Occupational Licensing and the First Amendment

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Introduction

Meet Dr. Ron Hines. Dr. Hines is a retired veterinarian from Brownsville, Texas, who wrote articles about animal health on his website, www.2ndchance.info.[2] In 2002, Dr. Hines began offering personalized online veterinary advice, known as telemedicine, to pet owners around the world.[3] Dr. Hines' clientele included pet owners who had received conflicting diagnoses from their local veterinarians, individuals who could not afford conventional veterinary care, and people without access to trustworthy veterinarians.[4] Dr. Hines charged a flat fee for his online advice, however, he would waive the fee for clients who could not easily afford the cost.[5] Although Dr. Hines did not personally examine the animals, he requested the animals' complete medical records.[6] Dr. Hines did not prescribe medicine; his online practice consisted solely of providing advice via email and phone calls to pet owners.[7] Dr. Hines never advised a pet owner to do something that would be illegal for the pet owner to do with or without his advice.[8]

On March 25, 2013, despite zero client complaints, the Texas State Board of Veterinary Medical Examiners fined Dr. Hines, suspended his veterinary license, and forced him to retake part of the state licensing exam.[9] It is a crime in Texas for licensed veterinarians

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[2] Complaint ¶¶ 17-18, Hines v. Alldredge, No. 1:13-CV-56, 2014 WL 11320417 (S.D. Tex. Feb. 11, 2014), 2013 WL 1736778 [hereinafter Complaint].

[3] *Id.* ¶ 20.

[4] *Id.* ¶ 26.

[5] *Id.* ¶¶ 32-33.

[6] *Id.* ¶¶ 22-23.

[7] *Id.* ¶ 39.

[8] Complaint, *supra* note 2, ¶¶ 21, 40.

[9] *Id.* ¶¶ 69, 90.

to render online advice without previously examining the animal.[10] When Texas amended the Veterinary Licensing Act in 2005 to explicitly forbid a veterinarian-client-patient relationship from arising solely via electronic means, there was no evidence that online veterinary advice was harming animals, resulting in consumer fraud, or causing public-health emergencies.[11] The only rationale behind the amendment was to protect brick-and-mortar veterinarians from competition.[12] If Dr. Hines only provided generalized veterinary advice, the State Board would not have batted an eye, but by giving specialized advice regarding a specific animal, Dr. Hines had inadvertently incriminated himself.[13]

Dr. Hines is not alone. Across the country, licensing boards have aggressively regulated many matters pertaining to speech.[14] Whether it be requiring a license for occupations that are comprised mainly, if not entirely, of speech, or defining an occupation in a manner that unnecessarily regulates purely expressive conduct, bureaucrats have extensively regulated occupational speech in a manner that hinders economic growth.[15] These regulations often hinder the First Amendment rights of professionals.[16]

For years, courts have given these licensing boards a blank check to regulate so-called "professional speech" as they see fit,[17] with the

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[10] *See* TEX. OCC. CODE ANN. § 801.351(a) (requiring advice in the context of a formal veterinarian-client relationship); *id.* § 801.351(b) (possessing "sufficient knowledge" for purposes of a veterinarian-client relationship, veterinarian must have recently examined animal or visited premises where it is kept); *id.* § 801.351(c) (forbidding a formal veterinarian-client relationship from arising solely via electronic means); *id.* § 801.504 (authorizing criminal penalties for violations).

[11] Complaint, *supra* note 2, ¶¶ 59-61.

[12] *Id.* ¶ 58. In 2017, Governor Greg Abbott signed Senate Bill 1107 which made it legal for medical doctors to practice telemedicine for humans without requiring an in-person examination. *New Law Shapes the Future of Telemedicine in Texas*, TEX. MED. ASS'N (Feb. 14, 2020), https://www.texmed.org/Template.aspx?id=45284#:~:text=Senate%20Bill%201107%2C%20passed%20this,patients%20remotely%20via%20telecommunication%20technology (codified as Texas Occupational Code Annotated § 111.005). Given the heightened health and safety concerns involved with medical advice to humans, the legalization of telemedicine for medical doctors only makes the restriction on veterinary telemedicine more irrational.

[13] Complaint, *supra* note 2, ¶ 92; *see* TEX. OCC. CODE ANN. §§ 801.351, 801.504.

[14] Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 183 (2015).

[15] *See infra* Background Part I, Analysis Part I.

[16] *See* Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).

[17] *See* Hines v. Alldredge, 783 F.3d 197, 201 (5th Cir. 2015) (relying on the professional speech doctrine to uphold Texas' restriction on rendering online advice to pet owners), *abrogation recognized by* Hines v. Quillivan, 982 F.3d 266 (5th Cir. 2020); Wollschlaeger v. Governor of

Supreme Court's only advice on the matter coming from a concurring opinion.[18] However, the tide is set to turn in favor of free speech in occupational licensing. The Supreme Court, in *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*), denied the existence of any separate, let alone unprotected, category of "professional speech."[19]

This development is a welcome one for professionals and consumers alike.[20] Although the Court did not decide how much scrutiny regulations of "professional speech" should receive, precedent suggests that professional speech is not "exempt from ordinary First Amendment principles,"[21] and thus, heightened scrutiny applies.[22] For professionals, providing full First Amendment scrutiny to professional speech affords protection from prior restraints—here, occupational licensing—that "has been generally, if not universally, considered . . . the chief purpose" of the First Amendment to prevent.[23] Providing this protection will make it easier to enter many professions, thus providing avenues for upward mobility and closing the income inequality gap.[24] For consumers, subjecting professionals to regulations, specifi-

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Fla., 760 F.3d 1195, 1203, 1204, 1217 (11th Cir. 2014), *vacated on reh'g*, 797 F.3d 859 (11th Cir. 2015), *vacated on reh'g*, 814 F.3d 1159 (11th Cir. 2015), *vacated en banc*, 649 F. App'x. 647 (11th Cir. 2016) and 848 F.3d 1293 (11th Cir. 2017) (upholding, on the basis of the professional speech doctrine, Florida's Firearm Owners Privacy Act which prevents doctors from engaging in any conversation with, or providing any information to, patients on the topic of firearms); Moore-King v. Cnty. of Chesterfield, 708 F.3d 560, 569-70 (4th Cir. 2013) (relying on the professional speech doctrine to uphold Chesterfield County's licensing regime for fortune tellers), *abrogated by Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct.; Locke v. Shore, 634 F.3d 1185, 1190-92 (11th Cir. 2011) (relying on the professional speech doctrine to uphold Florida's license requirement for interior designers); Acct.'s Soc'y of Va. v. Bowman, 860 F.2d 602, 604-05 (4th Cir. 1988) (relying on professional speech doctrine to uphold Virginia law that prohibits accountants who were not licensed as CPAs from using certain terms in the documents they prepared for clients); Accts.' Ass'n of La. v. State, 533 So. 2d 1251, 1253-55 (La. Ct. App. 1988) (upholding, on the authority of the professional speech doctrine, Louisiana Board of Certified Public Accountants rule that prohibits accountants who were not licensed as CPAs from issuing review reports (a financial analysis that falls well short of a comprehensive audit, and does not express an opinion regarding the financial statements analyzed)).

18 Sherman, *supra* note 14, at 184, Lowe v. SEC, 472 U.S. 181, 211-36 (1985) (White, J., concurring in the result).

19 *Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. at 2371-72.

20 *See infra* Background Part I.

21 *Nat'l Ins. of Family & Life Advocs*, 138 S. Ct. at 2375.

22 *Id.*

23 Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931).

24 MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 5-6 (W.E. Upjohn Inst. for Emp. Rsch. 2006) [hereinafter KLEINER BOOK].

cally licenses, that restrict speech to strict scrutiny will open the door to more options in many service markets, thus leading to lower consumer costs.[25] For the individual consumer, their interest in the free flow of professional services "may be as keen, if not keener by far, than [their] interest in the day's most urgent political debate."[26]

The shift to protect professional speech advances the First Amendment interest in fostering self-realization "without improperly interfering with the legitimate claims of others,"[27] by protecting those who seek to make a living via speech and upholding this country's tradition of open inquiry, while leaving the door open for less speech-restrictive means of protecting consumers, such as laws of general application proscribing fraud and malpractice.[28] Protecting professional speech also allows for one's occupational success to hinge on the ability of their speech to be accepted in the marketplace of ideas, not whether it is accepted by government bureaucrats.[29] Just because professional speech is engaged in for financial motives does not make it less worthy of First Amendment protection—"a speaker is no less a speaker because he or she is paid to speak."[30]

Critics of *NIFLA* and other cases protecting professional speech argue that such opinions are misguided attempts to use the First Amendment to resurrect *Lochner v. New York*, the early twentieth century Supreme Court decision, now anti-canon, that recognized a due process right to liberty of contract.[31] However, these claims are greatly exaggerated.[32] Unlike the right to freedom of contract recognized in *Lochner*, a right to engage in professional speech advantages the worker at the expense of the more powerful party, in this case, the

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[25] *See* U.S. Dep't of the Treasury Office of Econ. Policy et al., Occupational Licensing: A Framework for Policymakers 4 (2015) [hereinafter Obama Report].

[26] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976).

[27] C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978).

[28] *See, e.g.,* 18 U.S.C. § 1341.

[29] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

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

[31] *See* Lochner v. New York, 198 U.S. 45, 53 (1905), *overruled in part by* Ferguson v. Skrupa, 83 S. Ct. 1028 (1963); *see also* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 165-67 (2015); Jeremey K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917-18 (2016); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 134-37 (2016).

[32] *See* Sherman, *supra* note 14, at 193.

government.[33] Additionally, the right recognized in *NIFLA* is the application of an explicit constitutional guarantee, freedom of speech, to a specific circumstance, professional relationships.[34] Contrast this with *Lochner*, where the right to freedom of contract was not explicitly recognized in the Constitution.[35]

This Article seeks to explore what promises to be a quickly evolving area of First Amendment jurisprudence. In Part II, this Article will provide a short overview of occupational licensing by discussing the hardships that aspiring license holders go through to obtain permission to work, distinguishing licenses from certifications and registrations, and flagging First Amendment issues that arise under licensing schemes. Part III dissects the Supreme Court case law that has provided the framework for lower courts to analyze First Amendment challenges to licensing laws and highlights recent cases that demonstrate that such speech is not subject to lower First Amendment scrutiny just because it is uttered by professionals. In Part IV, this Article will use this case law to analyze the different First Amendment issues that arise in the context of occupational licensing by suggesting a framework to resolve these issues and compare that framework with the various approaches that lower courts have taken. In Part V, this Article will layout and assess the normative arguments for, and against, providing full First Amendment protection to professional speech. This Article concludes by discussing the practical benefits of providing heightened scrutiny for licensing regulations that restrict speech.

BACKGROUND

Before diving into the "professional speech" doctrine and how it implicates occupational licensing schemes, it is important to understand how occupational licensing works. To gain this understanding, this section will examine occupational licensing and the effect it has on an individual's ability to enter a licensed profession, alternatives to

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[33] *See* DICK M. CARPENTER II ET AL., LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 31-32 (2d. ed. Inst. for Just. 2017); KLENIER BOOK, *supra* note 24, at 5-6; Obama Report, *supra* note 25, at 4.

[34] Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018).

[35] *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting), *overruled in part by Ferguson*, 83 S. Ct. 1028.

licensing, and the First Amendment conflicts that occur in the licensing context.

I. COSTS AND BENEFITS OF OCCUPATIONAL LICENSING

Economist Morris Kleiner defines occupational licensure as "the process by which governments establish qualifications required to practice a trade or profession, so that only licensed practitioners are allowed by law to receive pay for doing work in the occupation."[36] Similarly, the Obama administration in its report on licensing laws in the United States referred to occupational licensing as "a form of regulation that requires individuals who want to perform certain types of work to obtain the permission of the government."[37] The effect that licensing has on the United States labor force is significant, as around one in four U.S. workers is licensed.[38] This number has risen significantly over recent decades; in the early 1950s, less than 5% of the workforce was covered by licensing laws.[39]

The primary justification for licensing systems, and occupational regulation more generally, is to protect the public from harm that could occur at the hands of incompetent practitioners.[40] Under this view, licensing is appropriate where information asymmetry makes it difficult for a consumer to judge a professional's quality of work

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[36] MORRIS M. KLEINER, REFORMING OCCUPATIONAL LICENSING POLICIES 5 (The Hamilton Project 2015).

[37] Obama Report, *supra* note 25, at 6.

[38] CARPENTER II ET AL., *supra* note 33, at 6.

[39] MORRIS M. KLEINER & ALAN B. KRUEGER, THE PREVALENCE AND EFFECTS OF OCCUPATIONAL LICENSING 10 (Nat'l Bureau of Econ. Rsch. 2008).

[40] *See* Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system."); Dent v. West Virginia, 129 U.S. 114, 122 (1889) ("The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal.").

beforehand or where a provider's incompetence can inflict serious harm.[41] Professions such as law and medicine come to mind as occupations where some form of licensing is needed to protect the public from harm.[42] Advocates of licensing laws advance other justifications as well, such as lowering consumer search costs by providing a "signal" of knowledge and competence,[43] building a relationship of trust between practitioners and the public,[44] and market stabilization.[45]

While occupational licensing has its justifications, it also has its costs. In a study examining licensing requirements for 102 lower-income occupations throughout the United States, the Institute for Justice found that those licenses required on average $267 in fees, an exam, and nearly a year of education and experience.[46] The most stringent professions have significantly more demanding requirements.[47] These burdens lead to reduced employment, and thus, reduced competition in licensed occupations,[48] wider gaps in income inequality between licensed and unlicensed workers,[49] and increased costs in goods and services.[50] In fact, economic models suggest that occupational licensing may result in 2.85 million fewer jobs nationwide, as well as an additional annual consumer cost of $203 billion.[51] Because licensing occurs mainly on the state level,[52] there is significant

41 Obama Report, *supra* note 25, at 7; *see also* Nick Robinson, *The Multiple Justifications of Occupational Licensing*, 93 WASH. L. REV. 1903, 1936 (2018).

42 *See* Obama Report, *supra* note 25, at 7; Robinson, *supra* note 41, at 1936.

43 *E.g.*, Robinson, *supra* note 41, at 1938; *see also* KLEINER BOOK, *supra* note 24, at 47 ("Occupations can limit entry as a method to 'signal' quality and to show both those in the occupation and outsiders that individuals are committed to the work of the occupation." (citing Michael Spence, *Job Market Signaling*, 87 Q.J. OF ECON. 355 (1973)).

44 *See* Robinson, *supra* note 41, at 1940.

45 *Id.* at 1942-43 (citing KARL POLYANI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (2001)) (arguing that anticompetitive protectionism can protect both consumers and laborers from market instability).

46 CARPENTER II ET AL., *supra* note 33, at 6.

47 Interior design was the most stringently licensed profession studied; the three states (and D.C.) that licensed interior designers required them to have six years of experience, pay between $1,120 and $1,485 in fees, and pass an exam in order to become licensed. *Id.* at 170.

48 KLEINER BOOK, *supra* note 24, at 115.

49 *Id.* at 6 (citing Zvi Eckstein & Eva Nagypal, *The Evolution of U.S. Earnings In-equality: 1961-2002*, 28 FED. RSRV. BANK OF MINNEAPOLIS Q. REV. 10 (2004)).

50 Obama Report, *supra* note 25, at 4.

51 KLEINER, *supra* note 36, at 6 (citing KLEINER ET AL., A PROPOSAL TO ENCOURAGE STATES TO RATIONALIZE OCCUPATIONAL LICENSING PRACTICES (Princeton Univ. 2011)).

52 Dent v. West Virginia, 129 U.S. 114, 122 (1889) (establishing the power of states to license certain occupations and establishing state law as the appropriate vehicle for occupational licensing).

variation in licensing burdens within the same occupation.[53] The share of the workforce that is licensed also varies considerably from state to state.[54] The variation of licensing requirements across states leads to diminished mobility, particularly where states have no reciprocity agreements.[55] Those who would otherwise choose to move to a new state may decide not to if they have to requalify for an occupation for which they already hold a license.[56]

Additionally, many licensing requirements have a questionable impact on advancing public health and safety.[57] Some occupations have disproportionate burdens compared to other, more dangerous, occupations.[58] For instance, although there are many more health and safety risks inherent in being an Emergency Medical Technician (EMT) than in being a cosmetologist, the average cosmetologist must complete over a year of training to receive a license while the average EMT needs only complete about a month's worth.[59] Similar inconsistencies are present when comparing the licensing requirements that different states impose on the same occupations.[60] Furthermore, many states license professions that pose minimal, if any, health and safety concerns. Auctioneers, florists, and home entertainment installers are a few examples of such professions that are licensed in at least one state.[61]

II. ALTERNATIVES TO LICENSING

Occupational licensing reform is an issue that has garnered strong bipartisan support in recent years. In fact, it is one of the few policies

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53 CARPENTER II ET AL., *supra* note 33, at 7 ("In roughly half of the occupations studied, the difference between the heaviest state education and experience requirements and the lightest is more than 1,000 days.").

54 KLEINER, *supra* note 36, at 8, 11 ("Iowa (33.3%) leads the country as the state with the highest share of its workforce licensed, while South Carolina (12.4%), Rhode Island (14.5%), New Hampshire (14.7%), and Indiana (14.9%) are the states with the smallest shares of their workforce licensed.").

55 *See* Obama Report, *supra* note 25, at 53 (discussing reciprocity agreements, and other interstate compacts, that are in use in various states).

56 *See* JANNA E. JOHNSON & MORRIS M. KLEINER, IS OCCUPATIONAL LICENSING A BARRIER TO INTERSTATE MIGRATION? (Nat'l Bureau of Econ. Rsch. 2017).

57 CARPENTER II ET AL., *supra* note 33, at 7.

58 *Id.*

59 *Id.*

60 For example, four states require four years of experience to become licensed as a residential landscape contractor. 40 other states, however, require no previous experience. *Id.*

61 *Id.* at 24.

to receive support from both the Obama and Trump administrations.[62] Fortunately for reformers, there are alternative means to advance the underlying goals of occupational regulation without requiring aspiring professionals to obtain government permission slips before they can earn a living. One such mechanism is through government certification—"[u]nder state certification, anyone can work in an occupation, but only those who meet the state's qualifications can use a designated title, such as a certified interior designer or certified financial planner."[63] By designating those who meet the state's standards, regulators are still able to police health and safety requirements while also lowering consumer search costs, by providing consumers with a signal of competence in the form of a protected title.[64] Certification accomplishes these goals without raising overall costs, as certification does not limit competition by establishing barriers to entry.[65] Certification systems can also be run by private, third-party organizations.[66] Nurses, counselors, and crane operators are examples of occupations that utilize private certification.[67]

Certification is not the only alternative to licensing. Another option is registration, which "is even less restrictive [than state certification], and means that workers in an occupation must apply to be on an official roster maintained by a government agency."[68] Registration ensures that professionals can be easily reached in the case of a consumer complaint.[69] Registration systems may also impose some minimum quality control requirements, such as documentation or a

62 *Compare* Obama Report, *supra* note 25, at 41-55 (recommending potential reforms for state policymakers), *with* U.S. Dep't of Labor, News Release: U.S. Department of Labor Announces Grants to Help Reform Licensing Requirements and Increase Portability (2018), https://www.dol.gov/newsroom/releases/osec/osec20180412 (announcing availability of $7.5 million to states to help review and streamline occupational licensing rules).

63 CARPENTER II ET AL., *supra* note 33, at 34.

64 *See id.* at 33. By providing a stamp of competence, certification systems can also facilitate trust between consumers and certified practitioners, accomplishing another objective of occupational regulation mentioned in Analysis Section II.A.

65 *See* Obama Report, *supra* note 25, at 8.

66 CARPENTER II ET AL., *supra* note 33, at 33.

67 *Id.*

68 KLEINER, *supra* note 36, at 8.

69 Obama Report, *supra* note 25, at 44.

character reference.[70] Other alternatives include mandatory bonding,[71] inspection,[72] and deceptive trade practice laws.[73]

III. THE LEGAL DOCTRINE

A. *Distinguishing Professional Speech from Commercial Speech*

Before diving into the evolution of the so-called "professional speech" doctrine, it is important to distinguish professional speech from what the Supreme Court has referred to as "commercial speech."[74] Commercial speech, as defined by the Court, is speech that does "no more than propose a commercial transaction."[75] Under the Court's First Amendment doctrine, commercial speech receives lesser protection than other constitutionally protected speech.[76] Professional (occupational) speech, on the other hand, is, generally speaking, speech that occurs within a professional-client relationship.[77] As the Eighth Circuit stated in *Argello v. City of Lincoln*, professional speech "*is* the transaction. The speech itself is what the 'client' is paying for."[78] This Article focuses on professional speech and its First Amendment implications in the context of occupational licensing.

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[70] *Id.*

[71] In mandatory bonding systems, employers or workers are required to maintain funds for compensation in the event of harm to the consumer. *Id.*

[72] Inspection allows for monitoring of the establishments without excluding practitioners from the labor force. *Id.* at 44-45.

[73] Deceptive trade practice acts are consumer protection laws that create a cause of action against service providers deemed to have engaged in false, misleading, or deceptive practices. CARPENTER II ET AL., *supra* note 33, at 33.

[74] Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 385 (1973).

[75] *Id.* (referencing Valentine v. Chrestensen, 316 U.S. 52 (1942), *overruling recognized by* Payne v. Tennessee, 501 U.S. 808 (1991)).

[76] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980). The Court has established the following four-part analysis for commercial speech cases:

> "At the outset, [the court] must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, [the court must] ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [the court] must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

Id. at 566.

[77] *See* Lowe v. SEC, 472 U.S. 181, 211-36 (1985) (White, J., concurring in the result); Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67 (2016); *infra* Background Section III.B.2-3, Analysis Section I.A-B.

[78] Argello v. City of Lincoln, 143 F.3d 1152, 1153 (8th Cir. 1998).

B. *Professional Speech at the Supreme Court*

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

The first time the Court significantly addressed First Amendment protections for occupational licensing was in a three-justice concurring opinion in *Lowe v. SEC*.[79] Christopher Lowe was a former investment advisor who had been convicted of various felonies and, as a result, had his registration revoked, forbidding him from acting as an investment advisor in the future.[80] After his conviction, Lowe started publishing investment newsletters which "contained general commentary about the securities and bullion markets, reviews of market indicators and investment strategies, and specific recommendations for buying, selling, or holding stocks and bullion."[81] The SEC filed a complaint in federal court, claiming that Lowe's newsletters violated the Commission's order revoking Lowe's registration.[82] The Court, in an opinion by Justice Stevens, held that the statutory registration requirement did not reach Lowe's newsletter, and thus avoided any constitutional questions.[83]

Justice White, in a concurring opinion joined by Chief Justice Burger and Justice Rehnquist, disagreed.[84] Justice White concluded that the underlying statute did reach Lowe's conduct and that it was thus necessary to reach the First Amendment issue.[85] In analyzing the First Amendment question, Justice White attempted to draw a line between professional regulation and infringements on speech:

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. If

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79 *See* Sherman, *supra* note 14, at 184; *Lowe*, 472 U.S. at 211-36 (White, J., concurring in the result).

80 *Lowe*, 472 U.S. at 183.

81 *Id.* at 185.

82 *Id.* at 184.

83 *Id.* at 183, 210-11.

84 *Id.* at 211, 227 (White, J., concurring in the result).

85 *Id.* at 227 (White, J., concurring in the result).

> the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny. Where the *personal nexus* between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[86]

In drawing the line between permissible professional regulation and impermissible burden of speech, Justice White was building off of Justice Jackson's concurring opinion forty years earlier in *Thomas v. Collins*.[87] In that opinion, Justice Jackson noted that "a rough distinction always exists" between permissible regulation of a vocation and an impermissible infringement of speech.[88] Justice Jackson went on to provide a vague framework by which to draw that distinction: "Modern inroads on . . . [First Amendment] rights come from associating the speaking with some *other factor* which the state may regulate so as to bring the whole within official control."[89] Although Justice Jackson did not identify that "other factor" in *Thomas*, Justice White concluded that a "personal nexus" between speaker and client was sufficient to bring the speech within government control.[90] Such a "personal nexus" occurs when one "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances."[91] Because Lowe was not providing individualized advice, but rather was publishing for a general audience, the application of the statute to his

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[86] Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring in the result) (emphasis added) (citing Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 720 (1931)).

[87] *Id.* at 231 (referencing Thomas v. Collins, 323 U.S. 516, 544-48 (1945) (Jackson, J., concurring)).

[88] Sherman, *supra* note 14, at 186; Thomas v. Collins, 323 U.S. 516, 544 (1945) (Jackson, J., concurring).

[89] *Thomas*, 323 U.S. at 547 (Jackson, J., concurring) (emphasis added).

[90] *Lowe*, 472 U.S. at 232 (White, J., concurring in the result).

[91] *Id.* (White, J., concurring in the result).

newspaper, according to Justice White, violated the First Amendment.[92]

How Justice White came up with the "personal nexus" test is unclear, as he did not cite a single Supreme Court case supporting the existence of such a standard.[93] A majority of the Supreme Court has never adopted the "personal nexus" test, nor has any Justice since *Lowe* even cited it.[94] However, lower courts have often applied Justice White's test in occupational speech cases.[95] In fact, lower courts have even expanded the concept of a "personal nexus" from exercising judgment on behalf of a client to any situation where a client pays a professional to speak to them.[96]

2. *Holder v. Humanitarian Law Project* and *United States v. Stevens*

In 2010, the Court issued two First Amendment opinions with significant implications for the viability of the professional speech doctrine. *Holder v. Humanitarian Law Project* dealt with a federal statute that made it a crime to "knowingly provid[e] material support or resources to a foreign terrorist organization."[97] "Material support or resources" was defined to include "training" and "expert advice or assistance."[98] "Training" was further defined to mean "instruction or teaching designed to impart a specific skill, as opposed to general

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[92] *Id.* at 236 (White, J., concurring in the result).

[93] Sherman, *supra* note 14, at 186; *Lowe*, 472 U.S. at 211-36 (White, J., concurring in the result).

[94] Sherman, *supra* note 14, at 186; *see* Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).

[95] *See* Wollschlaeger v. Governor of Fla., 760 F.3d 1195, 1203, 1204, 1217, 1226 (11th Cir. 2014), *vacated on reh'g*, 797 F.3d 859 (11th Cir. 2015), *vacated on reh'g*, 814 F.3d 1159 (11th Cir. 2015), *vacated en banc*, 649 F. App'x. 647 (11th Cir. 2016) and 848 F.3d 1293 (11th Cir. 2017) (upholding, on the basis of the "personal nexus" test, Florida's Firearm Owners' Privacy Act which prevents doctors from engaging in any conversation with, or providing any information to, patients on the topic of firearms); Locke v. Shore, 634 F.3d 1185, 1197 (11th Cir. 2011) (Black, J., concurring) (relying on the "personal nexus" test to uphold Florida's license requirement for interior designers); Acct.'s Soc'y of Va. v. Bowman, 860 F.2d 602, 604-05 (4th Cir. 1988) (relying on "personal nexus" test to uphold Virginia law that prohibits accountants who were not licensed as CPAs from using certain terms in the documents they prepared for clients).

[96] *See* Moore-King v. Cnty. of Chesterfield, 708 F.3d 560, 569-70 (4th Cir. 2013) (applying the professional speech doctrine to a licensing regime governing fortune tellers), *abrogated by Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. 2361.

[97] Holder v. Humanitarian L. Project, 561 U.S. 1, 8 (2010) (quoting 18 U.S.C. § 2339B(a)(1)).

[98] *Id.* (quoting 18 U.S.C. § 2339A(b)(1)).

knowledge."[99] The plaintiffs were U.S. citizens, domestic organizations, and nonprofits who wanted to provide aid to two groups that had been designated as "foreign terrorist organizations."[100] Plaintiffs challenged the constitutionality of the statute to the extent that it prohibited them from providing legal training and political advocacy to the foreign organizations, arguing that as applied to them, the statute violated their freedom of speech.[101] The government countered by saying that the statute was aimed at the plaintiffs' conduct and only incidentally burdened their speech.[102] While the government did not argue that the statute's aim at conduct took away all First Amendment protection, the government did argue that the statute should be reviewed under the intermediate scrutiny standard set out in *United States v. O'Brien*[103] instead of under the strict scrutiny standard that is normally applicable in free speech cases.[104]

The Court, in an opinion by Chief Justice Roberts, rejected the government's contention that the statute was only aimed at conduct.[105] The Court found that whether the statute allowed the plaintiffs to communicate to the designated terrorist groups depended on what they intended to communicate.[106] The statute barred the plaintiffs from talking to the terrorist groups about a "specific skill" or "specialized knowledge."[107] However, if the plaintiffs only imparted "general or unspecialized knowledge" to a designated terrorist group, the statute would not prohibit them from doing so.[108] While the statute was facially directed at conduct, as applied to the plaintiffs, it was a con-

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[99] *Id.* at 12 (quoting 18 U.S.C. § 2339A(b)(2)).

[100] *Id.* at 9-10.

[101] *Id.* at 10-11.

[102] *Id.* at 26.

[103] Holder v. Humanitarian L. Project, 561 U.S. 1, 26-27 (2010) (referencing United States v. O'Brien, 391 U.S. 367 (1968)). *United States v. O'Brien* has come to stand for the proposition that a "content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 189 (1997) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

[104] *Humanitarian L. Project*, 561 U.S. at 28.

[105] *Id.* at 6, 27.

[106] *Id.* at 27.

[107] *Id.*

[108] *Id.*

tent-based regulation of speech.[109] Thus, the Court held the statute was subject to strict scrutiny.[110]

Also in 2010, the Supreme Court decided *United States v. Stevens*, a case that dealt with the constitutionality of the federal ban on commercial depictions of animal cruelty.[111] 18 U.S.C. § 48 established criminal penalties for anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty" if done "for commercial gain" in interstate or foreign commerce.[112] The statute only addressed portrayals of animal cruelty, not the underlying harmful acts themselves.[113] The government, in defending the constitutionality of the statute, argued that depictions of animal cruelty were categorically exempt from First Amendment protection.[114]

The Court, in another opinion by Chief Justice Roberts, disagreed.[115] The Court started its analysis by stating that because the statute prohibited "visual [and] auditory depiction[s]" based on whether they depict animal cruelty, the statute was a content-based regulation of speech and was thus presumptively invalid.[116] In determining whether the government could overcome the presumption of invalidity in *Stevens*, the Court recognized that "'[f]rom 1791 to the present,' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'"[117] Some of these historical exceptions include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[118] The Court

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109 *Id.*

110 Holder v. Humanitarian L. Project, 561 U.S. 1, 28 (2010) The Court went on to uphold the statute under strict scrutiny. *Id.* at 36 ("Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government's interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups' nonviolent ends.").

111 United States v. Stevens, 559 U.S. 460 (2010).

112 *Id.* at 464-65.

113 *Id.* at 464.

114 *Id.* at 468.

115 *Id.* at 463, 468.

116 *Id.* at 468 (alteration in original).

117 United States v. Stevens, 559 U.S. 460, 468 (2010) (alteration in original) (quoting R.A.V. v. St. Paul, 505 U.S. 377, 382-83 (1992)).

118 *Id.*

found no evidence that depictions of animal cruelty were among the historical exemptions from First Amendment protection.[119]

The government also argued that, whether or not depictions of animal cruelty were historically exempt, they should be categorically exempted from First Amendment protection because its value was outweighed by its societal costs.[120] The Court rejected this argument, stating that:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.[121]

The Court went on to reaffirm that the only categories of speech that are completely unprotected are those that "the prevention and punishment of which have never been thought to raise any Constitutional problem."[122] Having found no historical exemption for depictions of animal cruelty, the Court found the statute to be "substantially overbroad," and thus, in violation of the First Amendment.[123]

Both *Humanitarian Law Project* and *Stevens* had significant implications for the professional speech doctrine. *Humanitarian Law Project* rejects the notion, articulated in Justice White's *Lowe* concurrence, that speech that occurs while engaging in a profession should be treated as conduct itself and thus receive no First Amendment protection.[124] Instead, the Court in *Humanitarian Law Project* stated that when "the conduct triggering coverage under [a] statute consists of communicating a message," the First Amendment is implicated, and the statute receives strict scrutiny as a content-based regulation of speech.[125] Thus, any occupational licensing statute whose coverage is

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119 *Id.* at 469.
120 *Id.* at 469-70.
121 *Id.* at 470.
122 *Id.* at 468-69.
123 United States v. Stevens, 559 U.S. 460, 469, 482 (2010).
124 *See supra* pp. 14-17; Sherman, *supra* note 14, at 190-91.
125 Holder v. Humanitarian L. Project, 561 U.S. 1, 28 (2010).

dependent on someone speaking should be considered as regulating speech, not conduct.[126]

Stevens further rejected the conclusion reached in Justice White's *Lowe* concurrence that professional speech is to be categorically exempted from First Amendment coverage.[127] *Stevens* articulated a historical test for determining whether a given category of speech was exempted from First Amendment protection: the only speech that fails to receive First Amendment coverage is speech for which there is a historical tradition of limiting, dating back to 1791.[128] Additionally, courts should take a narrow view of the type of speech in question to determine whether it falls into a historical exception.[129] While some specific examples of occupational speech might fall under one of the historic exemptions based on a tradition of regulation, it is impossible to claim that all occupational licensing is exempted from First Amendment protection, as there was little occupational licensing in the United States during the eighteenth and nineteenth centuries.[130] Thus, after *Humanitarian Law Project* and *Stevens*, the professional speech doctrine conflicted with Supreme Court precedent; setting the stage for its eventual demise.[131]

3. *National Institute of Family and Life Advocates v. Becerra*

In 2018, the Supreme Court laid to rest the professional speech doctrine in *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*).[132] *NIFLA* dealt with a California law known as the FACT Act which required licensed, pro-life, crisis pregnancy centers to provide a notice to every patient stating that California had public family

126 *See id*; *see also* Sherman, *supra* note 14, at 191.

127 *See supra* pp. 16-17; Sherman, *supra* note 14, at 191.

128 *Stevens*, 559 U.S. at 468.

129 *See id.* at 468-69 (referring to historical exceptions as "'well-defined and *narrowly limited* classes of speech'" (emphasis added) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)); *see also id.* at 469 (recognizing a long history of prohibiting animal cruelty but finding no history of prohibiting *depictions* of animal cruelty).

130 Sherman, *supra* note 14, at 192 (citing KLEINER, *supra* note 36, at 7). An example of occupational speech that has been historically regulated, and thus exempted from First Amendment coverage under *Stevens*, would be any advice that turns out to be malpractice. *Id.* at 196 (citing Stephens v. White, 2 Va. 203 (1796) (recognizing legal malpractice as a well-established legal principle) and Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1196-97 (1992) (finding that the first reported recovery for medical malpractice occurred during the reign of Henry IV)).

131 *See* Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).

132 *See id.*

planning services that provided, among other things, abortions at low-cost.[133] The notices were required to be provided in English and any other language which a significant number of people in the area of the facility spoke.[134]

The Court, in an opinion by Justice Thomas, held that the licensed notice requirement violated the First Amendment.[135] In so holding, the Court expressly rejected the professional speech doctrine: "[T]his Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'"[136] Not only did the Court find no precedent supporting a professional speech doctrine, but the Court also found such a doctrine to be unwise, as it would interfere with the "marketplace of ideas" that the First Amendment is supposed to protect.[137] Further, excluding "professionals" from First Amendment protection would be dangerous, as "professional," and thus "professional speech," is difficult to define.[138] Because the law at issue could not survive intermediate scrutiny, the Court found it unnecessary to foreclose the possibility that a persuasive reason existed for treating professional speech differently.[139] However, the Court's scathing analysis of the pitfalls of a professional speech doctrine strongly suggests that no such reason exists, and thus that strict scrutiny should generally apply when analyzing restrictions on "professional speech."[140]

The Court did recognize two specific instances where professional speech would be subject to lesser scrutiny. One circumstance where

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133 *Id.* at 2369 (referencing CAL. HEALTH & SAFETY CODE § 123472(a)(1), *held unconstitutional by Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. 2361).

134 *Id.* (referencing CAL. HEALTH & SAFETY CODE § 123472(a), *held unconstitutional by Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. 2361).

135 *Id.* at 2368, 2378.

136 *Id.* at 2371-72.

137 *See* Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2374 (2018) (quoting McCullen v. Coakley, 573 U.S. 464, 476 (2014)).

138 *Id.* at 2375. Lower court cases illustrate the breadth with which "professional" and "professional speech" had been defined. *See* Moore-King v. Cnty. of Chesterfield, 708 F.3d 560, 569 (4th Cir. 2013) (finding that fortune tellers are professionals and, thus, their speech was subject to the professional speech doctrine), *abrogated by Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. 2361.

139 *Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. at 2375.

140 *Id.* at 2371-72, 2374-75 (noting "the rule that content-based regulations of speech are subject to strict scrutiny," finding that the professional speech doctrine, as applied by lower courts, was an exception from the rule, and finding the license notice requirement to be a content-based regulation of speech).

professional speech may be afforded lesser protection is where the law requires professionals to make disclosures that are limited to purely "factual, noncontroversial information in their 'commercial speech.'"[141] Because the licensed notice requirement mandated clinics to disclose information about state-sponsored services and not the services that the clinics provided, the notice requirement did not fall under this exception.[142]

Second, the Court recognized speech may receive reduced protection where there is a regulation of a professional's conduct with an incidental effect on speech.[143] The Court recognized an informed consent requirement as an example of permissible regulation of professional conduct with incidental effects on speech.[144] The Court differentiated the disclosure requirement in *NIFLA* from informed-consent requirements by noting that the licensed notice requirement was not tied to any procedure and applied "to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed."[145]

Because the licensed notice requirement did not fall under either exception, it was subject to First Amendment analysis.[146] The Court began its analysis by noting that the licensed notice was under-inclusive to California's purported goal of educating low-income women of the services that the state provides, as most community clinics that provided family planning services were excluded from the notice requirement without explanation.[147] Additionally, the Court found that there were other means for California to educate low-income women about the services the state offered without burdening the free speech rights of the licensed clinics.[148] For example, the state could have informed the women directly through a public information cam-

141 *E.g., id.* at 2372 (citing Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)).

142 *Id.*

143 *E.g., id.*

144 *Id.* at 2373 (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 884 (1992)).

145 Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2373 (2018).

146 *Id.* at 2375.

147 *Id.* at 2375-76.

148 *Id.* at 2376.

paign.[149] Given the flaws in the licensed notice requirement, the statute violated the First Amendment.[150]

For over thirty years, lower courts had been applying a professional speech doctrine that the Supreme Court had never adopted in a majority opinion.[151] After *NIFLA*, the professional speech doctrine is now expressly dead.[152] Outside of certain compelled disclosures and regulations of professional conduct with incidental effect on speech, restrictions on so-called professional speech are to be treated like all other content-based restrictions of speech and thus analyzed under strict scrutiny.[153] The next section examines the specific implications of this change in the legal landscape.

ANALYSIS

I. FIRST AMENDMENT ISSUES IN OCCUPATIONAL LICENSING

Occupational licensing regimes can raise several different First Amendment issues.[154] This section will analyze two instances where licensing laws often run up against the protective mandate of the First Amendment: licensing of speech-driven occupations and laws that define occupations broadly so as to unnecessarily include speech.

A. *Speech-Driven Occupations*

Many occupations are driven mainly, or entirely, by speech. As such, attempts to license these occupations will face First Amendment scrutiny.[155] I will analyze the First Amendment implications of licensing speech-driven occupations by using tour guides as a case study.

While the Supreme Court has never heard a First Amendment challenge to licensing requirements for tour guides, in 2014, two federal appellate courts reached opposite conclusions regarding the gov-

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149 *Id.*

150 *Id.* at 2376, 2378.

151 *See* Sherman, *supra* note 14, at 186; Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring in the result).

152 *See* Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371-72 (2018).

153 *See id.* at 2371-72, 2375.

154 *See infra* pp. 22-25.

155 *See Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. at 2371-72, 2375.

ernment's ability to license tour guides.[156] *Kagan v. City of New Orleans* was a Fifth Circuit case regarding New Orleans' license requirement for tour guides.[157] New Orleans required aspiring tour guides to pass an exam and pay a $50 fee to obtain a license to charge customers for tours.[158]

In a brief cursory opinion, the Fifth Circuit upheld the licensing requirement.[159] Purportedly applying intermediate scrutiny, the court focused strongly on the government's interest in ensuring that tour guides were knowledgeable while ignoring the interest of aspiring tour guides in being able to express their knowledge of the city to anyone willing to pay.[160] As the court stated, the New Orleans law "has no effect whatsoever on the content of what *tour guides say*. *Those who have the license* can speak as they please, and that would apply to almost any vocation that may be licensed. *Tour guides may talk* but what they say is not regulated or affected by New Orleans."[161] Thus, because the licensing requirement did not regulate the speech of licensed tour guides, the Fifth Circuit held that the law did not violate the First Amendment.[162]

Edwards v. District of Columbia was a D.C. Circuit case decided a few weeks after *Kagan*.[163] The D.C. licensing scheme was nearly identical to the one involved in *Kagan*, as an aspiring "sightseeing guide"[164] was required to pass a 100-question exam and pay $200 in fees.[165]

The D.C. Circuit struck down the licensing law as violating the First Amendment.[166] The court, like the Fifth Circuit in *Kagan*, applied intermediate scrutiny.[167] Unlike the Fifth Circuit, however, the D.C. Circuit found the law to not be sufficiently narrowly tailored

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156 Kagan v. City of New Orleans, 753 F.3d 560 (5th Cir. 2014); Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014).

157 *Kagan*, 753 F.3d at 561.

158 *Id.*

159 *Id.* at 562.

160 *See id.* at 561-62.

161 *Id.* at 562 (emphasis added).

162 *Id.*

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

164 *See id.* at 999 (referencing D.C. Mun. Regs. tit. 19, § 1200.1 ("[A]ny person who engages primarily in the business of guiding or directing people to any place or point of interest in the District.").

165 *Id.* at 998.

166 *Id.* at 1001.

167 *See id.* at 1000.

to advancing the District's interest in promoting the tourism industry.[168] In so holding, the court found that there was no evidence that ill-informed tour guides were hurting the District's tourism industry.[169] Even assuming that D.C. was facing a crisis of incompetent tour guides, the court found that the exam requirement was ill-suited to fixing the problem.[170] The exam did nothing to regulate the work of licensed tour guides, and the general nature of the exam meant that it did little to nothing to educate specialty tour guides, such as those who led ghost or food tours.[171] The court also noted that there were less intrusive means for the District to regulate the quality of tour guides, such as general restrictions on fraud, requiring tour guides to carry maps, and providing a voluntary certification program, where certified tour guides could use their certification as a market indicator of quality.[172]

Interestingly enough, neither court invoked the professional speech doctrine in reaching their holdings.[173] However, the Fifth Circuit's intermediate scrutiny analysis could be read as giving the city of New Orleans the carte blanche authority to license the speech of tour guides in a way that is associated with the professional speech doctrine.[174] By focusing on those who hold a tour guide license can say whatever they want, the Fifth Circuit ignores that to speak as a paid tour guide in the first place, the city imposed a license requirement.[175] In so doing, the Fifth Circuit also ignored the principle that "[g]enerally, speakers need not obtain a license to speak."[176] Additionally, in light of *NIFLA*, both courts were wrong in applying intermediate scrutiny.[177] Because both licensing requirements regulated speech based on its content, in that the regulations targeted speech given as part of a tour, strict scrutiny should have applied.[178] Because a tour guide's primary job is to speak to tourists, the regulations can-

168 *See id.* at 1003-09.

169 Edwards v. District of Columbia, 755 F.3d 996, 1003 (D.C. Cir. 2014).

170 *Id.* at 1003-07.

171 *Id.* at 1005-06.

172 *Id.* at 1009.

173 *See id.* at 1000-09; Kagan v. City of New Orleans, 753 F.3d 560, 562 (5th Cir. 2014).

174 *See Kagan*, 753 F.3d at 561-62.

175 *Id.* at 562.

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

177 *See* Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371-72, 2375 (2018).

178 *See id.*

not be characterized as a regulation of conduct with an incidental effect on speech, but rather they are a regulation on the professional's speech itself.[179] Thus, any law that imposes a licensing requirement to speak as a tour guide, or to engage in any other speaking profession,[180] must survive strict scrutiny analysis.[181]

B. *Overbroad Licensing Laws that Unnecessarily Cover Speech*

Licensing laws can also run into First Amendment issues when the underlying occupation is defined so broadly as to include speech that poses no health and safety risks.[182] Recall Dr. Hines?[183] Dr. Hines would either advise pet owners of steps they can take to help their pet that did not require obtaining veterinarian permission or recommend they see a veterinarian.[184] In other words, all of the actions Dr. Hines recommended were actions the pet owners could legally do themselves without the advice.[185] Nonetheless, Texas suspended his license for violating state law that prohibited licensed veterinarians from offering advice without first seeing the animal.[186]

This is a classic example of an occupational regulation that unnecessarily covers speech. However, when Dr. Hines' case reached the Fifth Circuit in 2015, the court upheld the Texas statute.[187] In so doing, the court invoked the professional speech doctrine, citing Justice White's *Lowe* concurrence.[188] The court framed the statute as prohibiting "the practice of veterinary medicine unless the veterinarian has first physically examined either the animal in question or its

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179 *Id.* at 2373-74; Holder v. Humanitarian L. Project, 561 U.S. 1, 27 (2010).

180 Other examples include teaching trade skills and telemedicine. Nick Sibilla, *Woman Could be Fined for Teaching Makeup Skills, Sues North Carolina for Stifling Her Free Speech*, FORBES, Aug. 29, 2017; *supra* text accompanying notes 1-12.

181 *See Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. at 2371-72, 2375.

182 *See supra* text accompanying notes 1-12.

183 *Id.*

184 Complaint, *supra* note 2, ¶¶ 38-40.

185 *Id.* ¶ 40.

186 *See id.* ¶ 90; TEX. OCC. CODE ANN. § 801.351(a) (requiring advice in the context of a formal veterinarian-client relationship); *id.* § 801.351(b) (possessing "sufficient knowledge" for purposes of a veterinarian-client relationship, veterinarian must have recently examined animal or visited premises where it is kept); *id.* § 801.351(c) (forbidding a formal veterinarian-client relationship from arising solely via electronic means).

187 Hines v. Alldredge, 783 F.3d 197, 198 (5th Cir. 2015), *abrogation recognized by* Hines v. Quillivan, 982 F.3d 266 (5th Cir. 2020).

188 *Id.* at 201-02 (citing Lowe v. SEC, 472 U.S. 181, 211 (1985) (White, J., concurring in the result)).

surrounding premises."[189] Thus, according to the court, the statute did not "regulate the content of any speech . . . or restrict what can be said once a veterinary-client-patient relationship is established."[190] Instead, the statute only had "an incidental impact on speech."[191] Thus, the court concluded that the statute fell under Texas' "broad power to establish standards for licensing practitioners and regulating the practice of professions."[192]

The Fifth Circuit's holding, however, is in serious conflict with the Supreme Court's more recent decision in *NIFLA*.[193] Once it is accepted that "[s]peech is not unprotected merely because it is uttered by 'professionals,'"[194] it becomes apparent that the Texas statute, at least as applied to Dr. Hines, is unconstitutionally overbroad.[195] While the Fifth Circuit may have been correct that the statute does not restrict speech once a veterinary-client relationship is formed,[196] the court completely overlooked the effect the statute has on speech before the statutorily defined "relationship" is established.[197] By defining "the practice of veterinary medicine" to include instances where people, like Dr. Hines, merely offer advice over the internet, the statute covers protected speech based on its content—online advice to pet owners.[198] Because the statute banned "the practice of

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189 *Id.* at 201.

190 *Id.*

191 *Id.*

192 *Id.* (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992)).

193 *See* Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371-72, 2375 (2018).

194 *Id.* at 2371-72.

195 *See id.* at 2371-72, 2375. It is possible that the statute may also be unconstitutionally overbroad on its face. In order for a statute to be struck down on its face as being overbroad, "the overbreadth of [the] statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973). A court trying to determine whether the Texas statute at issue in *Hines* is unconstitutional on its face would thus need to conduct a balancing test of sorts, comparing the number of unconstitutional applications of the statute to the number of constitutional applications to determine if the overbreadth is "substantial." *See id.* However, since the statute violates Dr. Hines own First Amendment rights, that analysis is unnecessary here.

196 Hines v. Alldredge, 783 F.3d 197, 201 (5th Cir. 2015), *abrogation recognized by* Hines v. Quillivan, 982 F.3d 266 (5th Cir. 2020).

197 *Id.*

198 *See id.*; TEX. OCC. CODE ANN. § 801.351. A statute may be a content-based regulation of speech if it fails to be both viewpoint and subject matter neutral. *See, e.g.,* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983). Viewpoint neutrality requires that the government not regulate speech based on the ideology of the message. *See* Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102

veterinary medicine" prior to establishing a proper relationship with a client, it is a content-based restriction on speech subject to strict scrutiny.[199] The restriction on providing online advice to pet owners is not narrowly tailored because Dr. Hines only advised pet owners to take steps that they could already legally do on their own without a veterinarian's permission.[200] Thus, the restriction on Dr. Hines' speech imposed by the statute fails strict scrutiny analysis.[201]

II. NORMATIVE ARGUMENTS FOR PROTECTION OF PROFESSIONAL SPEECH

A. *The Issue of Prior Restraints*

The Court's move in *NIFLA* to clarify the jurisprudential confusion that resulted from Justice White's *Lowe* concurrence, and to explicitly provide so-called "professional speech" full First Amendment protection, is a welcome development.[202] Protecting professional speech faithfully adheres to both the language, and purpose, of the First Amendment.[203] To illustrate this, it is important to look at the history behind the First Amendment. One of the major abuses of the British government that led to the passage of the First Amendment was the use of laws that required a license to print any material or to sell any book.[204] There is an important parallel between the licensing of the press by the British Crown, and the licensing of professional speech today: the decision of who can and cannot speak is in the hands of self-interested parties who have a strong incentive to restrict competition.[205] Thus, occupational licensing of professional

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YALE L.J. 1209, 1220 (1993). Subject matter neutrality, on the other hand, requires that the government not regulate speech based in its topic. *See id*. at 1218. Here, Texas has failed the subject matter neutrality requirement, as it proscribed all veterinary advice that occurs before the person giving the advice has seen the animal. *See Hines*, 783 F.3d at 201; TEX. OCC. CODE ANN. § 801.351.

199 *See Hines*, 783 F.3d at 201; TEX. OCC. CODE ANN. § 801.351; Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018).

200 *See Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. at 2371; Complaint, *supra* note 2, ¶ 40.

201 *See Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. at 2371-72, 2375.

202 *Id.*

203 *See* U.S. CONST. amend. I.

204 *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713-14 (1931).

205 *Compare* Grosjean v. Am. Press Co., 297 U.S. 233, 245 (1936) ("For more than a century prior to the adoption of the amendment—and, indeed, for many years thereafter—history

speech entails one of the core concerns of the framers of the First Amendment: the disdain for prior restraints.[206]

A prior restraint is a requirement that speech is licensed before it is delivered, or an injunction against speech yet to be delivered.[207] The legal debate over prior restraints came to the forefront after the invention of the printing press when the English government among others established a licensing system for authors and printers.[208] This licensing system was met with much criticism, most notably from John Milton.[209] In an "Appeal for the Liberty of Unlicensed Printing," published in 1644 shortly after Parliament established the licensing system, Milton vehemently attacked the act, forcefully arguing that every man had a right to make his views public "without previous censure."[210] While Parliament allowed the act to lapse in 1695, the British government used other means to impose previous restraints on publications, such as imposing a tax on all newspapers and advertisements.[211]

From this history came the foundations for a theory on free press, and free speech more generally.[212] Blackstone, in his influential Commentaries on the Laws of England, defined "[t]he liberty of the press" as consisting of "laying no previous restraints upon publication," rather than "freedom from censure for criminal matter when published."[213] As the Supreme Court recognized in *Near v. Minnesota.*: "[I]t has been generally, if not universally, considered that it is the

discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the gaencies and operations of the government."), *with* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 UNIV. PA. L. REV. 1093, 1102-1130 (2014) (detailing how occupational licensing regimes vest licensed professionals with gatekeeping power).

206 *See Grosjean*, 297 U.S. at 245-46; *Near*, 283 U.S. at 713.

207 *See* DVD Copy Control Ass'n v. Bunner, 75 P.3d 1, 17 (Cal. 2003) (defining prior restraints as "administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur" (emphasis in original)).

208 *See Grosjean*, 297 U.S. at 245-46 (discussing this history).

209 *Id.*

210 *Id.* (citing 1 COLLETT DOBSON COLLET, HISTORY OF THE TAXES ON KNOWLEDGE: THEIR ORIGIN AND REPEAL 4-6 (BiblioBazaar, LLC 2019) (1899)).

211 *Id.* (referencing 1 COLLETT DOBSON COLLET, HISTORY OF THE TAXES ON KNOWLEDGE: THEIR ORIGIN AND REPEAL 8-10 (BiblioBazaar, LLC 2019) (1899)).

212 *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713-14 (1931).

213 *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52).

chief purpose of the [First Amendment] to prevent previous restraints."[214]

Protecting professional speech is consistent with the First Amendment's particular adversity against prior restraints.[215] In the context of occupational licensing, many of the licensing boards that act as gatekeepers for entering a given profession comprise established members of that profession.[216] Thus, there is a perverse incentive for many licensing boards to use the power of the government to restrict competition.[217] When the occupation being licensed is a speech-driven service profession, this practice is analogous to that of the British licensing laws: Britain used their licensing regime to restrict competition in thought, while occupational licensing boards often use licensing laws to restrict economic competition.[218] In both instances, the power of the government is being exercised to favor the powerful and well-connected over those who just want to get an idea out there, or who just want to make an honest living.[219]

The effects of these perverse incentives of occupational licensing regimes are significant. Licensing regimes prevent many people from entering the occupation of their choice.[220] Many low-income individuals are cost-prohibited from pursuing an opportunity to move up the economic ladder, as the requirements for obtaining a license are too expensive in both time and money.[221] Consumers are hurt too, as having fewer options available in the marketplace causes prices for services to go up, and often causes quality to decline, even though ensuring high-quality service is supposedly the goal of occupational

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214 *Id.* at 713.

215 *See* Grosjean v. Am. Press Co., 297 U.S. 233, 245-46 (1936); *Near*, 283 U.S. at 713.

216 See Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPS. 189, 191 (2000) ("Generally, members of the occupation dominate the licensing boards.").

217 Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 UNIV. ST. THOMAS J.L. & PUB. POL'Y 28, 45 (2011) ("[T]he actual individuals that determine the exclusive jurisdiction of the occupation–and therefore the scope of the anticompetitive harm–have strong incentives . . . to expand the reach of their occupation to the detriment of both consumers and other occupations.").

218 *See id*; *Grosjean*, 297 U.S. at 245-46.

219 *See* Bona, *supra* note 217, at 45; *Grosjean*, 297 U.S. at 245-46.

220 KLEINER BOOK, *supra* note 24, at 5-6.

221 CARPENTER II ET AL., *supra* note 33, at 6, 110 (finding Oregon, on average, required $267 in fees, an exam, and a year and a half of education and experience).

licensing regimes.[222] Given the increasing amount of services that are now provided online, the requirement to obtain a license before someone can recommend a veterinarian, provide interior design recommendations, or otherwise advise individuals over the internet threatens to stifle innovation in how service industries are run.[223] Protecting professional speech allows for freedom to engage in desirable, speech-driven, service professions and eliminates the perverse, repressive incentives of government regulators who are all too often also members of the same profession as those who seek to get licensed.[224]

B. *First Amendment Values*

Scholars and jurists have long argued over what values the First Amendment protection for freedom of speech is designed to, or should, serve.[225] This Article will briefly analyze three different First Amendment values and how protecting professional speech comports with these values.

1. Individual Autonomy/Self-Realization

Under the individual autonomy, or self-realization, view of the First Amendment, speech should be protected to the extent that it "fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others."[226] Under this view, freedom of speech is premised on the idea that "[o]ur ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons."[227] Under this Kantian view of autonomy, limits may be put on

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222 KLEINER, *supra* note 36, at 6 (citing KLEINER ET AL., A PROPOSAL TO ENCOURAGE STATES TO RATIONALIZE OCCUPATIONAL LICENSING PRACTICES (Princeton Univ. 2011)) (licensing imposes an annual cost of $203 billion to consumers).

223 *See supra* text accompanying notes 1-12; CARPENTER II ET AL., *supra* note 33, at 170; KLEINER, *supra* note 36, at 24 ("Some even suggest that occupational licensing dampens the rate of innovation within an occupation by setting fixed and in some cases arbitrary rules.").

224 *See* Bona, *supra* note 217, at 45.

225 *See* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 UNIV. CHI. L. REV. 225, 233 (1992); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1; ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Lawbook Exch., LTD 2004) (1948).

226 Baker, *supra* note 27, at 966.

227 Fried, *supra* note 225, at 233.

one's actions only insofar as those actions impede on another's sphere of liberty.[228]

Affording professional speech full protection advances the individual autonomy/self-realization value of the First Amendment: limiting one's professional speech through licensing impedes on their liberty because it inhibits them from deciding for themselves how they want to arrange their lives.[229] While occupational licensing schemes are often justified by consumer protection rationales (i.e. protecting other people's "spheres of liberty"), such schemes should be heavily scrutinized under First Amendment jurisprudence to ensure that no unnecessary limits are imposed on expressive actions, keeping in mind more targeted approaches to dealing with consumer protection, such as laws proscribing fraud.[230]

2. Marketplace of Ideas

The "marketplace of ideas" is "the most familiar metaphor in the First Amendment lexicon."[231] The marketplace of ideas view of the First Amendment was first espoused by Justice Holmes as follows:

> [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[232]

The concept of a marketplace of ideas has long justified expansive protection for free speech.[233]

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228 *Id.* (citing IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Pearson 2d ed. 1989) (1959); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (Hackett Publ'g Co. 2d ed. 1999) (1965)).

229 *Id.*

230 *See id.*; Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371-72, 2375 (2018); *e.g.,* 18 U.S.C. § 1341.

231 Blasi, *supra* note 225, at 1.

232 *Id.* at 2; Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

233 *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318-19, 354 (2010) (invoking the marketplace of ideas to justify invalidating corporate campaign finance limits);

Providing professional speech with full First Amendment protection is consistent with advancing a marketplace of ideas: while professional speech is more about the quality of the service being provided than the truth of an idea per se, the principle of the marketplace of ideas still stands.[234] Protecting professional speech allows for the test of the quality of a speech-based service to be tested through the competition of the market, instead of through censorship by the government.[235]

3. Democratic Self-Government

The view that the First Amendment primarily serves the value of ensuring democratic self-government has been most prominently advanced by Alexander Meiklejohn.[236] According to Meiklejohn, "[w]hen men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American."[237] Under this view, speech should be protected to the extent that it aids in public discourse.[238] Public discourse is defined as including "all communicative processes deemed necessary for the formation of public opinion."[239] While other forms of speech may deserve protection under a self-government view of the First Amendment, the core focus of this view is on speech whose content is on matters of public concern, or political speech.[240]

In determining whether protecting professional speech is consistent with a self-government view of the First Amendment, the relevant question is whether, and to what extent, professional speech aids

Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 537-38 (1980) (invoking the marketplace of ideas to invalidate a regulation prohibiting public utility companies from bills of insert discussing controversial issues of public policy).

234 *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

235 *See id.*

236 Patrick M. Garry, *Self-government Rationale*, FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1018/self-government-rationale.

237 MEIKLEJOHN, *supra* note 225, at 26.

238 *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 486 (2011).

239 Post, *supra* note 238, at 486.

240 *See id.*

in public discourse.[241] The tour guide industry is built on matters of public concern, such as Washington D.C., historic sites, and museums.[242] Telemedicine is currently a matter of great public concern, as it promises to change medical care as we know it.[243] Arguably any form of professional speech is a matter of public concern, as the public has a strong interest in the availability of valuable services.[244]

The difficulty in determining what speech touches matters of public concern illustrates a central problem with the democratic self-government theory of the First Amendment: it leads to many difficult line-drawing questions.[245] It is not inherently clear what speech should be "deemed necessary for the formation of public opinion."[246] Moreover, it is hard to see what role watching dog-fighting videos[247] or playing violent video games[248] have in forming public opinion (outside of the strong public opinions that have formed against these forms of expression). Yet both cases have been held to be protected speech under the First Amendment.[249] Thus, while the democratic self-governance view has some staunch supporters in academia, the view seems to have minimal influence in actual First Amendment doctrine.[250]

C. *Claims of First Amendment Lochnerism*

One complaint that many have raised towards providing First Amendment protections to professional speech, as well as other "economically motivated" aspects of speech, is that in moving to provide such protections, the courts are engaging in First Amendment *Loch-*

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241 *Id.*

242 *See* Edwards v. District of Columbia, 755 F.3d 996 (2014).

243 *See* Kara Gavin, *Telehealth Visits Skyrocket for Older Adults, but Concerns and Barriers Remain*, UNIV. MICH. HEALTH LAB (Aug. 17, 2020, 11:00 AM), https://labblog.uofmhealth.org/rounds/telehealth-visits-skyrocket-for-older-adults-but-concerns-and-barriers-remain; *see* Hines v. Alldredge, 783 F.3d 197 (5th Cir. 2015), *abrogation recognized by* Hines v. Quillivan, 982 F.3d 266 (5th Cir. 2020).

244 Eugene Volokh, *The Trouble with "Public Discourse" as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567 (2011).

245 *Id.* at 567-68.

246 *Id.*; Post, *supra* note 238, at 486.

247 *See* United States v. Stevens, 559 U.S. 460 (2010).

248 *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011).

249 *Stevens*, 559 U.S. at 482; *Brown*, 564 U.S. at 805.

250 *See* Garry, *supra* note 236; *Stevens*, 559 U.S. at 482; *Brown*, 564 U.S. at 805.

*ner*ism.[251] Many academics and practitioners have accused the Court of expanding the coverage of the First Amendment to cover purely economic activity that has been considered to be outside the reach of Fourteenth Amendment substantive due process since the demise of *Lochner*.[252] In doing so, the accusations go, the Court is "weaponizing" the First Amendment to enact their policy preferences.[253] However, these claims, at least as applied to the Court's recent move to protect professional speech, are unpersuasive.[254] There have been many critiques levied at *Lochner* in the over-100 years since the case was decided.[255] An analysis of two of the main critiques shows how protecting professional speech under the First Amendment differs sharply from protecting the freedom to contract under Fourteenth Amendment substantive due process.

One of the main complaints of the *Lochner* decision was that the right recognized, freedom of contract, was an illusory right.[256] Because of the unequal bargaining power between workers and employers, the legislation being struck down under the *Lochner* line of cases advanced freedom of contract by evening the playing field, while *Lochner* made it more difficult for workers to exercise bargaining power.[257]

On this account, *NIFLA*, and the broader movement to protect professional speech, can be easily distinguished from *Lochner*. Occupational licensing disadvantages potential professionals by making it more difficult to make a living.[258] By reviewing occupational licensing of speech under a strict scrutiny analysis the Court provides an actual right to professionals, as they are free to engage in professional speech, and thus engage in a number of occupations, without govern-

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251 Post & Shanor, *supra* note 31, at 166 (accusing the D.C. Circuit, after the *Edwards* case, of reviving "*Lochnerian* substantive due process").

252 *See, e.g.*, Kessler, *supra* note 31, at 1998; Shanor, *supra* note 31.

253 *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

254 Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371-72, 2375 (2018).

255 *See, e.g.,* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873.

256 *See, e.g.,* Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015).

257 *See* Sunstein, *supra* note 255, at 882 (criticizing *Lochner* because it viewed "consideration of the plight of the disadvantaged [as] insufficiently public or general and not neutral at all").

258 *See supra* Background Section I.

ment interference.[259] Thus, unlike *Lochner*, protecting professional speech gives people more power to advance their economic well-being.[260]

Another of the prevalent critiques of *Lochner* is that it was blatant judicial activism.[261] By recognizing a right not stated in the Constitution, the Court enacted "Mr. Herbert Spencer's Social Statics."[262] Contrast this with providing professional speech protection under the First Amendment, where the text of the Amendment explicitly protects the "freedom of speech."[263] Additionally, as discussed in subsection A, occupational licensing of speech hits at the heart of the First Amendment's strong distrust of prior restraints.

Some critics, particularly those of a democratic self-governance persuasion, will respond that professional speech, because of its economic nature, does not fall under the umbrella of the First Amendment.[264] However, the Court resolutely denounced this view in *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, where it stated "[i]t is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."[265] Additionally, the view that speech that is engaged in for financial purposes is unprotected by the First Amendment would be untenable, as "a great deal of vital expression" results from economic motives.[266] Thus, the focus should not be on whether the speech is being conveyed for economic motives, but whether the speech falls under a historic exception to the reach of the First Amendment.[267]

CONCLUSION

The Court's decision in *NIFLA*, reaffirming the protection that professional speech receives under the First Amendment, should be

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259 *See Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. at 2371-72, 2375; Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

260 *See supra* Background Section I.

261 *See, e.g.,* Sunstein, *supra* note 255, at 874.

262 *See* Lochner v. New York, 198 U.S. 45, 75 (1905), *overruled in part by* Ferguson v. Skrupa, 83 S. Ct. 1028 (1963).

263 *See* U.S. CONST. amend. I.

264 *See* Garry, *supra* note 236.

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

266 Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011).

267 United States v. Stevens, 559 U.S. 460, 468-69 (2010).

celebrated.[268] The ability of people to freely speak in a professional setting, subject to regulations that can pass strict scrutiny, is beneficial for everyone involved. For the speaker, it opens up opportunities to work in certain service fields that can provide gainful employment as well as personal fulfillment.[269] For the consumer, it allows for more options in the service marketplace, thus leading to lower prices and higher quality.[270] Occupational licensing is commonplace throughout all 50 states and the District of Columbia in the 21st Century.[271] While economists and politicians can argue about the merits of widespread occupational licensing, the First Amendment has long mandated "that we presume that speakers, not the government, know best both what they want to say and how to say it."[272] The Supreme Court's decision in *NIFLA* confirms that this central principle of the First Amendment applies equally when people speak in a professional capacity.[273] Thus, occupational licensing laws must be carefully crafted to avoid infringing the free speech rights of those who, in whole or in part, speak for a living.[274]

NIFLA is already having an impact on litigation in the lower courts. For example, the Fifth Circuit recently held that their earlier decision in Dr. Hines' case is abrogated and has remanded the case so that the District Court can consider Dr. Hines's claim under the heightened standard of *NIFLA*.[275] This and other cases will be watched closely as they will provide the first look at the impact and reach of *NIFLA*.

The First Amendment is a powerful tool, one that provides protections for incitements of violence,[276] publication of sensitive and private information,[277] and speech that inflicts emotional distress on the listener.[278] It is assuring to see the Court recognize that the First

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268 *See* Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371-72, 2375 (2018).

269 *See supra* Background Section I.

270 Obama Report, *supra* note 25, at 4.

271 CARPENTER II ET AL., *supra* note 33, at 6.

272 Riley v. Nat'l Fed'n of the Blind of N.C, Inc., 487 U.S. 781, 790-91 (1988).

273 *Nat'l Inst. of Family & Life Advocs.*, 138 S. Ct. at 2371-72, 2375.

274 *See id.*

275 Hines v. Quillivan, 982 F.3d 266, 272 (5th Cir. 2020).

276 Brandenburg v. Ohio, 395 U.S. 444 (1969).

277 Fla. Star v. B.J.F., 491 U.S. 524 (1989).

278 Snyder v. Phelps, 562 U.S. 443 (2011).

Amendment also protects professional speech; speech that provides inherent value to everyday Americans.[279]

[279] *See* Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371-72, 2375 (2018); *supra* Background Section I; Obama Report, *supra* note 25, at 4.