the supposedly therapeutic aspects of SOCE. If the answer is no—if the two are inextricably intertwined—then SOCE would seem to necessitate heightened First Amendment protection from Meiklejohnian perspective. If the answer is yes—separating the political and therapeutic strands is possible—the argument that speech-based SOCE merits the utmost First Amendment protection is stripped away.

3. Human Dignity/Autonomy

As suggested in the Introduction, SOCE arguably has a direct effect on an individual's interest in *self-realization* and *human dignity*—concepts regarded as "fundamental purposes of the First Amendment."[292] This theory, sometimes known as the "liberty theory,"[293] holds that the importance of free expression lies in the notion that "[s]peech or other self-expressive conduct is protected not as a means to achieve a collective good but because of its value to the individual."[294] As Thomas Emerson wrote, "freedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and potentialities as a human being."[295]

If Judge Shubb is correct that SOCE involves speech, then California's anti-SOCE law imposes a burden on doctor-patient relationships by restricting both the doctor's right to speak and the patient's right to receive speech.[296] The law not only restricts the speech of the doctor—who provides therapy that presumably is in line with his or her moral and religious beliefs and thus his or her

290. APA Report, *supra* note 79, at 92.
291. *See supra* note 123 and accompanying text.
292. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 51 (1989).
293. *Id.* at 3.
294. *Id.* at 5.
295. EMERSON, *supra* note 89, at 6.
296. *See* Welch v. Brown, 907 F. Supp. 2d 1102, 1109 (E.D. Cal. 2012).

identity—but also thwarts a patient's right to receive speech that could lead to a change in sexual orientation or an affirmation of his or her self-identity.[297]

Sexual orientation intuitively seems to cut to the very core of person's identity as straight, gay or bisexual. If the Ninth Circuit accepts the arguments of the proponents of SOCE regarding mutability of sexual orientation, then California's law removes the possibility of self-realization through speech for minors who may be questioning and wrestling with their own sexual orientation.

Simply put, the California law removes *choice*—the choice of doctors to say what they believe and the choice of patients to believe what they hear. This goes against what Vincent Blasi suggests is one of the most valuable reasons for free expression: "*choosing* what to believe and how to interact with others." [298] Having choices, Blasi asserts, "is personally fulfilling," [299] as those who "have made themselves what they are through the exercise of their own initiative" [300] are the best people.

The human dignity/autonomy theory of the First Amendment proposes that the central benefit of freedom of expression is that of individual self-fulfillment.[301] Personal growth in character, decision-making and autonomous experiences are among the values that are strengthened when a society enjoys free speech liberties.[302] With the SOCE issue, it is presumable that therapists using this method hold the moral belief that homosexuality is unnatural and can be reversed.

One might also assume that some patients—even some minors—seeking SOCE essentially have a level of uncertainty about their self-identity and that they could potentially benefit from being introduced to all ideas that may lead to self-discovery, even those perceived by others to be bad. Regardless of what the outcome of the therapy may be, this theory provides a rationale that suggests that California's SOCE law, by denying freedom of speech, also denies freedom of thought. First Amendment scholar Rodney Smolla encapsulates this notion: "[t]he linkage of speech to thought, to man's central capacity to reason and wonder, is what places speech above other forms of fulfillment, and beyond the routine jurisdiction of the state." [303]

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297. *Id.* at 1116–17.
298. Blasi, *supra* note 86, at 74–75 (emphasis added).
299. *Id.* at 75.
300. *Id.*
301. SMOLLA, *supra* note 192, at 9.
302. BUNKER, *supra* note 256, at 12–13.
303. SMOLLA, *supra* note 192, at 10.

C. Summary of Doctrines & Speech Theories as They Might Apply to California's Anti-SOCE Law

What level of proof must California demonstrate to safely jettison speech-based SOCE for minors from the realm of First Amendment protection? This part has addressed various doctrines and free speech theories that the Ninth Circuit might use when reviewing California's law. This could prove an exceedingly complex task for the appellate court. As Yale Law School Dean Robert Post writes, "[s]ometimes diverse First Amendment theories will require inconsistent doctrinal regimes, and when this occurs, courts must decide which theory is to be given priority." [304]

The APA's report plausibly can be interpreted as suggesting that the Ninth Circuit is left without empirical facts proving SOCE harms minors and that what remains, instead, are differing opinions and anecdotal evidence.[305] When dealing with false opinions, as opposed to empirically false facts, both the marketplace of ideas and democratic self-governance hold that the government should be last in line to determine whether an opinion is false.[306] Every idea should have a place at the table. Self-realization that a minor questioning his sexual orientation might gain through exploring opinions presented by gay-conversion therapists also lie in the balance. Does not a person—even a minor, since the Supreme Court in *Brown* just two years ago made it clear that "minors are entitled to a significant measure of First Amendment protection" [307]—questioning his sexuality have the right to receive information regarding SOCE?

California's anti-SOCE law is manifestly wrapped in political, religious and normative judgments, all of which, as Professor Gey explains, would "produce strong protections of speech" under the marketplace theory.[308] If the Ninth Circuit considers SOCE to be merely a false opinion about sexual orientation or one that simply is ineffective (but not harmful), then core First Amendment values and theories support its protection. This, in turn, suggests California's law should be held to a very high doctrinal standard of review.

If the Ninth Circuit proceeds down this path, then strict scrutiny becomes the standard of review. The cases discussed in Section A, with the exception of *Carhart*, provide stiff doctrinal burdens California must overcome in order to constitutionally ban speech-based

304. Post, *supra* note 82, at 171.
305. APA Report, *supra* note 79, at 72–73, 90.
306. BUNKER, *supra* note 256, at 3–10.
307. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2735 (2011).
308. Gey, *supra* note 90, at 8–9.

SOCE and strip it of First Amendment protection.[309] In *Brown*, California claimed it had a compelling interest in protecting minors from speech in violent video games; that's precisely what California is now doing in *Welch* and *Pickup*, but with another type of speech from which minors must be shielded.[310] Given the seeming ambiguity of proof in the APA report regarding a direct causal link of harm from SOCE, the battle could boil down to how much deference under *Carhart* the Ninth Circuit is willing to cut the California legislature.

If the Ninth Circuit grants such deference and accepts California's position that SOCE is harmful to minors, then it appears the law will be struck down because the state would clearly have a compelling interest under strict scrutiny.[311] Deference to legislative judgment thus could be the judicial wildcard affecting the decision, regardless of what doctrines and/or theories the Ninth Circuit purports to apply to resolve the First Amendment issues. Indeed, Justice John Paul Stevens wrote shortly before his retirement from the Court, that "[t]he degree to which we defer to a judgment by the political branches must vary up and down with the degree to which that judgment reflects considered, public-minded decisionmaking." [312] Disputes thus often revolve around the initial decision regarding "the appropriate level of deference." [313]

CONCLUSION

Although this Article sought to provide a comprehensive analysis of the First Amendment issues surrounding the statute at issue in *Welch* and *Pickup* from both a doctrinal and theoretical perspective, three caveats must be acknowledged. First and foremost, the research question and the analysis in Part III assumed, for the sake of argument, that SOCE is sufficiently imbued with speech to fall under the umbrella of First Amendment protection. It may be that the Ninth Circuit sides with Judge Mueller in *Pickup* and declares that SOCE constitutes conduct, thus rendering the First Amendment analysis an academic exercise, unless the case reaches the U.S. Supreme Court.[314]

309. *See* United States v. Alvarez, 132 S. Ct. 2537, 2543–44, 2546–57; *Brown*, 131 S. Ct. at 2738.

310. *Brown*, 131 S. Ct. at 2739–42.

311. *Id.* at 2738.

312. Doe v. Reed, 130 S. Ct. 2811, 2830 n.3 (2010) (Stevens, J., concurring).

313. *See, e.g.*, Lopez v. Terrell, 654 F.3d 176, 180 (2d Cir. 2011) ("We determine first the appropriate level of deference to afford the agency's interpretation . . . .").

314. Pickup v. Brown, 2012 U.S. Dist. WL 6021465, at *9–12 (E.D. Cal. Dec. 4, 2012).

If, however, the Ninth Circuit sides with Judge Shubb's categorization of SOCE as speech, the free speech theories addressed here seemingly provide strong support for protecting SOCE in the marketplace of ideas, at least up until the time it can be considered an empirically disprovable and harmful falsehood. The Ninth Circuit has decidedly strong pro–free speech doctrines from the opinions of *Brown* and *Alvarez* that it might choose to adopt.[315]

While the Court's decision in *Carhart* cuts against protecting SOCE because it grants deference to legislative choices in instances of medical uncertainty, it is important to note that the target of the legislation in *Carhart*—abortion—clearly centered on conduct (as a medical procedure) rather than on speech (speech-based SOCE therapy).[316] The Ninth Circuit might use this distinction to distinguish *Carhart*.

A second caveat is that the speech analyzed in this Article occurs within the context of the medical profession. Doctors are professionals who engage in a heavily regulated practice,[317] and courts have suggested restrictions on their speech may be subject to a standard of review less rigorous than strict scrutiny.[318] Indeed, it is important to note that the U.S. Supreme Court in the abortion-limitation case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*[319] "refused to apply strict scrutiny to the physicians' compelled speech claims." [320] Thus, it may be easier to enact or allow restrictions on speech within the medical profession. As one federal judge observed in a 2012 opinion involving the First Amendment speech interests of physicians, "which constitutional standard should be applied in professional speech cases is still an unsettled question of law." [321]

Finally, this Article concentrated on the First Amendment freedom of speech. It did not address the interests of parents in the care, custody and control of their children, which the Supreme Court in

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315. *See* United States v. Alvarez, 132 S. Ct. 2537, 2543–44, 2546–47 (2012); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

316. Gonzales v. Carhart, 550 U.S. 124, 148, 162–63 (2007).

317. The U.S. Supreme Court asserted more than a century ago that "[t]here is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine." Watson v. Maryland, 218 U.S. 173, 176 (1910).

318. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 839–40 (1992); *see also* Martha Swartz, *Physician-Patient Communications and the First Amendment After* Sorrell, 17 MICH. ST. U.J. MED. & L. 101, 101 (2012).

319. *Casey*, 505 U.S. at 839–40.

320. Scott W. Gaylord & Thomas J. Molony, Casey *and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 630 (2012).

321. Wollschlaeger v. Farmer, 880 F. Supp. 2d 1251, 1262–63 (S.D. Fla. 2012).

2000 characterized as "perhaps the oldest of the fundamental liberty interests recognized by this Court." [322] The Ninth Circuit may well factor such interests into its analysis when considering parents who are prevented by California's law from enrolling their children in SOCE counseling.

Ultimately, the Ninth Circuit's decision in *Welch* and *Brown* is bound to spark outrage in some quarters and draw rave reviews in others. Such is the nature of any case in which speech interests are bound up in political, religious and cultural battles. This Article attempted to illustrate the ways in which complex issues of First Amendment doctrine and theory might intersect to influence the outcome. It strove to bridge the gulf between free speech theory and doctrine, while simultaneously calling scholarly attention to an issue that easily could, given its controversial nature, work its way up to the nation's high court.

322. Troxel v. Granville, 530 U.S. 57, 65 (2000).