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Professional Speech at Scale

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ABSTRACT

Regulatory actions affecting professional speech are facing new challenges from all sides. On one side, the Supreme Court has grown increasingly protective of professionals' free speech rights, and it has subjected regulations affecting that speech to heightened levels of scrutiny that call into question traditional regulatory practices in both law and medicine. On the other side, technological developments, including the growth of massive digital platforms and the introduction of artificial intelligence programs, have created brand new problems of regulatory scale. Professional speech is now able to reach a wide audience faster than ever before, creating risks that misinformation will cause public harm long before regulatory processes can gear up to address it.

This article examines how these two trends interact in the fields of health-care regulation and legal practice. It looks at how these forces work together both to create new regulatory problems and to shape the potential government responses to those problems. It analyzes the Supreme Court's developing caselaw on professional speech and predicts how the Court's jurisprudence is likely to shape current legal challenges in law and medicine. The Article further examines the regulatory challenges posed by the change in scale generated by massive digital platforms and the introduction of artificial intelligence. It concludes by recommending ways in which government regulators can meet the new challenges posed by technological development without infringing on protected speech. The crux of our proposal is that incremental change in the traditional state regulatory process is insufficient to meet the challenges posed by changes in technological scale. Instead, it is time to ask bigger questions about the underlying goals and first principles of professional regulation.

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I. INTRODUCTION

Living in an era of massive digital platforms has significant implications for professional speech. Mass communication used to be the province of established media outlets—newspapers, television and radio stations, and magazines. But the internet revolution made mass communications available to the individual, and the growth of social media, along with easier access to video production and distribution, further facilitated communication.[1] The growth of massive digital platforms has had implications for regulation in general, and matters historically falling into the areas of medical, legal, or other licensed professional practice are no exception to that trend.

Doctors and lawyers can now communicate with large audiences; their influence is no longer tied to one-on-one consultations. Moreover, individuals who lack professional training and licensing can similarly communicate with large audiences about legal and medical matters, sometimes spreading harmful misinformation. Finally, technology enables lawyers and medical professionals to meet face-to-face with clients and patients across state lines without the inconvenience of travel. All of these new capabilities raise serious questions about professional licensing.

The growth in online communication is accompanied by the Supreme Court's increasingly strong interest in, and protection of, commercial and professional speech. In a 2018 case, the Court held that professional speech was not categorically different from any other type of speech.[2] This means that going forward, most restrictions on professional speech will be analyzed in the same manner as restrictions on non-professionals' speech—that is, the speech limitations will typically fall under strict scrutiny, the hardest standard to satisfy. Scholars have warned that such a ruling would significantly restrict states' long-standing authority to engage in professional regulation—and that such restrictions could have far-ranging consequences in areas such as law and medicine.[3]

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[1] Paul Ohm, *Regulating at Scale*, 2 GEO. L. TECH. REV. 546 (2018).

[2] Natl. Inst. of Fam. and Life Advocates v. Becerra (NIFLA), 138 S. Ct. 2361 (2018).

[3] Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward A More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 194 (2018) ("These cases pose significant risks to public health, whether from more extensive (and less well-understood) off-label uses of drugs or more extensive (and less well-understood) uses of electronic and conventional cigarettes."); William French, Note, *This Isn't Lochner, It's the First Amendment: Reorienting the Right to Contract and Commercial Speech*, 114 NW. U.L. REV. 469, 471 (2019) (acknowledging critics' fears that "as soon as the First Amendment wholly protects commercial speech, economic legislation as the country knows it will crumble"); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 182 (2015) (questioning whether the Supreme Court's increased protection of First Amendment rights means that "those who engage in 'occupational speech,' like lawyers and doctors, have an equivalent right to engage in deliberately false speech").

This Article examines how professional regulation will change given both increasing judicial scrutiny and new technological capabilities. It re-envisions how professional regulation can adapt to the change in regulatory scale and, at the same time, meet the Supreme Court's increasingly high bar for speech limitations. Part II begins with an analysis of the Supreme Court's new landscape for regulations affecting speech. It examines the constitutional law of professional speech, analyzing how the Court has increasingly protected the speech rights of professionals. Part III extends the speech analysis further into the particular contexts of law and health care, analyzing how current controversies in professional regulation will be affected by the Supreme Court's higher bar for speech protection and examining how far the state can go in regulating the provision of legal and medical advice.

Part IV moves to the particular regulatory challenges posed by the change in scale generated by both massive digital platforms and artificial intelligence. We often think of the doctor-patient and lawyer-client relationships as existing within a professional dyad. But what happens when lawyers and doctors can reach much larger audiences online, and what happens when professionals take a back seat to algorithms? This Part examines regulations on telemedicine and technology-assisted legal practice as well as pressure to enable cross-border practice in both law and medicine.

Finally, Part V brings these issues together to discuss recommendations for how the regulatory landscape should integrate technological innovations at the same time as it backs away from relying on direct regulation of technological speech. Although technology went through a period of extremely rapid change in capability at the turn of the millennium, both law and medicine were slow to catch up. The COVID-19 pandemic swept away prior resistance to change in medicine and law. When public health and fundamental justice were on the line, institutions quickly adapted to encourage virtual medical visits and even online jury trials. The pandemic will end, but the regulatory structure of both law and medicine are unlikely to return to their prior status. This Article concludes with an analysis of how professional regulation can be re-imagined in the modern era to improve the reliability of legal and medical information while maintaining an environment of robust and open communication.

II. THE SUPREME COURT'S GROWING SKEPTICISM OF SPEECH LIMITATIONS

One of the Roberts Court's most notable jurisprudential developments has been its robust protection of First Amendment rights. The Roberts Court has been described as "the most free-speech-protective

Supreme Court in memory."[4] This protection is especially apparent when regulatory efforts clash with free-speech claims. In recent years, free speech advocates have generally prevailed against speech-limiting regulatory efforts in diverse areas.[5]

Whether this heightened protection is a good thing or a bad thing depends on one's perspective.[6] Supporters applaud the Court's protection of civil liberties.[7] Critics, on the other hand, charge that the Court "has turned the constitutional protection for free speech into a tool with which to blow holes in the regulatory state."[8]

Traditional regulatory regimes for law and medicine, after all, regulate speech in many ways. Regulatory regimes determine who can speak—that is, who is authorized to offer legal or medical advice. They may also determine to whom professionals can speak—for example, whether licensed professionals may offer services online to out-of-state clients. They may determine how professionals speak, especially how they structure their businesses—that is, can they partner with individuals outside their profession? Can they be employed by a business entity funded by outside investors?

This section examines the likely impact of the Court's First Amendment jurisprudence on professional regulation. It first examines the regulatory landscape within the legal profession and explains how free-speech claims fit into that landscape. Next, it turns to health care, examining how free-speech challenges intersect with traditional regulatory authority over medical professionals. Finally, it explores the Supreme Court's recent jurisprudence touching on professional regulation,[9] including a greater emphasis on free-speech rights in the professional

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[4] Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 64 (2016).

[5] *See, e.g.* Janus v. Am. Fedn. of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 (2018) (striking down public union agency fees); NIFLA, 138 S.Ct. 2361 (striking down disclosure requirements for crisis pregnancy centers); Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (striking down state restrictions on the sale of prescription data); Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010) (striking down campaign finance restrictions).

[6] Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1253–54 (2020) (concluding that critics' problem with the Supreme Court's heightened speech protection "was not that it illegitimately sought to vindicate unenumerated rights, employed overly vague rules of decision, or failed to take adequate account of economic inequality," but that "[w]hat they meant instead was that the Court failed to show adequate deference to the policy judgments of democratically elected legislatures").

[7] Erwin Chemerinsky, *The First Amendment in the Era of President Trump*, 94 DENV. L. REV. 553, 557 (2017) (noting that "the Roberts Court has been very protective of speech" by "expanding who is protected by the First Amendment's safeguarding of expression").

[8] Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377, 1380 (2020).

[9] NIFLA, 138 S. Ct. 2361.

sphere as well as increasing skepticism of professional practices that inhibit economic competition.[10] It analyzes arguments that the Supreme Court's recent jurisprudence undermines regulatory authority in these areas, questioning how far the Court's current jurisprudence might go in limiting traditional areas of regulatory authority over both lawyers and medical practitioners.

A. Protecting Professionals' Commercial Speech

Until recently, there were few cases exploring the tension between professional regulation and free-speech jurisprudence.[11] Law and medicine, as two of the earliest recognized professions, have long been regulated at the state level through the licensing of professionals.[12] In the late nineteenth century and early twentieth century, the story was one of regulatory growth: during that period, states adopted licensing and regulatory regimes for many professions and occupations, often based on the earlier model originally developed for law and for medicine.[13] And although the Supreme Court struck down some of these early regulatory efforts, most notably in its *Lochner* decision, the Court shifted gears in 1937 and later upheld state regulatory efforts under a highly deferential "reasonable basis" standard.[14]

It was not until several decades after the end of the *Lochner* era that the Supreme Court began striking down regulatory actions on free-speech grounds.[15] These early cases tended to focus on marketing activities, protecting the rights of labor-union lawyers to offer representation to injured workers[16] and striking down advertising prohibitions on pharmacies[17] and lawyers.[18] The Court gave the greatest protection to speech rights in cases in which "political expression" was at issue—thus protecting the rights of the NAACP and the ACLU to seek clients in high-profile civil-rights litigation.[19]

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[10] North Carolina Bd. of Dental Examiners vs. FTC, 574 U.S. 494 (2015).

[11] Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 184 (2014) (noting that "[t]he protection available to occupational speech 'is one of the least developed areas of First Amendment doctrine.").

[12] Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation-Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1172 (2003).

[13] *Id.*

[14] Armijo, *supra* note 8.

[15] Nick Robinson, *The Multiple Justifications of Occupational Licensing*, 93 WASH. L. REV. 1903 (2018).

[16] Bhd. of R. R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1 (1964).

[17] Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[18] Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

[19] Natl. Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 429 (1963) (stating that "[i]n the context of NAACP objectives, litigation is not a technique of resolving

When marketing activities arose from a desire for payment rather than a desire to effect political change, the Court still offered some protection, though at a lower level of scrutiny. Applying intermediate scrutiny to commercial speech allowed the Court to uphold some restrictions, such as limitations on direct personal solicitation of clients.[20] In upholding the restriction, the Court noted that the "procurement of remunerative employment is . . . only marginally affected with First Amendment concerns," and that it "falls within the State's proper sphere of economic and professional regulation."[21]

In recent years, however, the Supreme Court has suggested that it may be backing away from its prior dicta that appeared to devalue commercial speech.[22] In *Sorrell v. IMS Health Inc.*, pharmaceutical companies challenged a Vermont restriction that barred the sale of doctors' prescription data for marketing purposes, although it allowed the data to be shared for non-commercial uses.[23] Vermont argued that the prohibition regulated conduct, rather than speech, and it asserted that even if the prohibition did limit speech, the state had an interest in protecting doctors' privacy that was sufficient to justify a restriction on commercial speech.[24] The Supreme Court disagreed with the state's position and struck down the prohibition.[25] It explained that "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish" and that it was up to "the speaker and the audience, not the government" to assess the value of that information.[26] The Court suggested that commercial speech restrictions could be supported when necessary to combat false or misleading advertising and related marketplace harms but that a state may not impose regulatory restrictions that burden commercial speech when the state's goal is "to tilt public debate in a preferred direction."[27]

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private differences" but is rather "a form of political expression"); In re Primus, 436 U.S. 412, 434 (1978) ("Where political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs.").

[20] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

[21] *Id.* at 459.

[22] Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133–206, 196 (2016) (noting that "the Supreme Court arguably cast a shadow on commercial speech's lower-value status in *Sorrell*").

[23] Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

[24] *Id.*

[25] *Id.* at 579.

[26] *Id.*

[27] *Id.* at 578-79.

B. Protecting the Content of Professional Speech

The Supreme Court's early cases largely examined how professionals attracted business—they did not touch on the scope of professional speech or regulation once that professional relationship had been established. In fact, the Court had been so deferential to state regulation that many observers believed that professional speech was "categorically exempted" from First Amendment scrutiny once a "personal nexus between professional and client" had been established.[28]

The "personal nexus" concept came from a concurrence by Justice White in *Lowe v. Securities Exchange*, but was never adopted by the Supreme Court itself.[29] The case arose when the SEC sought to restrain an individual who was not a registered securities advisor from publishing newsletters that offered investment advice. Because the Supreme Court held that the SEC's enabling act exempted the newsletter from regulation, it did not have to decide whether the First Amendment would have protected the newsletter writer. Justice White's concurrence, however, delved into the First Amendment principles, concluding that it was necessary "to locate the point where regulation of a profession leaves off and prohibitions on speech begin."[30] Justice White drew the line between advising individual clients and offering general advice to the public at large—the former type of speech, in his view, was subject to regulation as the speech was merely incidental to practicing a profession, but the latter was protected by the First Amendment.[31]

Even though Justice White's view was never adopted by a majority of the Supreme Court, it influenced lower courts, who cited it often in upholding speech restrictions incidental to professional regulation.[32] Under the approach adopted by these lower courts, speech directed generally at the public would be protected by heightened scrutiny under the First Amendment, but speech within the confines of a licensed professional-client relationship could be subject to content-neutral regulation by the state under a rational-basis standard.[33] Under this view, for example, the Ninth Circuit upheld a law that banned sexual orientation change efforts therapy.[34] The court reasoned that because the law prohibited treatment, not discussions about treatment, it regulated

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[28] Robinson, *supra* note 17 at 1930.

[29] Lowe v. SEC, 472 U.S. 181, 211 (1985) (White, J., concurring in the result); Sherman, *supra* note 11, at 185.

[30] Lowe, 472 U.S. at 232.

[31] *Id.*

[32] Sherman, *supra* note 11, at 187 ("[L]ower courts have generally found Justice White's test to be satisfied by the existence of any personal nexus between speaker and listener.").

[33] *See, e.g.*, Kagan v. City of New Orleans, La., 753 F.3d 560 (2014).

[34] Pickup v. Brown, 740 F.3d 1208, 1231-32 (9th Cir. 2014) *abrogated by* Natl. Inst. of Fam. and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

conduct and not speech.[35] This speech/conduct distinction follows from case law developed by district courts and adopted, in some cases, by courts of appeals.[36] According to the court, treatment constitutes conduct even if it consists entirely of speech, as with psychotherapy.[37]

The Supreme Court moved away from this deferential approach in *National Institute of Family and Life Advocates v. Becerra*.[38] The Court in *NIFLA* faced a challenge to the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act"), which had two disclosure requirements. First, it required pregnancy centers to distribute or post a notice informing the public about California's free and low-cost reproductive health programs that provided services such as contraception and abortions.[39] Second, it required unlicensed centers to distribute a notice stating that they were not licensed. A variety of pregnancy centers challenged the notice as unconstitutional compelled speech and sought a preliminary injunction against its enforcement.

In an opinion authored by Justice Thomas, the Supreme Court held that both disclosure requirements violate the First Amendment. The Court criticized decisions from the courts of appeals that "except[ed] professional speech from the rule that content-based regulations of speech are subject to strict scrutiny."[40] The Court explained that "this Court has not recognized 'professional speech' as a separate category of speech."[41] It stated that professional speech was afforded less protection than other speech only in "two circumstances": first, when a law requires professionals to disclose "factual, noncontroversial information" about the services they provide and second, when a regulation of conduct "incidentally involves" speech.[42]

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[35] *Id.* at 1230.

[36] *See* Wynter K. Miller & Benjamin E. Berkman, *The Future of Physicians' First Amendment Freedom: Professional Speech in an Era of Radically Expanded Prenatal Genetic Testing,* 76 WASH. & LEE L. REV. 577, 653 (2019) ("The lower courts have repeatedly approached the problem of identifying professional speech by attempting to differentiate "medical conduct" from physician speech.").

[37] Pickup, 740 F.3d at 1231 ("[A] regulation of only treatment itself—whether physical medicine or mental health treatment—implicates free speech interests only incidentally, if at all").

[38] NIFLA, 138 S.Ct. at 2361; *See* Rodney A. Smolla, *Commercial Speech in Specific Contexts—Commercial Speech and Professional Services—Regulation of 'Professional Speech'*, 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 20:37.40 (2020) ("The Supreme Court largely obliterated the nascent professional speech doctrine in National Institute of Family & Life Advocates v. Becerra.").

[39] NIFLA, 138 S.Ct. at 2369.

[40] *Id.* at 2371.

[41] *Id.*

[42] *Id.* at 2372.

The Court concluded that neither of those circumstances applied to the California law.[43] It explained that the notice about state-based low-cost health programs "in no way relates to the services that licensed clinics provide," but instead informed clients about other services provided by the state.[44] Furthermore, the requirement more than "incidentally" involved speech—its very purpose was communication.[45]

The disclosure of licensure status came closer to qualifying for deferential treatment as a factual, noncontroversial statement about services provided, but the Court concluded that even if the more deferential standard applied, the disclosure requirement would still fail for being unduly burdensome.[46] The Court held that the state had the burden of proof to establish that the licensing disclosure was "neither unjustified nor unduly burdensome."[47] To do so, it would have to show an alleged harm that is "potentially real and not purely hypothetical," and a disclosure requirement that extends "no broader than reasonably necessary" to avoid "chilling protected speech."[48] The Court concluded that the state had failed to establish more than hypothetical harms and had failed to tailor the disclosure requirement, stating that the law "targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech."[49]

The Supreme Court's *NIFLA* decision surprised many onlookers. Constitutional law scholar Erwin Chemerinsky believed that it would be easy for the Supreme Court to uphold the law.[50] After all, "traditionally, warnings and disclosures had not drawn constitutional attacks."[51] The Court's decision suggests that lower courts' interpretation of law will need substantial rethinking. In particular, the speech/conduct distinction is unlikely to play a dispositive role in future cases, even when there is a "personal nexus" between a licensed professional and an individual client or patient. As one scholar explained, "although the Court has upheld regulations of professional conduct that incidentally involved speech, it does not automatically assume that regulations that apply to professionals

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[43] *Id.*

[44] *Id.*

[45] *Id.* at 2373-74.

[46] *Id.* at 2378.

[47] *Id.* at 2377.

[48] *Id.* at 2377-78.

[49] *Id.* at 2378.

[50] Erwin Chemerinsky, *Symposium: Ensuring Accurate Information for Patients Does Not Violate the First Amendment*, SCOTUSBLOG (Dec. 12, 2017, 1:35 PM), https://www.scotusblog.com/2017/12/symposium-ensuring-accurate-information-patients-not-violate-first-amendment/.

[51] Andra Lim, *Limiting NIFLA*, 72 STAN. L. REV. 127, 129 (2020) ("traditionally, warnings and disclosures had not drawn constitutional attacks.").

are always regulations of conduct."[52] He pointed out that the plaintiffs themselves in *NIFLA* provided both advice and pregnancy-related medical services, and that "[t]he mere fact that the plaintiffs were licensed professionals did not render all of their advice regulable conduct."[53] Instead, the Court recognized that the First Amendment protects the content of licensed professionals' speech.

C. Protecting the Marketplace against Anti-Competitive Regulation

Along with protecting commercial and professional speech, the Supreme Court has also recently limited the power of some licensing boards to use their licensing power to control the speech of non-licensed individuals. In North Carolina, the state dental board challenged individuals who operated teeth-whitening kiosks in shopping malls, alleging that they were practicing dentistry without a license.[54] The Federal Trade Commission filed an administrative complaint, arguing that the board's decision "constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act."[55] The board claimed immunity from antitrust regulation as a state entity, and further argued that the state had delegated power to the board to regulate matters affecting public safety.[56]

When the dispute reached the Supreme Court, the Court sided with the FTC. It concluded that the dental board was not immune from antitrust liability because it was controlled by "market participants."[57] The Court explained that a "nonsovereign actor controlled by active market participants" would qualify for immunity only if it met two requirements: first, that the restraint of trade "be one clearly articulated and affirmatively expressed as state policy," and second, that it "be actively supervised by the State."[58] The Court found that the policy of prohibiting the unauthorized practice of dentistry was clearly established, but that the inclusion of teeth-whitening as "dentistry" was less clear. Nor was there any state involvement in the decision to categorize teeth-whitening as dentistry—that decision was made by the board, a majority of which consisted of practicing dentists.[59] The domination of the regulatory board

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[52] Michael E. Rosman, *Is It Time to Revisit the Constitutionality of Unauthorized Practice of Law Rules?,* 20 FEDERALIST SOC'Y REV. 74, 78 (2019).

[53] *Id.*

[54] N. Carolina State Bd. of Dental Examiners v. F.T.C., 574 U.S. 494 (2015).

[55] *Id.* at 501.

[56] *Id.; see also id.* at 522 (Alito, J., dissenting).

[57] *Id.* at 504.

[58] *Id.*

[59] *Id.*

by market participants, the Court stated, created a "risk that active market participants will pursue private interests in restraining trade."[60]

Although the Supreme Court's decision was not based expressly on a free-speech rationale, the decision will still reshape state regulatory authority of matters involving professional speech. A licensing regime, after all, is a means of "essentially granting 'speech monopolies'" to those it licenses.[61] Licensing practices identify a "class of speakers who may engage in certain forms of communication," thereby "entrench[ing] the power of those speakers" in relation to those who lack such state-sanctioned authority.[62] Thus, by limiting the power of practitioner-dominated state boards to engage in protectionist activity, the Supreme Court was protecting the free-speech rights of unlicensed individuals.[63] As with the Court's other cases, however, the decision meant that professional regulatory bodies would be given less deference.

In some ways, this decision may risk undermining the goals of professional regulation. Professor Claudia Haupt, who has written extensively about professional speech, has argued that the professions should be thought of as "knowledge communities."[64] She points out that state regulations that limit or control the content of professional speech may be more defensible if those restrictions depend on the professional judgment of the American Medical Association or equivalent entities.[65] Increased participation of political entities, in her view, "should result in a high degree of skepticism toward state interference at odds with professional insights."[66]

Even so, one of the likely results of the *North Carolina Board of Dental Examiners* case is greater political oversight over state professional boards. From the beginning, it was clear that the case would affect professional regulation beyond dentistry. At oral argument, Justice Breyer raised the question of whether a decision in favor of the FTC could affect medical credentialing and expressed concern that "neurologists, not non-physician state regulators," be allowed "to decide who can be a neurologist."[67]

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[60] *Id.* at 510.

[61] Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U.L. REV. 885, 974 (2000).

[62] *Id.*

[63] Armijo, *supra* note 8, at 1420–21 ("When the state has the power to revoke an occupational license for a speech-related reason and the grounds for revocation are subject to a lesser standard of constitutional review, the government grants itself the speech-hostile . . . power to ban individuals from the occupations of their choice based on what they say.").

[64] Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 YALE L.J. FORUM 150, 171 (2017).

[65] *Id.*

[66] *Id.*

[67] Eric M. Fraser, *Argument Analysis: Court Wary of Immunity for Licensing Boards, but What About Doctors?*, SCOTUSBLOG (Oct. 15, 2014, 12:29 PM),

Although Justice Breyer ultimately joined the majority decision, his concern was not unwarranted—commentators have noted that "neurologists and other doctors are just as capable of anticompetitive actions as are dentists."[68] The opinion does not carve out an exception for regulations resting on specialized medical knowledge.

The *Dental Examiners* opinion has influenced legal regulation as well. LegalZoom, a company that helps customers "create their own legal documents addressing a variety of routine legal matters" joined with other legal services providers and law professors to file an amicus brief in support of the FTC.[69] LegalZoom explained that it had also "been subject to anticompetitive actions taken by self- and financially-interested regulatory agencies controlled by private market participants that have threatened to restrict the market choices available to consumers," including in the state of North Carolina. After the Supreme Court ruled for the FTC, LegalZoom managed to reach a favorable settlement with regulators.[70]

In the five years after the Supreme Court's decision, there has been "a wave of private action suits against various state occupational licensing authorities."[71] One of those cases involved a Texas restriction on telemedicine treatment.[72] The federal district court relied on the Supreme Court's *Dental Examiners* decision to conclude that the plaintiffs had successfully set out a prima facie case showing that their antitrust claim would likely succeed. The district court therefore granted an injunction against the regulation.[73] The state regulatory board "later dropped its appeal, seemingly fearing that the circuit court would rule that the regulation did not have state action immunity."[74]

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https://www.scotusblog.com/2014/10/argument-analysis-court-wary-of-immunity-for-licensing-boards-but-what-about-doctors/.

[68] *Id.*

[69] Brief of Legalzoom.com, Inc. et al. as Amici Curiae Supporting Respondent, N. Carolina State Bd. of Dental Examiners v. F.T.C, 574 U.S. 494 (2015), 2014 WL 3895926 (2014).

[70] Keith A. Call, *Could Our "Ethics" Actually Be Illegal?*, 29 UTAH B.J. 34 (May/June 2016) (noting that a suit filed in the wake of the *Dental Examiners* case "resulted in a consent decree that allows LegalZoom to provide certain types of legal services in North Carolina, subject to certain consumer protection measures"); Caroline Shipman, *Unauthorized Practice of Law Claims Against Legalzoom--Who Do These Lawsuits Protect, and Is the Rule Outdated?*, 32 GEO. J. LEG. ETHICS 939, 947 (2019) (noting the North Carolina Legislature also passed a bill setting parameters similar to those of the settlement).

[71] Robinson, *supra* note15.

[72] Teladoc, Inc. v. Tex. Med. Bd., 112 F. Supp. 3d 529 (W.D. Tex. 2015).

[73] *Id.*

[74] Robinson, *supra* note 15.

III. PROFESSIONAL PRACTICE AND FREEDOM OF SPEECH

The Court's speech jurisprudence is new enough that it's too soon to tell just how far it will go in limiting regulation in traditional professional spheres like law and medicine. But the Court's recent decisions raise significant questions that continue to spawn a great deal of litigation likely to affect the regulatory landscape in both medicine and law. This section examines the most significant of those ongoing challenges in law and health care and analyzes what the Supreme Court's jurisprudence might mean for traditional regulatory actions in these areas of professional practice.

A. The Free Speech Landscape in Legal Practice

At its core, the regulation of legal practice is the regulation of speech.[75] The practice of law, in fact, is *only* speech—while many doctors may perform surgery or other physical procedures on patients, lawyers do not. Historically, the regulation of legal practice has centered on two areas. First is the question of who can speak—that is, how does the state license individual practitioners and how does it stop non-licensed individuals from encroaching on areas carved out for licensed attorneys? The second area of regulatory tension relates to what can be said, especially for the purpose of marketing legal services.

The last twenty years have seen major change in some aspects of lawyer regulation and growing frustration at the lack of change in other areas. States have offered greater uniformity and reciprocity in licensing, making law degrees more geographically portable than in prior decades.[76] At the same time, regulatory changes have failed to improve access to legal services, creating growing dissatisfaction with the unavailability of legal services to even middle-class individuals and small businesses.[77]

A few states have voluntarily begun to experiment with loosening regulatory structures in order to promote access to justice. The state of Washington was one of the first to license non-lawyer professionals to undertake some tasks historically reserved for lawyers, but the state abandoned the program when costs appeared to outweigh the program's

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[75] *See* Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1302-03 (2016) (noting that many professions are based in speech, and that "[i]t is therefore all the more troubling that there has not yet been a comprehensive theory of professional speech advanced in the courts and the legal literature.").

[76] Robert J. Derocher, *Breaking Barriers: In a Changing Profession, What Is the Impact of the Uniform Bar Examination?*, ABA Bar Leader (Sept.-Oct. 2019), *at* https://www.americanbar.org/groups/bar_services/publications/bar_leader/2019_20/september-october/breaking-barriers-in-a-changing-profession-what-is-the-impact-of-the-uniform-bar-examination/.

[77] Cassandra Burke Robertson, *The Facebook Disruption: How Social Media May Transform Civil Litigation and Facilitate Access to Justice*, 65 ARK. L. REV. 75, 75–98 (2012).

benefit.[78] Other states have taken a much more radical approach. The Utah Supreme Court adopted a "sandbox" program to pilot "new and innovative legal business models and services."[79] And Arizona has gone the furthest, enacting a wholesale change in late August 2020 that "has gotten rid of two of what many consider the main pillars of our professional independence: the rule against fee-splitting with non-lawyers and the rule against paid-for recommendations."[80]

Most of the states, however, continue to maintain traditional regulatory structures. These states are increasingly facing legal challenges, often based on free speech grounds. In recent years, litigation has challenged licensing restrictions that prohibit non-lawyers from offering legal advice, prohibitions on non-lawyer ownership of law firms, and restrictions on marketing and commercial speech.

1. Licensure

In general, states have taken a harder line on "unauthorized practice" rules in law (known as "UPL") than in medicine. In medicine, most unauthorized practice prosecutions focus on individuals who falsely hold themselves out to be licensed professionals. Although legal practice also has such cases, there are also many cases involving individuals who were honest about their status as non-lawyers.[81] Before the 1980s, there had been "surprisingly few constitutional challenges to unauthorized practice prohibitions."[82] In fact, a study by Professor Deborah Rhode identified only ten reported decisions considering First Amendment claims at all.[83]

Some of the earliest free-speech challenges to lawyer regulation occurred when state bars tried to limit assistance to individuals engaged in self-help legal practice. Texas famously prosecuted a legal publisher for printing forms intended to be used by *pro se* litigants.[84] More recently, state bars have gone after online service providers such as LegalZoom.[85] In

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[78] Lyle Moran, *How the Washington Supreme Court's LLLT Program Met Its Demise*, ABA J., July 9, 2020.

[79] Utah Supreme Court, The Office of Legal Services Innovation, https://sandbox.utcourts.gov/.

[80] Ron Minkoff, *Arizona's Sweeping Rule Changes Permit More Non-Lawyer Involvement in Legal Services,* FRANKFURT KURNIT KLEIN & SELZ PC PROFESSIONAL RESPONSIBILITY LAW BLOG (Sept. 9, 2020), https://professionalresponsibility.fkks.com/post/102ge8x/arizonas-sweeping-rule-changes-permit-more-non-lawyer-involvement-in-legal-servi.

[81] Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 33 (1981) (finding that a minority of unauthorized practice claims "concerned laymen fraudulently holding themselves out as attorneys").

[82] *Id.* at 44.

[83] *Id.*

[84] In re Nolo Press/Folk Law, Inc., 991 S.W.2d 768 (Tex. 1999).

[85] Catherine J. Lanctot, *Does Legal Zoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L.

recent years, the number of such challenges has grown—though appellate courts have "uniformly rejected such challenges . . . based on a wide variety of unconvincing rationales," such as the idea that nonlawyers' legal advice is conduct rather than speech, or that if legal advice is speech, it is merely "incidental" to conduct.[86]

Yet as the free-speech challenges in this area grow, courts are increasingly having to grapple with questions about whether their precedent is consistent with the Supreme Court's recent protection of professional speech. Ohio case law offers a recent example of this tension. Ohio has taken an explicitly "expansive" position.[87] *Cincinnati B. Assn. v. Foreclosure Sols* involved a complaint against advisors who helped families try to avoid foreclosure on their homes. In enjoining the conduct and imposing penalties on the defendants, the court held that efforts to "advise [others] of their legal rights," can qualify as the unauthorized practice of law.[88] Under the court's holding, it did not matter whether the advisors held themselves out as attorneys; the court stated that "laypersons may not insulate themselves . . . by simply informing customers facing foreclosure that the layperson is not an attorney and is, therefore, incapable of giving legal advice."[89] Unfortunately, this Ohio case did not grapple directly with potential First Amendment defenses to the UPL claim; the issue may not have been raised by the defendants. The Ohio Attorney General did file an amicus brief urging the court to adopt a "carefully crafted" definition of the practice of law, warning the court that an overly broad standard could "easily, although inadvertently, sweep into their ambit the many legitimate housing counselors who provide vital and valuable loss-mitigation and foreclosure prevention counseling in Ohio."[90]

While that case didn't directly address free-speech claims, two justices on the Ohio Supreme Court have signaled a willingness to reconsider the court's earlier precedents on First Amendment grounds. Justice Patrick DeWine, joined by Justice Sharon Kennedy dissented when the Ohio Supreme Court upheld a UPL charge based on an individual's action taken to help a church avoid foreclosure.[91] The facts show that the individual had taken three actions on behalf of the church: he (1) "advised

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REV. 255, 262 (2011); Mathew Rotenberg, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 725 (2012).

[86] Michele Cotton, *Improving Access to Justice by Enforcing the Free Speech Clause*, 83 BROOK. L. REV. 111, 155 (2017).

[87] Cincinnati Bar Assn. v. Foreclosure Sols., L.L.C., 914 N.E.2d 386, 389 (Ohio 2009) ("We have defined the practice of law expansively.").

[88] *Id.* at 390.

[89] *Id.*

[90] Ohio Attorney General Richard Cordray as Amicus Curiae in Support of Neither Party, Cincinnati Bar Assn. v. Foreclosure Sols., L.L.C., 914 N.E.2d 386 (Ohio 2009), 2009 WL 1939104 (June 25, 2009).

[91] Ohio State Bar Assn. v. Watkins Glob. Network, 150 N.E.3d 68 (Ohio 2020).

the church to try to 'find a solution before [the matter got] out of hand' and suggested that it 'try to raise the needed funds' and accept a settlement offer from PNC Bank" (2) he "apparently indicated to the bank's attorney that the bank should 'mediate' rather than litigate the dispute," and (3) he "may have expressed to the bank's attorney that he didn't believe that the church should owe on the debt."[92] None of this advice was clearly wrong, and the defendant had never purported to be acting as an attorney. Even so, the court found this evidence strong enough to support a $1,000 fine and an injunction against further action.

In his dissent, Justice DeWine wrote that "merely expressing an opinion with legal implications is not the practice of law," and that "a corollary of the principle that one doesn't violate our rules merely by voicing an opinion with legal implications is that one doesn't violate our rules just because one offers such an opinion in the course of providing another service to a client."[93] DeWine pointed to the Supreme Court's decision in *NIFLA* to explain that "[o]ur authority to regulate the practice of law is further limited by the associational and free-speech rights guaranteed by the First Amendment to the United States Constitution."[94] Justice DeWine also noted that "the Ohio State Bar Association, a professional association of lawyers, is acting as the prosecutor in this case" and cited the *Dental Examiners* case for the proposition that the Supreme Court had recently held that regulatory schemes relying on "active market participants" may violate antitrust law.[95]

2. Outside Investment in Law Practice

Most states retain restrictions on the "corporate practice of law"—that is, allowing nonlawyers to invest in law practices or to own law firms. Professor Renee Knake Jefferson has argued that corporate practice restrictions violate the First Amendment. She asserts that "commercial speech about the delivery of legal services is inherently political speech, speech that goes to the heart of meaningful access to the law, speech deserving of the strongest protection that the Constitution offers." She therefore believes that bans on external investment necessarily "function as content regulation that suppresses ideas."[96] The law firm of Jacoby and Meyers, LLP has made similar arguments challenging the corporate practice doctrine in court; it sued in New York, New Jersey, and Connecticut, arguing that the ban on investment violates the firm's

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[92] *Id.* at 80 (DeWine, J., concurring in part and dissenting in part).

[93] *Id.* at 78 (DeWine, J., concurring in part and dissenting in part).

[94] *Id.* at 79 *citing* Natl. Inst. of Family & Life Advocates v. Becerra, 138 S.Ct. 2361, 2371-2372, (2018).

[95] *Id.* at 79.

[96] Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 36 (2012).

constitutional rights.[97] The law firm lost its challenges in New York and Connecticut and voluntarily dismissed its New Jersey case.[98] Even so, the underlying constitutional issues are likely to be picked up by others making similar claims in the future.

3. Marketing and Commercial Speech

Protection for commercial speech continues to be a source of tension in legal regulation. The ABA Model Rules of Professional Conduct, which form the basis of most states' rules, now prohibit only "false or misleading communication" in advertising claims.[99] Even under the more relaxed modern regulatory scheme, however, there is plenty of room for disagreement about the allowable scope of attorney speech. For example, states may take a hard line in defining what is "misleading." In one recent case, an advertisement was held to be misleading when it "featured a relatively comic and innocuous fictional vignette in which an insurance company is depicted as capitulating and settling its case upon learning the identity of the plaintiff's personal injury firm."[100] Of course, there is room for judicial interpretation in deciding what constitutes a "misleading" communication. Nevertheless, the Supreme Court's decision in *NIFLA* suggests that restrictive decisions are vulnerable if they rely merely on "hypothetical" harms.[101] Without evidence that a reasonable client is likely to be misled by such an advertisement, the prohibition should fail.

Attorney speech that falls in the gray area between "commercial" and "political" speech is sometimes subject to challenge. The Virginia Supreme Court was sharply divided when one attorney was charged with a disciplinary violation for failing to label his blog posts, which discussed criminal justice issues, as "advertisements." Ultimately the court upheld the labeling requirement, concluding that the attorney used his blog as a way to generate client interest and that the state could therefore compel him to label the posts.[102] Two dissenting justices, however, would have held differently; they argued that "[w]hen commercial and political elements are intertwined in speech, the heightened scrutiny test must apply to all of the speech."[103] The case was decided several years before the Supreme Court's

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[97] Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 191 (2014).

[98] Charles Toutant, *Jacoby & Meyers Drops Bid for Nonlawyer Equity Stake*, N.J. L. J. (July 29, 2014); Mark Dubois, *Jacoby & Meyers Case-Not Only Unsuccessful but Moot, Too*, CONN. L. TRIB. (March 27, 2017).

[99] MODEL RULES PROF'L CONDUCT r. 7.1 (AM. BAR ASS'N 2020).

[100] Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1, 16 (2002).

[101] Natl. Inst. of Fam. and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

[102] Hunter v. Virginia State Bar ex rel. Third Dist. Comm., 744 S.E.2d 611, 620 (Va. 2013) ("Hunter's blogs are commercial speech and, thus, constitute lawyer advertising.").

[103] *Id.* at 623 (Lemons, J., dissenting).

NIFLA decision, and if the situation arose now, the attorney's case against compelled disclosure would be even stronger.

B. The Free Speech Landscape in Health Care

In many ways, medicine is regulated far more extensively than law.[104] For example, while plaintiffs can litigate *pro se*,[105] patients cannot write their own prescriptions.[106] Whereas legal practice is largely self-regulated, the practice of medicine is subject to constraints imposed by both state and federal legislatures and administrative agencies.[107] The plethora of health care regulations have generated a profusion of litigation, including First Amendment free speech claims.[108] The number and variety of such claims in medicine far exceeds the scope of litigation over professional speech in the legal field.

While the Supreme Court has consistently trended towards favoring free speech rights, the lower courts have been less consistent in health care professional conduct cases. Predictions are especially difficult to make when litigation is driven by political agendas, such as a desire to impede abortions or medical marijuana.[109] Below is a sampling of cases in which medical professionals have asserted freedom of speech claims.

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[104] Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?* 59 ALA. L. REV. 453, 461-465 (2008) (arguing that lawyers are the only self-regulated profession and are therefore less regulated than other professions, like medicine, because those professions are subject to control by legislatures whereas the legal profession answers to and is regulated by itself); Herbert M. Kritzer, *The Professions are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 L. & SOC'Y REV. 713, 714-715 (1999) (discussing the change in the medical profession from self-regulation to corporate and institutional regulation and comparing it to the legal profession which still functions as a self-regulated profession and is therefore less regulated than the medical industry).

[105] United States District Court, District of Massachusetts, *Pro Se Litigants / Representing Yourself*, http://www.mad.uscourts.gov/general/prose-litigants.htm (last visited January 9, 2021).

[106] Washington State Department of Health, *Who Can Prescribe and Administer Prescriptions in Washington State*, https://www.doh.wa.gov/LicensesPermitsandCertificates/ProfessionsNewReneworUpdate/PharmacyCommission/WhoCanPrescribeandAdministerPrescriptions (last visited January 9, 2021).

[107] Barton, *supra* note 104, at 461-65; Medscape, *Key Regulations Affecting a Physician's Practice*, https://www.medscape.com/courses/section/870050 (last visited January 2, 2021) (asserting that "[h]ealthcare is one of the most regulated industries in the United States" and that the "list of regulations and acts that affect the management of a physician's office is daunting").

[108] *See generally*, Jessica Clara Schidlow, *Prescribing Politics: A Call for Stronger First Amendment Protection of Physician-Patient Communications from State Interference in the Practice of Medicine*, NAT'L L. REV. (Sept. 12, 2016), https://www.natlawreview.com/article/prescribing-politics-call-stronger-first-amendment-protection-physician-patient.

[109] Cassandra Burke Robertson, *Judicial Impartiality in A Partisan Era*, 70 FLA. L. REV. 739, 763 (2018) (explaining that both the country and the judiciary have grown increasingly

1. Licensure

Like lawyers, health care professionals generally must have appropriate licenses from each state in which they practice.[110] Licensing requirements have generated several lawsuits.

To illustrate, in *Hines v. Quillivan*,[111] a veterinarian alleged that a Texas statute that prohibited the practice of veterinary medicine by phone and absent a valid veterinarian-client-patient relationship violated his First (and Fourteenth) Amendment rights.[112] The district court found that the law was content-neutral and ruled against Dr. Hines.[113] However, the Fifth Circuit reversed and remanded the case in light of *NIFLA* and related cases, instructing the district court to assess whether the statute regulated conduct or speech.[114]

In *Rosemond v. Markham*, the author of a long-running newspaper parenting advice column sought declaratory and injunctive relief, alleging that the Kentucky Board of Examiners of Psychology's effort to prohibit him from calling himself as a "family psychologist" violated his First Amendment free speech rights.[115] The court held that Board's attempted regulation of the plaintiff's tagline at the bottom of his advice column was a content-based restriction subject to strict scrutiny, which it did not survive.[116] More specifically, the court asserted:

> Rosemond is entitled to express his views and the fact that he is not a Kentucky-licensed psychologist does not change that fact. If the facts were different, had Rosemond represented himself to be a Kentucky-licensed psychologist or had he actually entered into a client-patient relationship in Kentucky, the outcome might be different.[117]

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politically polarized, but noting that "political bias is especially hard to pin down" in judicial rulings when there is no clear line between judicial ideology and interpretation).

[110] Robert Kocher, *Doctors Without State Borders: Practicing Across State Lines*, HEALTH AFF. BLOG (Feb. 18, 2014), https://www.healthaffairs.org/do/10.1377/hblog20140218.036973/full/; Washington State Department of Health, *License Requirements*, https://www.doh.wa.gov/LicensesPermitsandCertificates/ProfessionsNewReneworUpdate/HealthcareProfessionalCredentialingRequirements (last visited July 16, 2020). *See e.g.*, OH REV. CODE § 4731.41(A) (2019) ("No person shall practice medicine and surgery, or any of its branches, without the appropriate license or certificate from the state medical board to engage in the practice.").

[111] Hines v. Quillivan, 395 F.Supp.3d 857, 860 (2019).

[112] *Id.*

[113] *Id.* at 864-66.

[114] Hines v. Quillivan, 982 F.3d 266, 272 (2020).

[115] Rosemond v. Markham, 135 F. Supp. 3d 574, 578 (E.D. Ky. 2015).

[116] *Id.* at 586, 589.

[117] *Id.* at 589.

This outcome is markedly different from that of *Cincinnati B. Assn. v. Foreclosure Sols*, discussed above.[118] Faced with similar claims related to legal advice, an Ohio court prohibited nonlawyers from helping families facing foreclosure and imposed penalties on them for doing so.

A Georgia licensing case involved the regulation of midwifery.[119] Deborah Pulley, who worked as a certified professional midwife for forty years and delivered over one-thousand babies, asserted that a Georgia statute prohibiting individuals from calling themselves midwives unless they had a nursing degree violated her free speech rights.[120] The case quickly settled, and the state agreed not to pursue cases against midwives such as Ms. Pulley in the future.[121]

2. Compelled Speech and Forbidden Topics

Many professional speech cases have arisen in health care because states attempted to force practitioners to make certain statements or prohibited them from engaging in particular forms of speech. Below are a number of examples.

Conversion Therapy

Twenty states have passed laws prohibiting therapists from practicing conversion therapy[122] on gay minors.[123] When opponents challenged those laws in the Third Circuit and Ninth Circuits before *NIFLA*, the courts upheld the legislation.[124] The Third Circuit applied intermediate

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[118] See text associated with notes 87-90.

[119] Jim Manley & Caleb Trotter, *Call the Midwife — but Not if You Live in Georgia*, THE HILL (Dec. 16, 2019), https://thehill.com/opinion/healthcare/474216-call-the-midwife-but-not-if-you-live-in-georgia.

[120] *Id.*; Pulley v. Izlar, No. 1:19-cv-05574, (N.D. Ga. Dec. 11, 2019), *available at* https://pacificlegal.org/wp-content/uploads/2019/12/Debbie-Pulley-v.-Janice-Izlar-Complaint.pdf.

[121] Pulley v. Thompson, No. 1:19-cv-05574-AT, Consent Order and Final Judgment, (N.D. Ga. Jul. 8, 2020), *available at* https://pacificlegal.org/wp-content/uploads/2019/12/Pulley-v.-Thompson-Consent-Order-Final-Judgment.pdf ("Defendant agrees that the Board will only pursue cases involving the unlicensed practice of nursing (including midwifery) in Georgia for cases involving unlicensed individuals unlawfully practicing midwifery or holding themselves out to the public as being able to practice nursing (midwifery) lawfully in the State of Georgia.").

[122] Conversion therapy aims to change a person's sexual orientation or gender identity, and many consider it to be discredited and harmful. *See* The Trevor Project, *About Conversion Therapy*, https://www.thetrevorproject.org/get-involved/trevor-advocacy/50-bills-50-states/about-conversion-therapy/ (last visited January 2, 2021).

[123] Family Equality, *Conversion Therapy Laws*, https://www.familyequality.org/resources/conversion-therapy-laws/ (last visited July 14, 2020).

[124] King v. Governor of N.J., 767 F.3d 216 (3rd Cir. 2014) *overruled in part by* NIFLA, 138 S.Ct. at 2371-2372 (noting that SCOTUS has not recognized "professional speech" as a separate category of speech and stating that speech is not unprotected by the First

scrutiny and reasoned that the law was defensible under the First Amendment because it advanced the state's interest of protecting children from harm.[125] The Ninth Circuit upheld the conversion therapy ban under a rational basis analysis, reasoning that the law pertained to medical conduct rather than speech.[126] Notably, in a very recent post-*NIFLA* decision, the Eleventh Circuit subjected a conversion therapy ban to strict scrutiny as a content-based regulation and found that it violated the First Amendment.[127]

Medical Marijuana

Medical marijuana is legal in many states,[128] but doctors who prescribe it or advise patients to use it may risk disciplinary action by federal authorities, arguably in contravention of their free speech rights.[129] The Ninth Circuit considered a federal policy that established in relevant part that a doctor's recommendation of medical marijuana would lead to revocation of his or her registration to prescribe controlled substances.[130] The court found that the content-based restriction impermissibly interfered with the free speech rights of physicians.[131] By contrast, at least one district court held that the First Amendment does not protect physician speech surrounding the prescription and recommendation of medicinal marijuana.[132]

Gun Possession

In Florida, physicians and medical organizations challenged a law that barred doctors and other medical professionals from asking about firearm ownership or entering details regarding firearm ownership in a patient's medical chart.[133] The Eleventh Circuit found that the content-

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Amendment just because it is spoken by professionals); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).

[125] King, 767 F.3d at 237-39.

[126] Pickup, 740 F.3d. at 1230.

[127] Otto v. City of Boca Raton, Florida, 981 F.3d 854, 867-68, 872 (11th Cir. 2020). But see Doyle v. Hogan, 411 F.Supp.3d 337, 344-48 (D. MD. 2019) (applying intermediate scrutiny to uphold Maryland's statutory ban of conversion therapy and dismiss a practitioner's First Amendment claim).

[128] DISA Global Solutions, *Map of Marijuana Legality by State*, https://disa.com/map-of-marijuana-legality-by-state (last updated Nov. 4, 2020).

[129] Joseph Gregorio, *Physicians, Medical Marijuana, and the Law*, 16 AMA J. ETHICS 732, 733 (2014); Marijuana Policy Project, *"Prescribing" Versus "Recommending" Medical Cannabis*, MPP.ORG https://www.mpp.org/wp-content/uploads/2016/09/Prescribing-vs.-Recommending.pdf (last visited January 9, 2021).

[130] Conant v. Walters, 309 F.3d 629, 632 (9th Cir. 2002).

[131] *Id.* at 639.

[132] Pearson v. McCaffrey, 139 F. Supp. 2d 113 (D.C. Dist. 2001).

[133] Wollschlaeger v. Governor, 848 F.3d 1293, 1302-03 (11th Cir. 2017) (en banc); Florida's Firearms Owners' Privacy Act (FOPA), codified at Fla. Stat. §§ 790.338, 456.072, 395.1055 & 381.026 (2011).

based law failed to withstand both intermediate and strict scrutiny and thus violated plaintiffs' free speech rights.[134]

Abortion

Not surprisingly, some of the most vigorous First Amendment battles relate to speech about reproductive rights. Likely because of the politically charged nature of these cases, court decisions show no consistent pattern.

For example, in recent years, Arkansas[135], Idaho[136], Kentucky[137], North Dakota,[138] South Dakota[139], Oklahoma,[140] Nebraska[141], and Utah[142] passed laws requiring physicians to tell women that medication abortions (using pills) can be reversed, through use of the hormone progesterone even though this claim is not supported by scientific evidence.[143] Courts have temporarily enjoined enforcement of the laws in North Dakota and Oklahoma.[144]

Other states (fourteen in total) enacted laws mandating that clinicians conduct ultrasounds before performing abortions.[145] Kentucky's law, requiring that doctors perform an ultrasound and show and describe fetal images to a woman prior to an abortion, has been vigorously

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[134] Wollschlaeger, 848 F.3d at 1311 ("Because these provisions fail to satisfy heightened scrutiny under *Sorrell*, they obviously would not withstand strict scrutiny.").

[135] 20-16-1703(b) ARK. CODE R. § 9(A).

[136] IDAHO CODE § 18-609(2)(f).

[137] KY. REV. STAT. ANN. § 311.774(2)

[138] N.D. CENT. CODE § 14-02.1-02(11)(b)(5).

[139] KS.D. CODIFIED LAWS § 34-23A-10.1(1)(h).

[140] 63 OKLA. STAT. § 1-756 (B).

[141] NEB. REV. STAT. § 28-327 (1)(e).

[142] UTAH CODE ANN. § 76-7-305.5 (2)(u).

[143] Anna North, *Pregnant People are Being Offered an Unproven Treatment to "Reverse" Abortions*, VOX, https://www.vox.com/identities/2019/11/11/20953337/abortion-pill-reversal-ohio-bill-law-pregnancy (updated Dec. 6, 2019).

[144] AMA v. Stenehjem, 412 F.Supp. 3d 1134 (N.D. Dist. 2019) (granting preliminary injunction to prevent the enforcement of a state law requiring doctors to inform patients that the effect of an abortion-inducing drug can be reversed); Tulsa Women's Reproductive Clinic v. Hunter, No. CV-2019-2176 (Okla. Dist. Ct., Okla. County Oct. 29, 2019), *available at* https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CV-2019-2176&cmid=3813709 (granting a temporary restraining order preventing the Oklahoma Attorney General from enforcing the state's abortion-reversal disclosure law).

[145] Guttmacher Institute, *Requirements for Ultrasound*, GUTMMACHER.ORG, https://www.guttmacher.org/state-policy/explore/requirements-ultrasound (current as of Dec. 1, 2020).

litigated.[146] A federal court of appeals upheld the law, and the Supreme Court declined to hear the case.[147]

South Dakota requires physicians to tell patients, in writing and in person, that among the known risks of abortion are an increased likelihood of depression, suicidal ideation and suicide.[148] Mississippi and Texas mandate that doctors advise women that abortions are associated with an increased risk of breast cancer.[149] Although many experts agree that no credible evidence supports any of these claims,[150] the Eighth Circuit upheld South Dakota's law.[151]

3. FDA Regulation of Non-Clinicians

Not all First Amendment controversies involve health care clinicians. Some have involved entities and professional activities that the Food and Drug Administration (FDA) regulates, and they merit brief mention here.[152] The FDA regulates drugs, medical devices, and biological products.[153] The scope of regulation includes matters of professional speech, such as drug labeling and advertising.[154]

Physicians may prescribe drugs for purposes that the agency has not approved, a practice known as off-label use.[155] Traditionally, however, the FDA has prohibited manufacturers from *promoting* their drugs for off-

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[146] KY. Rev. Stat. Ann. § 311.727 (2020).

[147] EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 424 (6th Cir. 2019) *cert. denied*, EMW Women's Surgical Ctr., P.S.C. v. Meier, 140 S.Ct. 655 (2019). The court explained that:

> Under the First Amendment, we will not highly scrutinize an informed-consent statute, including one involving informed consent to an abortion, so long as it meets these three requirements: (1) it must relate to a medical procedure; (2) it must be truthful and not misleading; and (3) it must be relevant to the patient's decision whether to undertake the procedure, which may include, in the abortion context, information relevant to the woman's health risks, as well as the impact on the unborn life.

Id. at 428-29.

[148] S.D. CODIFIED LAWS § 34-23A-10.1(e)(i)-(ii) (West 2016).

[149] MISS. CODE. ANN. § 41-41-33(1)(a)(ii) (West 2017); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(1)(B)(iii) (West 2015).

[150] Sarah Kramer, *Not Your Mouthpiece: Abortion, Ideology, and Compelled Speech in Physician-Patient Relationships*, 21 U. PA. J.L. & SOC. CHANGE 1, 3-4 (2018).

[151] Planned Parenthood v. Rounds, 686 F.3d 889, 893 (8th Cir. 2012) (finding no First Amendment violation because a state could "require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion").

[152] U.S. Food & Drug Administration, *About FDA*, https://www.fda.gov/about-fda (last visited January 2, 2021).

[153] U.S. Food & Drug Administration, *What We Do*, https://www.fda.gov/about-fda/what-we-do (current as of Mar. 28, 2018).

[154] Kapczynski, *supra* note 3, at 180, 185.

[155] Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. 671, 724-25 (2017).

label uses.[156] Industry advocates have objected that this constraint violates manufacturers' First Amendment rights.[157] Following in the footsteps of *Sorrell*, at least a few courts have shown sympathy for this argument.

In *United States v. Caronia*, the government prosecuted a drug company detailer for promoting a drug approved for narcolepsy for off-label uses, including restless leg syndrome, insomnia, and other conditions.[158] The Second Circuit ruled that prosecuting individuals for off-label drug promotion violated their First Amendment rights, though the FDA could still prohibit companies from making false and misleading statements.[159] Likewise, in *Amarin Pharma, Inc. v. FDA*, a Southern District of New York judge granted a company preliminary relief on First Amendment grounds, allowing it to market a drug called Vascepa for off-label use..[160]

The FDA also regulates certain medical mobile applications and digital services.[161] One example is 23andMe, which analyzes customers' genetic material (a saliva sample), and provides them with information about their ancestry, health, and disease vulnerability.[162] Such products are often called direct-to-consumer (DTC) tests[163] Critics posit that regulation of medical mobile applications violates First Amendment free

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[156] Elizabeth Richardson, *Off-Label Drug Promotion. Drug Companies Are Largely Prohibited from Promoting a Drug for Uses That Have Not Been Approved by the Food and Drug Administration*, HEALTH POLICY BRIEF (June 30, 2016), https://www.healthaffairs.org/do/10.1377/hpb20160630.920075/full/healthpolicybrief_159.pdf.

[157] *Id.* at 4; Peter J. Henning, *F.D.A.'s 'Off-Label' Drug Policy Leads to Free-Speech Fight*, N.Y. TIMES (Aug. 10, 2015), https://www.nytimes.com/2015/08/11/business/dealbook/fdas-off-label-drug-policy-leads-to-free-speech-fight.html.

[158] U.S. v. Caronia, 703 F.3d 149, 156 (2nd Cir. 2012).

[159] Id. at 160, 168.

[160] Amarin Pharma, Inc. v. U.S. Food & Drug Admin., 119 F.Supp.3d 196, 198 (S.D.N.Y 2015) (granting the company's motion for a preliminary injunction and declaring that certain marketing statements were truthful and not misleading, despite the FDA's objections).

[161] U.S. Food & Drug Administration, *Device Software Functions Including Mobile Medical Applications* (Nov. 5, 2019), https://www.fda.gov/medical-devices/digital-health/device-software-functions-including-mobile-medical-applications.

[162] U.S. Food & Drug Administration, *FDA Allows Marketing of First Direct-to-Consumer Tests that Provide Genetic Risk Information for Certain Conditions* (Apr. 6, 2017), https://www.fda.gov/news-events/press-announcements/fda-allows-marketing-first-direct-consumer-tests-provide-genetic-risk-information-certain-conditions; 23andMe, *DNA Insights Are an Essential Part of Your Health Picture*, https://www.23andme.com/?mkbanner=true (last visited January 2, 2021); Erika Check Hayden, *The Rise and Fall and Rise Again of 23andMe*, NATURE (Oct. 11, 2017), https://www.nature.com/news/the-rise-and-fall-and-rise-again-of-23andme-1.22801.

[163] U.S. Food & Drug Administration, *Direct-to-Consumer Tests*, https://www.fda.gov/medical-devices/vitro-diagnostics/direct-consumer-tests (current as of Dec. 20, 2019).

speech rights.[164] Opponents believe that these applications should not be regulated because they simply process information or analyze data derived from FDA-approved devices, such as gene sequencers.[165] Free speech is at issue because arguably such regulation unjustifiably impedes lawful commercial speech and deprives consumers of wanted information.[166] The FDA justifies its regulatory approach by explaining that it oversees only DTC tests for "moderate to high risk medical purposes" that could have a significant impact on medical care, assessing their analytical validity, clinical validity, and the companies' claims about them.[167] The courts have not yet had an opportunity to rule on a First Amendment case involving DTC tests.

C. The Future of Free Speech and Professional Regulation

What does the Supreme Court's skepticism of speech limitations mean for legal and medical regulatory activity in the future? In order to consider how best to respond to the regulatory challenges posed by technological innovation, it's necessary first to consider how the Supreme Court's speech jurisprudence affects potential regulatory actions. This section analyzes how the Court's recent case law is likely to affect regulatory power over professional speech. It makes three predictions for the future of professional licensing. First, speech restrictions are likely to be increasingly vulnerable to legal challenges, but licensing itself is unlikely to go away any time soon. Second, health-care regulations are more likely to be upheld than other professional speech restrictions. Third, even if false speech carries constitutional protection, there is still room for private litigation based on individual harm caused by such speech.

1. Speech Restrictions are Vulnerable to Challenge, but Licensing is Unlikely to Disappear

It appears unlikely that the Court will back off its speech-protective jurisprudence any time soon. In addition to the cases directly affecting professional regulation, the Supreme Court has decided First Amendment cases that signal its continuing commitment to place free-speech principles over regulatory deference. Ten years ago in *Citizens United v. Federal Election Commission*, the Court recognized corporate free-speech rights and relied on the First Amendment to strike down campaign finance regulations.[168] In doing so, the Court demonstrated an "increasing tendency to construe the First Amendment as a shield that private market

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[164] Linnea M. Baudhuin, *The FDA and 23andMe: Violating the First Amendment or Protecting the Rights, of Consumers?* 60 CLIN. CHEMISTRY 835–837 (2014); Adam Candeub, *Digital Medicine, the FDA, and the First Amendment*, 49 GA. L. REV. 933, 968-69 (2015).

[165] Candeub, *supra* note 164, at 939-40, 971-80.

[166] Baudhuin, *supra* note 164, at 835.

[167] *Id.*

[168] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

actors can wield against government regulation, rather than (as it once did) as a mechanism for safeguarding free speech values against the threat posed to them by both private and government power."[169]

The Supreme Court reaffirmed this position recently, when it held in a 5-4 decision that public-sector "access fees" charged to employees opting out of union membership violated employees' free-speech rights.[170] In dissent, Justice Kagan sharply criticized the Court for "turning the First Amendment into a sword, and using it against workaday economic and regulatory policy."[171] She warned that the Court's free-speech jurisprudence—including its decisions in *Sorrell* and *NIFLA*—could have broad effects that threatened to overwhelm historical regulatory approaches.[172] She noted that "[s]peech is everywhere" and that "almost all economic and regulatory policy affects or touches speech."[173]

Justice Kagan is undoubtedly right that all or nearly all regulatory policy affects speech—and this is particularly true for professional regulation in the fields of law and medicine. Nonetheless, the Court shows no sign of backing off favoring speech over regulation, especially with the recent turnover in membership.[174]

Furthermore, the areas where most challenges are currently being raised in law and medicine would seem to be especially vulnerable under the free-speech jurisprudence of the Roberts court. The legal profession's ban on outside investment, for example, has a substantial protectionist basis and only a hypothetical public-protection rationale. Under *NIFLA*, a mere hypothetical basis for public protection is likely insufficient to support the regulation. If states cannot put forward evidence demonstrating that the ban is narrowly tailored to protect against a provable harm, the regulation is likely to be deemed unconstitutional. Requiring extensive disclaimers regarding attorneys' marketing speech and banning non-lawyer advice on matters touching legal rights are both similarly likely to fail under the *NIFLA* standard—and, to the extent that such regulations are adopted by boards comprised predominantly of practicing attorneys, may also give rise to antitrust challenges. Speech

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[169] Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1324 (2020).

[170] Janus v. Am. Fedn. of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 (2018).

[171] *Id.* at 2501.

[172] *Id.* (Kagan, J., dissenting).

[173] *Id.*

[174] Lisa Soronen, *SCOTUS and the Seismic Shift: What Might it Mean for States and Local Governments?*, NATIONAL LEAGUE OF CITIES (2020), https://www.nlc.org/article/2020/10/23/scotus-and-the-seismic-shift-what-might-it-mean-for-states-and-local-governments/ (last visited Dec 28, 2020) ("The Supreme Court usually hears numerous First Amendment free speech cases each term. It is not unusual for states and local governments to lose these cases unanimously or close to it.").

restrictions are similarly vulnerable on the medical side, as courts going forward are unlikely simply to defer to the fact of state regulation. Instead, under the Supreme Court's more restrictive approach, courts will have to provide a more searching analysis of both the bases for such regulations and the processes by which they were adopted.

This more searching review will limit the government's regulatory power over the professions, but it will not eliminate it. Wholesale abandonment of licensing is extremely unlikely. Even under the high bar set by recent Supreme Court cases, the public-protection aspects of licensing will likely outweigh the restrictions on liberty they impose.[175] The speech-restrictive actions taken by licensing entities, however, will have to meet a higher standard to be upheld.

2. Health-Care Speech Restrictions Backed by Sound Evidence Are More Likely to Survive

It's possible that regulatory actions in the health-care arena will more easily satisfy the Supreme Court's higher bar than actions regulating legal practice. Professional speech in the two fields is similar in many ways. Both doctors and lawyers are highly trained. And regulation is needed to protect vulnerable clients and patients who generally lack "the specialized knowledge necessary to effectively evaluate" professional advice.[176]

But the consequences of harm tend to be greater in medicine than in law.[177] Bad advice on medical matters is far more likely to lead to physical injury or even death, and these consequences cannot be undone by financial compensation.[178] This may explain, in part, lower courts' efforts to uphold speech-restrictive regulations related to health care.[179] We are already seeing courts grapple with whether these restrictions are consistent with recent Supreme Court jurisprudence. The easiest way to reconcile these tensions may be to hold that even if a higher standard of scrutiny applies, health-care regulations will survive a high level of

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[175] *See* Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501, 559 (2019) ("The First Amendment, it turns out, is a poor vehicle to challenge professional licensing regimes.").

[176] Cassandra Burke Robertson, *How Should We License Lawyers?*, 89 FORDHAM L. REV.__ (forthcoming 2021).

[177] Miller & Berkman, *supra* note 36, at 654 (recommending tying physician speech protection to patient safety, and arguing that "[p]hysician speech is professional speech--not medical conduct--when treating it as such promotes patient safety, occurs within the confines of a doctor-patient relationship, and is supported by evidence-based medicine").

[178] *See* Jane R. Bambauer, *Snake Oil Speech*, 93 WASH. L. REV. 73, 83 (2018) ("If claims that are very likely to be false are also likely to cause harm, the state can intervene on behalf of public safety without imposing a singular and authoritative definition of truth.").

[179] *See supra* Part III.B.

scrutiny as long as they are backed by an evidentiary record showing a positive effect on patient protection.[180]

At the same time, requiring an evidentiary record to uphold speech restrictions would likely mean striking down some current speech regulations. As discussed above, health care has sometimes been the target of both compelled and forbidden speech mandates that are highly politicized.[181] Courts upholding such regulations have broadly deferred to legislative actions.[182] If heightened scrutiny is applied, regulations that amount to "an attempt to skew the marketplace of ideas or invade the buffer of confidentiality and autonomy that protects the integrity of the professional-client relationship" are likely to fail.[183] Regulations backed by an evidentiary record, however, are more likely to survive.[184] In this way, heightened scrutiny actually increases courts' ability to engage in quality control and weed out requirements that are merely political.[185]

3. Private Litigation May Play a Role in Protecting Against False and Harmful Professional Speech

What happens if legal or medical professionals engage in false speech? To the extent that speech protection puts governmental regulation at risk, it is possible that private law—and especially litigation—may play a larger role in enforcing standards of professional care.[186] Having a right

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[180] *See* Miller & Berkman, *supra* note 36 at 654 (noting that "there remain definitional questions about how promotion of patient safety ought to be quantified, how a doctor-patient relationship ought to be recognized, and how much evidence (and of what type) demonstrates evidence-based medicine).

[181] *See supra* Part III.B. *See also* Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1406 (2019) ("in some cases, the State might use (and has used) compelled speech to force speakers to affirm an ideological viewpoint.").

[182] *E.g.*, Pickup v. Brown, 740 F.3d 1208, 1230 (9th Cir. 2014) ("[I]t is well recognized that a state enjoys considerable latitude to regulate the conduct of its licensed health care professionals in administering treatment.").

[183] Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 112 (2016).

[184] Jane R. Bambauer, *The Empirical First Amendment*, 78 OHIO ST. L.J. 947, 960 (2017) ("[E]mpirical studies and data can help improve the state's selection of political priorities and the efficacy of its political solutions.").

[185] Of course, some regulations may have both an evidentiary basis and a political bent. Politicization by itself is not a reason to strike down regulations affecting speech. *See* Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 910 (2015) ("Nor should mandated factual disclosures become constitutionally disfavored because they occur in circumstances of acrimonious political controversy. The need for sober factual disclosures might be most urgent in the context of socially contested issues like tobacco or obesity.").

[186] *Haupt, supra* note 175 (suggesting that "foregrounding of the relevant private common law" would protect against the risk of limiting regulation in areas such as "food labeling requirements, most securities disclosures, professional responsibility rules for lawyers, rules concerning doctor-patient confidentiality, and a host of other safety-based regulations"). Couldn't find the quote within the document referred to (was looking for the pincite)

to engage in speech, after all, does not insulate professionals from malpractice liability for harms caused when that speech amounts to fraud, negligence, or ineptitude. It is true that taken to its logical extreme, free-speech principles could protect even negligent or fraudulent speech if professional speech no longer has a categorical exclusion from First Amendment protection.[187] But even the elimination of a categorical exclusion does not result in absolute protection for all speech—it merely requires a higher level of scrutiny.[188]

The Supreme Court protects even blatantly untruthful speech on First Amendment grounds in some circumstances. In *U.S. v. Alvarez*, the Court struck down the Stolen Valor Act.[189] The government had argued that criminal prosecution for lying about military honors was allowable because the First Amendment did not protect false speech.[190] The government pointed to defamation liability and fraud liability as demonstrating that false speech could render an individual civilly and criminally liable. The Supreme Court held that false speech was not categorially excluded from the First Amendment, but rather that legal limits on false speech may be more likely to survive heightened scrutiny.[191] The Court explained that there must be a "direct causal link between the restriction imposed and the injury to be prevented."[192] When the speech is diffuse and public-directed, as with lying generally about military honors, the Court concluded that counterspeech should generally "suffice to achieve [the government's] interest."[193]

The Court may be wrong about whether government speech will suffice to protect the public interest in the face of false statements.[194]

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[187] Amanda Shanor, *Business Licensing and Constitutional Liberty*, 126 YALE L.J. FORUM 314, 320–21 (2016) ("If the "speaking" nature of a profession were sufficient to trigger stringent review of the regulation of that profession, professional conduct such as malpractice and fraud would be entitled to stringent review as well.").

[188] Thus, for example, a First Amendment challenge to a Florida restriction on personal fundraising by judges failed; the Court applied heightened scrutiny, but nevertheless concluded that the restriction was "narrowly tailored to serve a compelling government interest," and that therefore "the First Amendment poses no obstacle to its enforcement . . . Florida may continue to prohibit judicial candidates from personally soliciting campaign funds, while allowing them to raise money through committees and to otherwise communicate their electoral messages in practically any way." Williams-Yulee v. Fla. Bar, 575 U.S. 433, 455 (2015).

[189] U.S. v. Alvarez, 567 U.S. 709 (2012).

[190] *Id.*

[191] *Id.* at 725-27.

[192] *Id.* at 725.

[193] *Id.* at 726.

[194] *See* Zack Stanton, *You're Living in the Golden Age of Conspiracy Theories*, POLITICO(June 12, 2020 7:55pm), https://www.politico.com/news/magazine/2020/06/17/conspiracy-theories-pandemic-trump-2020-election-coronavirus-326530 ("What's a trusted source for

Nonetheless, the *Alvarez* opinion makes it clear that even false statements will have constitutional protection. It is only when the risks created by professional speech are high enough that restrictions will survive strict scrutiny.[195]

Constitutional protection for false speech, however, does not mean that professionals cannot be subject to liability for fraud or malpractice. The harms caused by fraud and malpractice are almost certainly distinct and concrete enough to allow the claims to survive heightened scrutiny.[196] Applying strict scrutiny to professional speech does not insulate such speech from liability. Instead, constitutional analysis is aimed only at "filtering out government regulation that is not, in the classic sense, targeted at preventing criminal, tortious, or palpably unethical professional conduct."[197] But private lawsuits seeking compensation for provable harm are likely to pass even a test of strict scrutiny.

IV. PROFESSIONAL COMMUNICATION AT SCALE

The Supreme Court's recent jurisprudence heightening speech protection has created a regulatory challenge for states. If the shift toward greater protection for professional speech had happened twenty or thirty years ago, it probably would have been relatively simple to reach a new regulatory equilibrium by backing off of some of the more protectionist restrictions and building a stronger evidentiary record to support the regulations that play a key role in protecting the public. Today, however, it is more difficult to reach a new regulatory equilibrium because technological advances—and in particular, massive digital platforms—have changed the scale of professional influence and therefore changed the entire regulatory context.[198]

What does it mean to regulate at scale? Professor Paul Ohm has described the effect of "massive digital platforms" that affect the

somebody who is literally defined by thinking that everyone and everything is a lie and against them and a conspiracy?").

[195] Holder v. Humanitarian L. Project, 561 U.S. 1, 26 (2010) (upholding restrictions on attorney speech imposed by a "statute [that] is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations").

[196] *See* John S. Ehrett, *Speak No Evil, Do No Harm: A New Legal Standard for Professional Speech Regulation,* 2018 U. ILL. L. REV. ONLINE 184, 191 (2018) (explaining that under a harm-based analysis, "a vast swath of occupational licensing laws . . . that would otherwise restrict speech with no substantial likelihood of doing harm to a client--would almost certainly fail strict scrutiny review, and be struck down as unconstitutional," but that "the legal structures allowing for malpractice liability and lawsuits arising from false advertising" would pass.).

[197] Smolla, *supra* note 182, at 112.

[198] Ohm, *supra* note1.

"mathematics of regulation."[199] He explains that law tends to work linearly, while the "power and harm of online activity" grow at a much faster rate, thus creating a situation in which regulatory policy fails to keep up with its underlying goal of public protection.[200] He points to the following: 1) the ability of digital platforms to facilitate cross-border communication even as regulatory authority remains jurisdictionally-bound, 2) the ability of a single communication to achieve a much larger scale of influence, potentially "touch[ing] the lives of billions," and 3) the growth of artificial intelligence (AI) programs that may come with unexpected externalities.[201]

These problems of regulatory scale affect regulatory policy in both law and health care. Traditionally, professional speech occurred on an individual basis: a doctor talking to a patient or a lawyer talking to a client. Professional regulation accordingly relied primarily on licensing, discipline, and exclusion from the profession to maintain quality and safety standards. Thus, regulatory bodies licensed individuals qualified to render advice, disciplined those whose advice breached the professional standard of care, and excluded non-professionals from engaging in conduct within the regulatory sphere. Of course, even under the traditional approach, there have always been some questions at the margin that didn't fit well in the traditional regulatory scheme: Does a bank that helps a client set up a trust engage in the unauthorized practice of law? Does an herbalist who recommends dietary supplements to individuals engage in unlicensed medical practice?[202] But even though these kinds of edge-cases received media attention and were the subject of academic discussion, they were rare enough that they did not upend the traditional structure of professional regulation that focused on individual qualifications and one-to-one communications.

The scale of modern mass communication offers a much larger threat to the viability of traditional regulatory approaches. Online forums such as Reddit's "legal advice" board allow individuals to pose questions about their legal rights and remedies and to receive near-instantaneous responses from around the globe, both from lawyers and laypeople. In the medical sphere, Icliniq.com provides an "Ask a Doctor Online" service through which users enter their health queries, create an account, and receive medical advice from a doctor.[203] Sibly is an employee wellness app

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[199] *Id.* at 546.

[200] *Id.*

[201] *Id.* at 548–52.

[202] At least one state has upheld a criminal conviction for practicing medicine without a license under this scenario. State v. Miller, 542 N.W.2d 241, 246-47 (Iowa 1995).

[203] iCliniq, *Ask a Doctor Online*, https://www.iccliniq.com/ask-a-doctor-online (last visited Nov. 22, 2020). iCliniq.com states that its "doctor panel consists of medical practitioners, physicians and therapists from US, UK, UAE, India, Singapore, Germany and counting," *About iCliniq*, ICLINIQ.COM, https://www.icliniq.com/p/aboutus (last visited Nov. 17, 2020).

that connects individuals to "helpful human coaches,"[204] individuals who are "trained in active listening, motivational interviewing, cognitive behavioral tools and mindfulness models of change."[205]

As a result of the challenge posed by massive digital platforms, merely rebalancing the regulatory equilibrium will not go far enough to meet the needs of public protection today. Instead, effective professional regulation requires rethinking both the goals and methods of professional regulation—and requires doing so within the speech-protective framework adopted by the Supreme Court. This section examines the regulatory challenges posed by modern technology. It begins with an analysis of health care and medical practice, as this area is more comprehensively regulated than legal practice. It examines the regulatory challenges posed by telemedicine, artificial intelligence (AI) and the diffusion of false and unreliable health information through social media. It then turns to the field of legal practice, assessing how technology has a similar effect on legal practice as it collapses geographic boundaries, enables mass communication, and creates both opportunities and risks with the integration of AI.

A. Health Care and Technology

Technology has changed the practice of medicine in profound ways. It has enabled health care providers to reach far beyond their local offices and to broaden their capabilities. However, technology also comes with risks and shortcomings that require careful regulatory responses.

This part will address three areas of technology-enabled medical practice: telemedicine, artificial intelligence, and communication through social media.

1. Telemedicine

Telemedicine is "the diagnosis and treatment of patients through telecommunications technology" such as smartphones, tablets, and computers.[206] Telemedicine is a subset of telehealth, which also includes remote patient monitoring, remote communication among clinicians, and other activities.[207]

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[204] Sibly, https://www.sibly.com/ (last visited Nov. 17,2020).

[205] *General Questions: Who Are Sibly Coaches?* https://www.sibly.com/faqs (last visited Nov. 17, 2020), Sibly's terms of use explicitly state that "Sibly only provides an online platform to connect users with coaches for one-on-one digital interfacing. Sibly Coaches are not authorized to provide services requiring professional licensure (e.g. psychotherapy or psychiatry." In addition, Sibly asserts that it cannot guarantee the "competence of any Sibly coach." *Sibly Terms of Use*, SIBLY.COM, https://www.sibly.com/terms-of-use (last visited Nov. 17, 2020).

[206] Medscape, *What Is Telemedicine?* https://www.medscape.com/courses/section/921359 (last visited Dec. 29, 2020).

[207] *Id.*

There are two types of telemedicine. The first is synchronous, or real-time video encounters between patients and clinicians.[208] Some real-time visits take place in medical offices so that a nurse or other assistant can engage in hands-on assessment, such as taking blood pressure or placing a stethoscope on the patient.[209] The second form of telemedicine is asynchronous, or "store-and-forward" communication.[210] Here, health care providers gather information about the patient, including the patient's narrative, lab results, images, videos, and medical records, and send it securely online for analysis by another party, such as a specialist.[211] The patient then receives a diagnosis and treatment plan.[212] Store-and-forward is often used for dermatology, pathology, and radiology services.[213]

Experts estimate that in 2019, thirty percent of doctors and over fifty percent of hospitals had access to telemedicine.[214] In 2020, during the COVID-19 pandemic, telemedicine use grew dramatically.[215] This option enabled patients to consult health care providers while remaining socially isolated in the safety of their own homes.[216]

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[208] *Id.*

[209] *Id.*

[210] *Id.*; Eric Wicklund, *Store-and-Forward Telemedicine Services Expand Connected Health*, MHEALTH INTELLIGENCE, https://mhealthintelligence.com/features/store-and-forward-telemedicine-services-expand-connected-health (last visited Dec. 29, 2020).

[211] Medscape, *supra* note 206; Wicklund, *supra* note 210.

[212] Medscape, *supra* note 206; Wicklund, *supra* note 210.

[213] Medscape, *supra* note 206.

[214] *Id.*

[215] *COVID-19 and the Rise of Telemedicine*, THE MEDICAL FUTURIST (Mar. 31, 2020), https://medicalfuturist.com/covid-19-was-needed-for-telemedicine-to-finally-go-mainstream/; *Research Shows Patients and Clinicians Rated Telemedicine Care Positively During COVID-19 Pandemic*, PENN MED. NEWS (June 24, 2020), https://www.pennmedicine.org/news/news-releases/2020/june/patients-and-clinicians-rated-telemedicine-care-positively-during-covid (reporting on a survey that found that at Penn Medicine, "[i]n one week, … [the] gastroenterology and hepatology practice went from doing roughly 5 percent of … visits per week with telemedicine to 94 percent").

[216] Alicia Adamczyk, *Can't See Your Doctor in Person? Take Advantage of Your Telemedicine Options*, CNBC.COM (May 6, 2020), https://www.cnbc.com/2020/05/06/why-you-should-take-advantage-of-your-telemedicine-options.html.

Telemedicine Benefits and Limitations

Telemedicine has many potential benefits.[217] Telemedicine care can be as effective as in-person care in many cases.[218] A Massachusetts General Hospital study found that among established patients, "[m]ost patients (62.6%) and clinicians (59.0%) reported 'no difference' between virtual and office visits on 'the overall quality of the visit.'"[219] A different study focused on telemedicine in intensive care units that enables off-site critical care experts to support patient care.[220] The study found that telemedicine "may reduce ICU mortality, hospital mortality, and lengths of ICU stays" though not the overall length of hospital stays.[221]

In addition, telemedicine appointments can be very convenient for patients, sparing them the need to travel to medical facilities and take extended time off from work or find childcare coverage.[222] Consequently, patients may receive more continuous medical oversight and avoid care disruptions.[223] Telemedicine can also be less expensive than in-person visits.[224] According to one study, telemedicine visits on average cost $79,

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[217] Zawn Villines, *Telemedicine Benefits: For Patients and Professionals*, MEDICAL NEWS TODAY (Apr. 20, 2020), https://www.medicalnewstoday.com/articles/telemedicine-benefits.

[218] *Id.*; Joel E. Barthelemy, *Virtual Care vs. In-Person Visits: Which is Higher Quality?* GLOBALMED (July 15, 2019), https://www.globalmed.com/telemedicine-vs-in-person-visits-which-is-higher-quality/.

[219] Karen Donelan et al., *Patient and Clinician Experiences with Telehealth for Patient Follow-up Care*, 25 AM. J. MANAG. CARE 40, 42 (2019).

[220] Jing Chen et al., *Clinical and Economic Outcomes of Telemedicine Programs in the Intensive Care Unit: A Systematic Review and Meta-Analysis*, 33 J. INTENSIVE CARE MED. 383, 384 (2018).

[221] *Id.* at 391. *See also*, Astrid Buvik et al., *Patient Reported Outcomes with Remote Orthopaedic Consultations by Telemedicine: A Randomised Controlled Trial,* 25 J. TELEMEDICINE & TELECARE 451, 451 (2019) ("We did not observe any difference in patient-reported satisfaction and health … between video-assisted and standard consultations"); Khidir Dalouk et al., *Outcomes of Telemedicine Video-Conference Clinic Versus In-Person Clinic Follow-Up for Implantable Cardioverter-Defibrillator Recipients*, 10 CIRCULATION: ARRYTHMIA & ELECTROPHYSIOLOGY (2017), https://www.ahajournals.org/doi/pdf/10.1161/CIRCEP.117.005217 (finding that outcomes for patients who received follow-up care by videoconferencing were "noninferior" to outcomes for those receiving in-person follow-up); Jessica F. Robb et al., *Comparison of Telemedicine Versus In-Person Visits for Persons with Multiple Sclerosis: A Randomized Crossover Study of Feasibility, Cost, and Satisfaction*, 36 MULTIPLE SCLEROSIS (2019), https://doi.org/10.1016/j.msard.2019.05.001 (reporting that 97.1% of patients would recommend televisits to others, and 94.3% of patients found it easy to connect with their provider via telemedicine).

[222] Donelan et al., *supra* note 219, at 40.

[223] Centers for Disease Control and Prevention, *Using Telehealth to Expand Access to Essential Health Services During the COVID-19 Pandemic*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/telehealth.html (updated June 10, 2020).

[224] Adamczyk, *supra* note 216.

while in-person office visits cost $146.[225] These benefits can be of particular value to members of vulnerable populations that face access barriers, such as the elderly, people with disabilities, or economically disadvantaged individuals.[226]

Telemedicine can be beneficial for providers as well. If they do a significant portion of their work through telemedicine, they may be able to cut costs by renting smaller office spaces and paying for less administrative assistance.[227] In addition, they may be able to serve more patients and supplement their incomes, and during COVID-19, telemedicine enabled clinicians to reduce their risk of infection by avoiding in-person contact with patients.[228]

At the same time, telemedicine has several risks and limitations. In some cases, it is more appropriate to examine a patient face-to-face, and pursuing a virtual consultation could delay urgently needed care or even lead to a misdiagnosis.[229] In addition, both the clinician and the patient must be sufficiently adept with technology to avoid glitches, and, depending on the medical problem, the patient may need to have a space at home in which to conduct the visit privately.[230] Other privacy concerns may arise if the technology does not meet state-of-the art security standards and is thus vulnerable to hacking.[231] Finally, clinicians and patients wishing to use telemedicine often face a variety of regulatory barriers.

Telemedicine Regulation

Extensive regulations govern telemedicine.[232] While technology theoretically should enable clinicians to render services throughout the

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[225] J. Scott Ashwood et al., *Direct-To-Consumer Telehealth May Increase Access to Care but Does Not Decrease Spending*, 36 HEALTH AFF. 485, 488 (2017) (concluding that because of its convenience, telehealth increases utilization of medical services and therefore raises overall health-care spending).

[226] Villines, *supra* note 217.

[227] *Id.*

[228] *Id.*

[229] Centers for Disease Control and Prevention, *supra* note 223.

[230] *Id.*

[231] Villines, *supra* note 217.

[232] *See generally*, CENTER FOR CONNECTED HEALTH POLICY, STATE TELEHEALTH LAWS & REIMBURSEMENT POLICIES (Fall 2019), https://www.cchpca.org/sites/default/files/2019-10/50%20State%20Telehealth%20Laws%20and%20Reibmursement%20Policies%20Report%20Fall%202019%20FINAL.pdf; Federation of State Medical Boards, *Telemedicine Policies Board by Board Overview*, https://www.fsmb.org/siteassets/advocacy/key-issues/telemedicine_policies_by_state.pdf (last updated July 2020); Christian D. Becker et al., *Legal Perspectives on Telemedicine Part 1: Legal and Regulatory Issues*, 23 PERMANENTE J. 18-293 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6636526/pdf/18-293.pdf.

United States, they are often severely constrained by federal and state laws. Nevertheless, telemedicine regulations demonstrate the ability of the state and federal governments to accommodate changing demands and circumstances in the health care arena.

One heavily regulated area is licensure. Ordinarily, physicians must be licensed in each state in which they practice medicine, and this principle is no different for telemedicine.[233] This means that physicians must be licensed in the state in which their patients are located.[234] However, licensing policies have become somewhat more lenient in many states.

Nine states issue special licenses or certificates that allow out-of-state clinicians to provide telemedicine services in the state, and several others permit the practice of medicine across state lines under certain circumstances (without specifically mentioning telemedicine).[235]

Twenty-nine states, the District of Columbia, and Guam are members of the Federation of State Medical Boards' Interstate Medical Licensure Compact (IMLC).[236] The compact creates an expedited process by which licensed physicians can obtain licenses in other states.[237] Note that the IMLC relaxes telemedicine barriers but does not remove them entirely because physicians still need to obtain licensure in new states, and not all states are IMLC members.

Three additional compacts facilitate licensure in multiple states.[238] The Nurses Licensure Compact (with 34 member states) allows nurses to serve in other states without obtaining additional licenses.[239] The Physical Therapy Compact (with 20 member states) allows eligible physical therapists and physical therapy assistants to purchase compact privilege

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[233] Federation of State Medical Boards, *supra* note 232; Kocher, *supra* note 110. *See e.g.*, OH REV. CODE § 4731.41(A) (2019) ("No person shall practice medicine and surgery, or any of its branches, without the appropriate license or certificate from the state medical board to engage in the practice.").

[234] Becker et al., *supra* note 232.

[235] CENTER FOR CONNECTED HEALTH POLICY, *supra* note 232, at 9; Federation of State Medical Boards, *supra* note 232. *See e.g.*, ALA. CODE § 540-X-16-.02 (1997) (allowing for the "practice of medicine across state lines in a medical emergency" or "on an irregular or infrequent basis" as defined by the statute); NEV. REV. STAT. § 630.261 (2015) (authorizing the medical board to issue a "special purpose license to a physician who is licensed in another state" to provide medical services through telehealth).

[236] CENTER FOR CONNECTED HEALTH POLICY, *supra* note 232, at 9; *Interstate Medical Licensure Compact*, https://www.imlcc.org/ (last visited Dec. 29, 2020).

[237] *Interstate Medical Licensure Compact*, *supra* note 236.

[238] CENTER FOR CONNECTED HEALTH POLICY, *supra* note 232, at 9.

[239] National Council of State Boards of Nursing, *Nurse Licensure Compact (NLC)*, https://www.ncsbn.org/nurse-licensure-compact.htm (last visited Dec. 29, 2020).

in member states and work without obtaining new licenses.[240] The Psychology Interjurisdictional Compact (with 15 member states) allows psychologists licensed in member states to provide telepsychology services or temporary in-person services in member states.[241]

Patients' ability to obtain insurance coverage for telemedicine is another area that is subject to regulation. Without insurance payments, patients and clinicians are unlikely to use telemedicine. Forty states and the District of Columbia have laws that address private insurers' reimbursement for telemedicine services.[242] However, only a few require that private insurers pay equally for in-person and telemedicine services.[243]

The United States' primary public insurance programs, Medicaid and Medicare, have also considered payment for telemedicine.[244] Under the Medicaid program, all states and the District of Columbia pay for some forms of live video telemedicine.[245] However, only fourteen states reimburse for store-and-forward.[246] Medicare provides reimbursement for telemedicine using an "interactive 2-way telecommunications system" in limited circumstances, but it does not pay for store-and-forward services.[247]

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[240] PT Compact, *Physical Therapy Compact...Increasing Access, Improving Mobility*, http://ptcompact.org/ (last visited Dec. 29, 2020).

[241] Psypact, *Psypact Applications Are Now Open*, https://psypact.org/? (last visited Dec. 29, 2020). As of 2020, twelve additional states had pending bills that, if passed, would add them to the compact. Psypact, *Map*, https://psypact.org/page/psypactmap (last visited Dec. 29, 2020).

[242] CENTER FOR CONNECTED HEALTH POLICY, *supra* note 232, at 9-10, 15.

[243] *Id. See e.g.*, DEL. CODE ANN. tit. 18 §§ 3370 & 3571R; HAW. REV. STAT. § 431:10A-116.3(c) ("Reimbursement for services provided through telehealth shall be equivalent to reimbursement for the same services provided via face-to-face contact between a health care provider and a patient.").

[244] Medicaid is a government program that provides health care coverage to low-income Americans. Medicaid is funded jointly by the states and federal government while the states administer it in accordance with federal guidelines. Medicaid.gov, *Medicaid*, https://www.medicaid.gov/medicaid/index.html (last visited Dec. 29, 2020). Medicare is a federal program that provides health care coverage to people who are 65 and older, some people with disabilities, and people with end-stage kidney disease. Medicare.gov, *What's Medicare*, https://www.medicare.gov/what-medicare-covers/your-medicare-coverage-choices/whats-medicare (last visited Dec. 29, 2020).

[245] CENTER FOR CONNECTED HEALTH POLICY, *supra* note 232, at 1; Federation of State Medical Boards, *supra* note 232.

[246] *Id.*

[247] Medicare.gov, *Telehealth*, https://www.medicare.gov/coverage/telehealth (last visited Dec. 29, 2020); Becker et al., *supra* note 232.

Regulations regarding online prescribing also vary, with some states embracing a more permissive approach than others.[248] Most states prohibit clinicians from writing prescriptions based exclusively on patients' answers to online questionnaires.[249] Some states do not address online prescribing, but many allow clinicians to conduct exams by telemedicine for prescribing purposes.[250]

Some states do not authorize doctors who see patients only remotely to prescribe controlled substances, but an increasing number allow such prescriptions.[251] The latter states have liberalized their laws in response to the opioid crisis so that telemedicine clinicians can provide medications such as methadone to treat opioid addiction.[252]

2. Artificial Intelligence

"Artificial intelligence," (AI) refers to a computer's ability to imitate human behavior and learn.[253] Computers learn with the help of algorithms. An algorithm is a "computational procedure that takes some value, or set of values, as input and produces some value, or set of values, as output."[254] It is thus "a sequence of computational steps that transform the input into the output."[255] Health care providers may rely on AI to assist them in making decisions or to be a substitute decision maker.[256] Clinicians may

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[248] CENTER FOR CONNECTED HEALTH POLICY, *supra* note 232, at 9.

[249] *Id. See e.g.*, ALASKA ADMIN. CODE, title 12, § 40.967(27) (establishing that unprofessional conduct includes "providing treatment, rendering a diagnosis, or prescribing medications based solely on a patient-supplied history that a physician licensed in this state received by telephone, facsimile, or electronic format.").

[250] CENTER FOR CONNECTED HEALTH POLICY, *supra* note 232, at 9; *See e.g.*, ALA. ADMIN. CODE. r. 540-X-9-.11 ("Prescribing medications for a patient whom the physician has not personally examined may be suitable under certain circumstances" including "electronic encounters such as those in telemedicine.").

[251] CENTER FOR CONNECTED HEALTH POLICY, *supra* note 232, at 9. *Compare* N.J. REV. STAT. §45:1-62(e) ("The prescription of Schedule II controlled dangerous substances through the use of telemedicine or telehealth shall be authorized only after an initial in-person examination of the patient") *with* DEL. CODE ANN. title 24 §1933(b)(7)(g) ("Prescriptions made through telemedicine … may include controlled substances, subject to limitations as set by the Board.").

[252] CENTER FOR CONNECTED HEALTH POLICY, *supra* note 232, at 9 ("Many of these laws have passed as a result of the opioid epidemic and the need to prescribe certain medications associated with medication assisted therapy."). Y. Tony Yang et al., *Telemedicine's Role in Addressing the Opioid Epidemic*, 93 MAYO CLIN. PROC. 1177, 1177-79 (2018). In some states Medicaid also now pays for controlled substance prescriptions by telemedicine physicians, as is the case in Indiana, Minnesota, Michigan, and Louisiana. CENTER FOR CONNECTED HEALTH POLICY, *supra* note 232, at 9.

[253] IAN GOODFELLOW ET AL., DEEP LEARNING 2 (2016).

[254] THOMAS H. CORMEN ET AL., INTRODUCTION TO ALGORITHMS 5 (3rd ed. 2009).

[255] *Id.*

[256] *See infra* text associated with notes 265-272 (discussing the benefits of AI).

input data about a patient's symptoms, medical history, and personal details and obtain a suggested diagnosis and treatment plan as the AI output.[257]

A well-known type of AI is machine learning, which enables computers to "automatically detect patterns in data, and then use the uncovered patterns to predict future data or to perform decision-making tasks under uncertainty."[258] Scientists prepare machine learning algorithms to engage in analysis by using training data.[259] For example, developers might show a learning algorithm numerous tumor images with indications as to whether they are cancerous.[260] The algorithm should then learn to distinguish between benign and malignant growths when it sees new images.[261]

Some machine learning algorithms are trained only once and are considered "locked," providing the same results each time they are given the same inputs.[262] Others continuously learn and adapt so the outputs they generate for specific inputs may change over time.[263]

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[257] Mayo Clinic, *AI System Works with Physicians to Identify the Most Helpful Treatments for People Diagnosed with Depression* (Feb. 17, 2020), https://advancingthescience.mayo.edu/2020/02/17/mcmag-ai-system-helps-individualize-treatment-people-diagnosed-with-depression/ ("AI methodologies can discover patterns in a patient's data…that can explain unique characteristics of the specific patient, allowing for the right treatment to be chosen at the right time and right dose to achieve the therapeutic benefit.").

[258] KEVIN P. MURPHY, MACHINE LEARNING: A PROBABILISTIC PERSPECTIVE 1 (2012). *See also*, David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn about Machine Learning*, 51 U.C. DAVIS L. REV. 653, 671 (2017) ("Fundamentally, machine learning refers to an automated process of discovering correlations (sometimes alternatively referred to as relationships or patterns) between variables in a dataset, often to make predictions or estimates of some outcome."); Alvin Rajkomar et al., *Machine Learning in Medicine*, 380 N. ENGL. J. MED. 1347, 1348 (2019) (explaining that "in machine learning, a model learns from examples rather than being programmed with rules").

[259] *See* SHALEV-SHWARTZ & BEN DAVID, UNDERSTANDING MACHINE LEARNING: FROM THEORY TO ALGORITHMS 13-14 (2014) (discussing "the statistical learning framework"); Niha Beig et al., *Perinodular and Intranodular Radiomic Features on Lung CT Images Distinguish Adenocarcinomas from Granulomas*, 290 RADIOLOGY 783, 784 (2019) (relating that a "machine classifier was trained on a cohort of 145 patients").

[260] Beig *et al., supra* note 259, at 784.

[261] Beig *et al., supra* note 259, at 792.

[262] Greg Slabodkin, Medtronic, *GE, Philips Embrace AI Amid Regulatory Limbo around Algorithms*, MEDTECH DIVE (Dec. 21, 2020), https://www.medtechdive.com/news/medtronic-ge-philips-embrace-ai-amid-regulatory-uncertainty-around-algori/592443/.

[263] Food & Drug Admin., *Proposed Regulatory Framework for Modifications to Artificial Intelligence/Machine Learning (AI/ML)-Based Software as a Medical Device (SaMD)*, 3 (Apr. 2, 2019), https://www.fda.gov/files/medical%20devices/published/US-FDA-Artificial-Intelligence-and-Machine-Learning-Discussion-Paper.pdf.

Many algorithms are commonly used by physicians and thus influence the treatment of numerous patients.[264] They are thus becoming an important component of professional medical speech.

AI Benefits and Limitations

AI can allow clinicians to analyze very large data sets quickly and efficiently so that they can potentially deliver better health care less expensively.[265] AI can do some of the analytical work that paid staff would otherwise do and can accomplish it more quickly and efficiently.[266] AI can also improve the quality of medical care.[267] Learning algorithms can help doctors determine which patients will respond well to different therapies so that they can tailor their treatments accordingly.[268] AI may also help identify individuals at high risk of contracting particular diseases so that doctors can screen them regularly.[269]

AI is also being harnessed to combat COVID-19.[270] For example, researchers are working to develop AI tools to predict which children will suffer severe COVID-19 symptoms.[271] Likewise, algorithms have been trained to analyze computed tomography (CT) scans and identify COVID-19-related pneumonia.[272]

Medical AI, however, is not devoid of hazards. First, AI can be flawed and provide incorrect information or advice to doctors, leading to improper

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[264] Sharon Begley, *Racial Bias Skews Algorithms Widely Used to Guide Care from Heart Surgery to Birth, Study Finds*, STAT (June 17, 2020), https://www.statnews.com/2020/06/17/racial-bias-skews-algorithms-widely-used-to-guide-patient-care/ ("Many of the algorithms are widely used and have a substantial impact on patient care"); Ziad Obermeyer et al., *Algorithmic Bias in Health Care: A Path Forward*, HEALTH AFFS. BLOG (Nov. 1, 2019), https://www.healthaffairs.org/do/10.1377/hblog20191031.373615/full/ (addressing "an algorithm widely used for population health management").

[265] Alicia Phaneuf, *Use of AI in Healthcare & Medicine Is Booming – Here's How the Market is Benefiting from AI in 2020 and Beyond*, BUS. INSIDER (Jul. 31, 2019), https://www.businessinsider.com/artificial-intelligence-healthcare.

[266] *Id.* (noting that "30% of healthcare costs are associated with administrative tasks").

[267] Sharona Hoffman, *Artificial Intelligence and Discrimination in Health Care*, YALE J. HEALTH POL'Y, L. & ETHICS (forthcoming 2021).

[268] EWOUT W. STEYERBERG, CLINICAL PREDICTION MODELS 11 (2009).

[269] *Id.*

[270] National Institutes of Health, *NIH Harnesses AI for COVID-19 Diagnosis, Treatment, and Monitoring* (Aug. 5, 2020), https://www.nih.gov/news-events/news-releases/nih-harnesses-ai-covid-19-diagnosis-treatment-monitoring.

[271] Jessica Kent, *Researchers Use AI to Predict Severe COVID-19-Related Illness*, HEALTH IT ANALYTICS (Aug. 11, 2020), https://healthitanalytics.com/news/researchers-use-ai-to-predict-severe-covid-19-related-illness.

[272] Stephanie A. Harmon et al., *Artificial Intelligence for the Detection of COVID-19 Pneumonia on Chest CT Using Multinational Datasets*, NATURE COMMUNICATIONS (2020), https://doi.org/10.1038/s41467-020-17971-2.

treatment choices.[273] Learning algorithms can be poorly designed or implemented. Moreover, the training data that is used to develop algorithms may contain serious data errors or gaps.[274]

AI critics worry not only about medical mistakes, but also about algorithmic bias.[275] Algorithmic bias can lead to discrimination that disadvantages particular groups.[276] Bias can be rooted in the absence of appropriate diversity in training data.[277] For example, if the training data come from a health system that serves primarily white and wealthy patients, the algorithm may not be generalizable to other patients.[278] It might thus work well for privileged white patients but make mistakes with respect to others.

To illustrate, an algorithm used to refer patients with chronic disease to high-risk care management programs favored Whites over sicker African-Americans.[279] It used past medical expenditures as a proxy for medical needs and interpreted low spending as indicating that an individual is healthy.[280] While this might be true for many people, health care access barriers such as poverty and lack of insurance often prevent African-Americans from pursuing adequate medical care.[281] The algorithm failed to take this into account and exacerbated the problem by also excluding African Americans from beneficial disease management programs.[282]

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[273] Sharona Hoffman, *What Genetic Testing Teaches about Predictive Health Analytics Regulation*, 98 N.C. L. REV. 123, 151-54 (2019); W. Nicholson Price II, *Risks and Remedies for Artificial Intelligence in Health Care*, BROOKINGS (Nov. 14, 2019), https://www.brookings.edu/research/risks-and-remedies-for-artificial-intelligence-in-health-care/.

[274] Hoffman, *supra* note 273, at 152-53.

[275] Price II, *supra* note 273.

[276] Hoffman, *supra* note 267, at __.

[277] *Id.* at __.

[278] Hoffman, *supra* note 273, at 153; Craig Konnoth, *Health Information Equity*, 165 U. PA. L. REV. 1317, 1361 (2017) (asserting that "relying on data that is biased towards certain social groups can have problematic effects").

[279] Charlotte Jee, *A Biased Medical Algorithm Favored White People for Health-Care Programs*, MIT TECH. REV. (Oct. 25, 2019), https://www.technologyreview.com/f/614626/a-biased-medical-algorithm-favored-white-people-for-healthcare-programs/; Ziad Obermeyer et al., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 SCIENCE 447, 447 (2019).

[280] Obermeyer et al., *supra* note 279, at 447; Jenna Wiens et al., *Diagnosing Bias in Data-Driven Algorithms for Healthcare*, 26 NATURE MED. 25, 25-26 (2020).

[281] Obermeyer et al., *supra* note 279, at 447.

[282] *Id.* at 447, 449.

In addition, training data may capture existing inequities, causing the trained algorithm to perpetuate discrimination.[283] For example, women have been found to be less likely than men to receive lipid-lowering drugs, in-hospital procedures, and proper care at hospital discharge despite being more likely to have high blood pressure and heart failure.[284] Algorithms developed from training data that reflect such under-treatment will likely learn to recommend less intensive care for women than men even though this approach is inappropriate.[285]

AI Regulation

The Food and Drug Administration's (FDA) approach to regulating AI is currently uncertain and evolving.[286] The agency acknowledges that its "traditional paradigm of medical device regulation was not designed for adaptive artificial intelligence and machine learning technologies."[287]

The FDA generally does not extend its reach to algorithms that are developed and used in-house by health-care providers.[288] It does intend to regulate certain types of software, such as software that analyzes "physiological signals" for purposes of diagnosis or treatment.[289] To that end, the FDA has approved many algorithms used in the fields of radiology, cardiology, and internal medicine.[290] The FDA also intends to scrutinize AI

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[283] Hoffman, *supra* note 267, at __ (discussing feedback loop bias).

[284] Shanshan Li et al., *Sex and Race/Ethnicity-Related Disparities in Care and Outcomes after Hospitalization for Coronary Artery Disease among Older Adults*, 9 CIRCULATION CARDIOVASCULAR. QUALITY OUTCOMES S36, S38 (2016).

[285] Hoffman, *supra* note 267, at __.

[286] *Id.* at __; Bradley Merrill Thompson, *New Developments in FDA Regulation of AI*, MED. DEVICE & DIAGNOSTIC INDUSTRY (Apr. 9, 2020), https://www.mddionline.com/new-developments-fda-regulation-ai; Slabodkin, *supra* note 262.

[287] *Artificial Intelligence and Machine Learning in Software as a Medical Device*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/medical-devices/software-medical-device-samd/artificial-intelligence-and-machine-learning-software-medical-device (current as of Oct. 5, 2020).

[288] Price II, *supra* note 273.

[289] U.S. FOOD & DRUG ADMIN., CLINICAL DECISION SUPPORT SOFTWARE: DRAFT GUIDANCE FOR INDUSTRY AND FOOD AND DRUG ADMINISTRATION STAFF 10-11, 25 (2019), https://www.fda.gov/media/109618/download; Thompson, *supra* note 286.

[290] Data Sci. Inst., *FDA Cleared AI Algorithms*, AM. C. RADIOLOGY, https://www.acrdsi.org/DSI-Services/FDA-Cleared-AI-Algorithms (last visited December 29, 2020); Stan Benjamens, Pranavsingh Dhunnoo, and Bertalan Meskó, *The State of Artificial Intelligence-Based FDA-Approved Medical Devices and Algorithms: an Online Database*, 3 NPJ DIGIT. MED. 118 (2020), https://www.nature.com/articles/s41746-020-00324-0.

tools that are opaque and do not enable clinicians to understand the basis of recommendations, sometimes called black-box algorithms.[291]

The agency has thus far focused its regulatory efforts on locked algorithms.[292] In 2019, it published a discussion paper detailing its "foundation for a potential approach to premarket review for artificial intelligence and machine learning-driven software modifications."[293] But the FDA has taken no further action to promulgate regulations for adaptive AI.[294]

Congress has also shown interest in the issue of AI integrity. In 2019 Senators Cory Booker (D-NJ) and Ron Wyden (D-OR) and Representative Yvette Clarke (D-NY) introduced a bill called the "Algorithmic Accountability Act."[295]

The bill would do the following:

- Authorize the Federal Trade Commission (FTC) to require covered entities to conduct impact assessments of any highly sensitive automated decision systems.
- Require covered entities to evaluate their automated decision systems and associated training data in order to identify problems in the areas of accuracy, fairness, bias, discrimination, privacy and security.
- Require covered entities to assess their information systems' ability to protect data subjects' privacy and safeguard data security.
- Require covered entities to resolve identified problems.[296]

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[291] Sara G. Murray et al., *Discrimination by Artificial Intelligence in a Commercial Electronic Health Record—A Case Study*, HEALTH AFF. BLOG (Jan. 31, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200128.626576/full/.

[292] Slabodkin, *supra* note 262. See text accompanying note 262 for explanation of locked algorithms.

[293] U.S. FOOD & DRUG ADMIN., *supra* note 289.

[294] Slabodkin, *supra* note 262.

[295] S. 1108, 116th Cong. (2019); H.R. 2231, 116th Cong. (2019); *Booker, Wyden, Clarke Introduce Bill Requiring Companies To Target Bias In Corporate Algorithms*, BOOKER.SENATE.GOV (Apr. 10, 2019), https://www.booker.senate.gov/news/press/booker-wyden-clarke-introduce-bill-requiring-companies-to-target-bias-in-corporate-algorithms [hereinafter Booker].

[296] S. 1108, §§ 2(2), 2(6), 3(b); Booker, *supra* note 295. A covered entity would have included any person, partnership, or corporation that is subject to FTC regulations and earns more than $50 million annually, possesses or controls personal information from at least one million people or consumer devices, or primarily acts as a data broker that acquires, processes, and sells consumer data. S. 1108, § 2(5).

The proposed Algorithmic Accountability Act was subject to a variety of criticisms and did not become law.[297] However, legislative action may be more successful in the future and is an additional path to establish algorithmic oversight and promote AI fairness.

3. Propagation of False Information

Technology enables individuals to reach almost limitless audiences and to convey information nationally and internationally. This includes information that is incorrect and even harmful.[298] For example, in July of 2020 a video of doctors making false claims about COVID-19 went viral after it was shared on Facebook, Twitter, and YouTube.[299] In the video, one doctor asserted that hydroxychloroquine, zinc, and Zithromax were a cure for the pandemic, rendering masks unnecessary.[300] Another argued that lockdowns did not significantly decrease COVID-19 death rates.[301] In a different video, Dr. Annie Bukacek claimed that death certificates were wrongly attributing deaths to COVID-19.[302] In yet another viral video, virologist Judy Mikovits falsely asserted that the number of COVID-19 deaths was inflated, that the virus was activated by face masks, and that Dr. Anthony Fauci was responsible for the deaths of millions of HIV/AIDS patients in the 1980s.[303]

B. Legal Advice and Technology

The rise of digital platforms has had three primary effects in the practice of law. First, it has made it easier for legal practice to cross state and even national boundaries. Second, it enables communication about legal matters to extend far beyond the traditional lawyer-client relationship. Finally, it has enabled the growth of AI systems that affect

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[297] *S. 1108: Algorithmic Accountability Act of 2019*, GOVTRACK.US, https://www.govtrack.us/congress/bills/116/s1108 (last visited Dec. 29, 2020).

[298] EJ Dickson, *On TikTok, COVID-19 Conspiracy Theories Flourish Amid Viral Dances*, ROLLING STONE (May 13, 2020), https://www.rollingstone.com/culture/culture-features/tiktok-conspiracy-theories-bill-gates-microchip-vaccine-996394/.

[299] Daniel Funke, *Who Are the Doctors in the Viral Hydroxychloroquine Video?*, POLITIFACT (July 29, 2020), https://www.politifact.com/article/2020/jul/29/who-are-doctors-viral-hydroxychloroquine-video/.

[300] *Id.*

[301] *Id.*

[302] EJ Dickson, *Anti-Vax Doctor Promotes Conspiracy Theory that Death Certificates Falsely Cite COVID-19*, ROLLINGSTONE (Apr. 16, 2020), https://www.rollingstone.com/culture/culture-features/anti-vax-doctor-covid-19-death-certificates-984407/.

[303] Martin Enserink & Jon Cohen, *Fact-Checking Judy Mikovits, the Controversial Virologist Attacking Anthony Fauci in a Viral Conspiracy Video*, SCIENCEMAG.ORG (May 8, 2020), https://www.sciencemag.org/news/2020/05/fact-checking-judy-mikovits-controversial-virologist-attacking-anthony-fauci-viral.

legal practice in ways that change the norms, expectations, and effects of legal work. This subsection explores how each of those changes in the scale of legal practice shapes the scope and results of regulatory policy.

1. Illusory Geographic Boundaries

The practice of law is regulated at the state level.[304] But with modern technology, state borders have little relevance to daily practice—lawyers can often do their work from anywhere, meeting virtually with clients and negotiating deals and settlements through email or video conferencing. Unlike telemedicine, which is regulated extensively, there is little direct regulation of virtual lawyering—instead, virtual and cross-border practice is regulated largely through the application of regulations on the unauthorized practice of law, which is often not a perfect fit.[305]

The gap between regulatory standards and common practice is growing. From the standpoint of a reasonable lawyer, there is no reason why a lawyer with expertise in a practice area shouldn't assist clients in need of that expertise even when the lawyer and client reside in different states. Research also shows that regulatory overreach in UPL enforcement negatively affects access to justice.[306]

But when a lawyer in Colorado tried to help his in-laws in Minnesota negotiate a debt-collection action, the Minnesota Supreme Court held that the Colorado lawyer had engaged in the unauthorized practice of law.[307] The attorney hadn't charged his in-laws a fee, hadn't claimed to be licensed in Minnesota, hadn't appeared in a Minnesota court, and hadn't practiced beyond his level of competence. Nonetheless, the court held that by attempting to negotiate a debt for Minnesota residents against a Minnesota creditor in a dispute arising under Minnesota law, the lawyer had engaged in the practice of law "in Minnesota."[308] Because the lawyer was licensed only in Colorado, the court upheld the admonition

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[304] Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in A Global Age*, 48 S.D. L. REV. 489, 498 (2011) (explaining that "[a]lthough the practice of law grows national, the regulation of the legal profession continues to be state based in four fundamental interrelated ways," including admission to practice, licensing, adoption of ethical rules, and disciplinary enforcement).

[305] *See, e.g.*, Karen Rubin, *Out-Of-State Lawyer Disciplined for E-Mail Negotiations; No Safe Harbor From Unauthorized Practice, Says MN Court*, The Law for Lawyers Today (Oct. 6, 2016), https://www.thelawforlawyerstoday.com/2016/10/2845/ (noting that "turf protection by state regulators has thwarted hopes for a multi-jurisdictional outlook that would be more in line with the realities of modern-day legal practice").

[306] Paul R. Tremblay, *Surrogate Lawyering: Legal Guidance, Sans Lawyers*, 31 GEO. J. LEG. ETHICS 377, 420 (2018) (explaining that "the ambiguity about the definition and limits of the practice of law" creates an unfortunate "constraint on innovation in the field of access-to-justice").

[307] In re Charges of Unprofessional Conduct in Panel File No. 39302, 884 N.W.2d 661 (Minn. 2016).

[308] *Id.* at 668.

imposed by the disciplinary panel.[309] One dissenting judge would have interpreted state law to find representation to be "reasonably related" to the lawyer's Colorado practice and therefore allowed under Minnesota law.[310] Neither the majority nor the dissent grappled with the constitutionality of restricting cross-border speech.

The question of cross-border practice was also raised in Ohio when Kentucky-licensed attorney Alice Auclair Jones applied for admission to the Ohio bar. Jones originally lived, worked, and was licensed in Kentucky. She worked for a firm that had offices in both Kentucky and Cincinnati. After getting married, she moved to Cincinnati where she continued to work for the firm representing her Kentucky-based clients while she applied for admission to the Ohio bar.[311] Jones was careful to work exclusively on matters "before Kentucky tribunals arising under Kentucky law" and avoid working on any matters arising under Ohio law, affecting Ohio clients, or coming before Ohio courts.[312] She did not hold herself out as an Ohio-licensed attorney, and continued to use letterhead with contact information for the firm's Kentucky office.[313] Nonetheless, the Ohio Board of Commissioners on Character and Fitness recommended that her admission to the Ohio bar be denied, concluding that her physical presence in Ohio while her application was pending amounted to the unauthorized practice of law in Ohio.[314]

The matter went up to the Ohio Supreme Court with substantial amicus participation from national law firms. The court ultimately ruled that Jones could be admitted to practice in Ohio, holding that her pre-admission presence in Ohio could be deemed "temporary" because she had applied for admission and that the practice therefore was not "unauthorized" under Ohio law.[315] While the majority did not need to reach the question of whether the result was constitutionally mandated, a concurring opinion did address the constitutional issues.

The concurring justices acknowledged that technology had outpaced regulation, stating that "before the advent of the Internet, electronic communication, and the like, a lawyer who worked in Ohio was almost always practicing Ohio law," but that now it was easy for an attorney to

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[309] *Id.* at 669.

[310] *Id.* at 670 (Anderson, J., dissenting).

[311] Applicant's Brief, In re Application of Jones, 123 N.E.3d 877 (Ohio 2018) No. 2018-0496 *at* http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=844493.pdf

[312] *Id.*

[313] *Id.*

[314] In re Jones, 123 N.E.3d 877, 879 (Ohio 2018).

[315] *Id.* at 881 ("[H]er practice from Ohio pending her application is temporary because the continuation of her practice depends on the resolution of her application.").

physically reside in the state while practicing outside of it.[316] The concurring justices would have held that the state had no interest in regulating the legal practice of "a lawyer who is not practicing Ohio law or appearing in Ohio courts."[317] The concurring justices pointed to instances in which lawyers might practice across a state border but maintain "a secondary office inside their homes so that they can access their files remotely" or might live and practice elsewhere but keep an "Ohio vacation home on Lake Erie" in which they spend summers. Under the majority opinion, such attorneys would still be required to seek licensure in Ohio. Under the concurring opinion, however, the state would have no interest in regulating this practice and could not constitutionally forbid it.

2. One-to-Many and Many-to-Many Communication

In addition to more commonly crossing geographic boundaries, the provision of legal advice has also expanded beyond the traditional client-lawyer relationship. The growth of massive digital platforms has changed the scale of communication about legal information. This has meant that more information about legal matters is available directly to the public even without legal representation. As Professor Robert Kry has pointed out, "technological advances have enabled clients to access a wealth of advice with minimal time and expense."[318] Greater accessibility of information means both that a single expert can more easily reach a broad audience (one-to-many communication) and that groups of people can more easily collaborate (crowdsourcing, or many-to-many communication).[319]

Both of these communication patterns have implications for the regulation of legal practice. The ability to communicate with a large audience fuels companies such as LegalZoom and others that provide routine legal forms and non-specialized advice on "simple document preparation, such as wills, incorporation documents, and name-change petitions" to a broad audience.[320] The ability to crowdsource legal information has led to new forums popping up online, providing legal advice for people who may not be able to afford to hire lawyers or may not trust their own lawyer's advice.[321]

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[316] *Id.* at 886 (DeWine, J., concurring).

[317] *Id.*

[318] Kry, *supra* note 61, at 975.

[319] Derek E. Bambauer, *The MacGuffin and the Net: Taking Internet Listeners Seriously*, 90 U. COLO. L. REV. 475, 477 (2019) (explaining that the internet is "the first widespread medium to make communication by many speakers and many listeners--one-to-one and one-to-many, simultaneous and asynchronous--not only possible but routine," and that it "makes many-to-many communication seamless").

[320] Robertson, *supra* note 77, at 87.

[321] *Id.* at 83-86.

Crowdsourced advice is not always *good* advice, of course, as "[l]awyers who quickly dispense advice do not have time to fully investigate the facts," while "non-lawyers may lack information both about the facts and the law."[322] Nonetheless, forums such as Reddit's r/legaladvice are increasingly active. The Reddit forum alone has over 1.4 million members and enables individuals to seek advice on matters such as how to obtain embassy assistance in returning a minor citizen to the United States,[323] whether a tenant could be evicted for non-payment,[324] and whether a sibling's drug addiction would provide grounds for an individual to seek custody of the sibling's child.[325] It's true that crowdsourcing isn't the best way to handle important legal matters. But legal representation is often financially out of reach even for relatively well-off Americans, so seeking advice online may be the most accessible source of information about the law for many people.[326]

Crowdsourced advice doesn't just cover the substance of legal matters. Instead, it can also serve as a way of monitoring lawyer quality. Just as online reviews have cropped up for everything from restaurants to cookbooks, they have also become a major source of information for individuals seeking to hire an attorney.[327] Over the last twenty years, prospective clients increasingly rely on Internet searches rather than simply on recommendations from family and friends.[328]

The rise of online reviews of attorneys has created both challenges and opportunities for lawyer regulation. The challenges arise from the psychological dynamics at play with online reviews—lawyers who feel threatened both personally and professionally are likely to lash out in response, answering negative reviews defensively and sometimes revealing

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[322] *Id.* at 86.

[323] REDDIT.COM, "Can I (a Minor) Use the Embassy to Get Home? (USA), https://www.reddit.com/r/legaladvice/comments/knsljp/can_i_a_minor_use_the_embassy_to_get_home_usa/(last visited Jan. 15, 2021)

[324] REDDIT.COM, "(US CA) Can I Legally Evict My Tenant if They Did Not Use Rental Assistance Funds to Pay Rent?" https://www.reddit.com/r/legaladvice/comments/knx4u5/us_ca_can_i_legally_evict_my_tenant_if_they_did/(last visited Jan. 15, 2021).

[325] REDDIT.COM, "Update: Vermont—Can I Get Legal Custody of a Baby if I'm Not One of the Parents? My Drug Addicted Sister Just Gave Birth," https://www.reddit.com/r/legaladvice/comments/knkfw3/update_vermont_can_i_get_legal_custody_of_a_baby/(last visited Jan. 15, 2021).

[326] Robertson, *supra* note 77, at 78.

[327] Cassandra Burke Robertson, *Online Reputation Management in Attorney Regulation*, 29 GEO. J. LEG. ETHICS 97, 106 (2016) ("While uniformly positive reviews can help attract new clients, a single negative review--even in the midst of additional positive ones--can drive potential clients away.").

[328] *Id.*

confidential or privileged information in doing so.[329] But the practice also creates opportunities, as client reviews can be helpful in monitoring attorney competence and diligence, sometimes bringing problems to light that might otherwise have escaped disciplinary attention.[330] It is true that clients typically lack the substantive legal knowledge that would allow them to evaluate matters of technical competence. Nevertheless, even clients without such specialized knowledge can still effectively evaluate non-technical matters that play into an attorney's competence, most importantly responsiveness, communication, and billing practices.[331] This information can play a useful role both in helping prospective clients identify attorneys they might (or might not) want to hire, and in helping disciplinary bodies identify potential problems.

3. Integrating Artificial Intelligence into Legal Practice

Artificial intelligence (AI) is playing an increasingly large role in legal practice just as it does in medical practice. In some cases, the legal system is required to grapple with the consequences and biases of AI. For example, three individuals—all Black men—were wrongfully arrested as a result of errors in a facial identification tool.[332] Even though the cases did not proceed to a conviction, the arrest and initial detention created significant disruption in the lives of those wrongly accused.[333]

Moreover, facial identification is only the beginning. Once a person is arrested, some local justice systems will use "an algorithm that evaluates the defendant's risk [of reoffending] rather than money to determine whether a defendant can be released before trial."[334] These algorithms are prone to bias and error. One study revealed that an algorithm incorrectly labeled Black defendants as likely to reoffend almost twice as frequently as it did White defendants, and it mislabeled White defendants as low-risk more often than Black defendants.[335] The legal

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[329] *Id.* at 113-16; 122-23.

[330] *Id.* at 142 (explaining that "it is easier for clients to write a review on Yelp or Yahoo than it is to navigate the lawyer disciplinary system").

[331] *Id.* at 152 (noting that former clients can evaluate "how responsive the attorney was, how clearly they explained matters, and how transparent their billing practices were").

[332] Kashmir Hill, *Another Arrest, and Jail Time, Because of a Bad Facial Recognition Match*, N.Y. TIMES (Dec. 29, 2020), https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html (last visited Dec 29, 2020).

[333] *Id.*

[334] *Id.*

[335] Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing. *See also*, Melissa Hamilton, *Debating Algorithmic Fairness*, 52 U.C. DAVIS L. REV. 261, 264 (2019) (reporting that the risk tool's corporate owner denied the allegation and stated that its reanalysis of the data led it to conclude that "the tool was unbiased as blacks and whites had similar positive predictive values for recidivism"); Sandra G. Mayson,

profession hasn't yet established a way to address AI harm or to systematically consider whether the benefits of algorithmic assessments outweigh their potential hazards.

Artificial intelligence also plays an increasingly large role in the day-to-day practice of law. Lawyers may not be aware of the extent to which they are increasingly integrating AI into ordinary legal practice. One author has explained how AI is embedded in everyday legal-research tools:

> Anybody using Google for any sort of research is using one of the world's most advanced AI-backed tools for legal work, whether they're looking into an opponent's business entities, combing through news articles for a quote to cite, trying to find the right government agency website for filing a form, or looking for a legal blog post summarizing the implications of an obscure subsection of ERISA they've never heard of.[336]

Artificial intelligence may also be integrated into more specialized systems. IBM's Ross, for example (a version of the Watson AI platform tailored to legal practice), garnered a great deal of attention in legal circles.[337] Ross was described as the "world's first AI lawyer" and was added to Baker & Hostetler's bankruptcy practice several years ago.[338]

When used for legal research and information management, artificial intelligence systems can offer significant benefits by making information more easily available. Many companies are already integrating AI into their contract-review processes—a big task when "large enterprises will have millions of outstanding contracts, with thousands of different counterparties, across numerous internal divisions."[339] AI systems allow companies to move away from a siloed approach to information and can allow for easier access to the details of thousands of contracts at once, facilitating comparison, standardization, and management of contractual obligations.

Bias In, Bias Out, 128 YALE L. J. 2218, 2221-2 (2019) (discussing algorithmic risk assessment in the criminal justice system and its racial impact).

[336] Nicholas Gaffney, *How Artificial Intelligence Is Changing Law Firms and the Law*, ABA LAW PRACTICE TODAY (2019), https://www.lawpracticetoday.org/article/artificial-intelligence-changing-law-firms-law/ (last visited Dec 28, 2020).

[337] Robert Ambrogi, *At AI Research Company ROSS, A New Stage of Transparency and Engagement*, LAWSITES (2019), https://www.lawsitesblog.com/2019/07/at-ai-research-company-ross-a-new-stage-of-transparency-and-engagement.html (last visited Dec 31, 2020).

[338] Matthew Griffin, *Meet Ross, the World's First AI Lawyer*, 311 INSTITUTE (2016), https://www.311institute.com/meet-ross-the-worlds-first-ai-lawyer/ (last visited Dec 31, 2020).

[339] Rob Toews, *AI Will Transform The Field Of Law*, FORBES, https://www.forbes.com/sites/robtoews/2019/12/19/ai-will-transform-the-field-of-law/ (last visited Dec 28, 2020).

Artificial intelligence also makes it easier to analyze thousands of litigation outcomes at once and thus to predict the likely outcome of future cases. According to one company, "its AI can predict case outcomes with 90% accuracy."[340] The ability to predict litigation outcomes can, in turn, improve advice to clients about whether it is worth pushing forward with a lawsuit and how much it is worth paying to do so. Making it easier to estimate a case's value likewise increases the comfort level of outside litigation funding entities and thus makes it more likely that lawsuits will be able to attract outside funding.[341]

The legal system's greater reliance on artificial intelligence will almost certainly change the legal system in both foreseeable and unforeseeable ways. One predictable effect is that adopting new AI systems may be more attractive to corporate clients than to the law firms that serve them. Most law firms, after all, bill by the hour and profit from the value added by human analysis.[342] Corporations, on the other hand, reap significantly greater benefits from being able to synthesize legal knowledge quickly and reduce the hours dedicated to organizing and maintaining legal information.

New technology can be both very helpful and very flawed—thus encouraging users to rely on it without fully understanding its limitations. Professor Brian Sheppard has described concerns about "skill fade" and "out of the loop problems" that can arise from the integration of AI systems.[343] Skill fade occurs when lawyers come to rely so heavily on computer-assisted analysis that they cannot conduct the analysis themselves. This phenomenon has been identified in other areas. It has been noted, for example, that "autopilot can lead to a decline in pilot skill."[344] A fully mature technology might be reliable enough that it won't matter if human skills are lost. But we are not yet at that point.

The same process is likely to play out in AI systems used in health care and legal practice.[345] Sometimes the value added outweighs the erosion of skill so strongly that there is little net loss. Computer-aided

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[340] *Id.*

[341] *Id.*

[342] Gaffney, *supra* note 336 (explaining that "[t]he main purpose of AI is to reduce the time humans spend on tasks, but the business model of most law firms depends on billing as much human time as possible to clients").

[343] Brian Sheppard, *Skill Fade: The Ethics of Lawyer Dependence on Algorithms and Technology*, 19 THOMSON REUTERS PRACTICE INNOVATIONS 2 (March 2018) http://info.legalsolutions.thomsonreuters.com/signup/newsletters/practice-innovations/2018-mar/article1.aspx.

[344] *Id.*

[345] *See* Claudia E. Haupt, *Artificial Professional Advice*, 21 YALE J. L. & TECH. 55, 71 (2019) ("Based on big data inputs, the characteristic of machine learning is accumulation of information that then generates opaque outputs the professional may incorporate into advice without understanding how exactly they were generated.").

citation checking, for example, is both faster and more comprehensive than old-fashioned Shepardizing with books was.[346] But when skill is lost, individuals may lack the knowledge to recognize when "out of the loop" problems occur—that is, when problems crop up that the underlying algorithm fails to recognize or address.[347]

Skill fade and out-of-the-loop problems are likely to occur when technological ability outstrips its reliability. Computerized systems are growing increasingly able to augment or replace legal work, but this growth is currently uneven, resulting in "incomplete innovation."[348] This uneven development creates a risk that individuals will be tempted to over-rely on algorithmic analysis before it has progressed to a point where it is reliable enough to substitute for human judgment.[349] The benefits of AI-assisted legal analysis are so strong that there is little doubt their role will expand. As the legal system's reliance on algorithms grows, it becomes increasingly important to "adopt approaches that preserve our ability and motivation to monitor and assess the justice system itself."[350]

V. RETHINKING REGULATION AT SCALE

Professional regulation in the twenty-first century faces two converging trends. First, the Supreme Court has adopted stricter control on the regulation of speech, limiting the scope and structure of professional regulatory authority. Second, the growth of massive digital platforms and technological innovations are re-shaping both law and health care, giving rise to new regulatory challenges. This creates difficulty for state regulatory authorities, because the new Supreme Court jurisprudence

[346] Matter of Liquidation of Azstar Cas. Co. Inc., 938 P.2d 76, 78 (Ariz. App. 1st Div. 1996) (allowing the recovery of funds spend on computerized cite-checking because "such tasks can more quickly and accurately be done by computer").

[347] Sheppard, *supra* note 343; Alan Wolf & Lynn Wishart, *Shepard's and Keycite Are Flawed (or Maybe It's You)*, 75 N.Y. St. B.J. 24, 25 (September 2003) (explaining that computer-assisted citation checking went through a period where this was a significant problem, as online citators failed to pick up situations where the holding of one case was overruled by another that did not specifically mention the first).

[348] Brian Sheppard, *Incomplete Innovation and the Premature Disruption of Legal Services*, 2015 MICH. ST. L. REV. 1797, 1808 (2015).

[349] *Id.* at 1808 (noting that earlier suggestions that computer analysis could never replace legal work were made before it was every contemplated "that a machine could beat the very best human opponents in chess, that video games could procedurally generate virtual cities, or that a concealed iPhone can make anyone appear to be an unbeatable trivia expert on Shakespeare").

[350] Sheppard, *supra* note 343; *see also* Alyson Carrel, *Legal Intelligence Through Artificial Intelligence Requires Emotional Intelligence: A New Competency Model for the 21st Century Legal Professional*, 35 GA. ST. U. L. REV. 1153, 1161 (2019) ("Lawyers must understand the underlying technology enough to ask the right questions and to ensure that data and technology are being used appropriately, ethically, and with an appreciation of the impact on society and clients.").

seems to limit their power just as new problems emerge and need attention.

But even if the convergence of these trends creates a certain amount of difficulty, it also creates new opportunities for creative regulation that safeguards constitutional rights. As scholar David Han has pointed out, "technological change plays a vital role in the evolution and development of constitutional rights doctrine."[351] He argues that "the destabilizing force of technological change on constitutional rights doctrine ultimately serves as a valuable opportunity for courts to reevaluate, in a deep and meaningful manner, the fundamental theoretical, intuitional, and empirical judgments that underlie the existing doctrinal framework."[352]

This section examines what such reevaluation might look like for professional regulation in law and in health care. If regulators can no longer rely primarily on speech-restrictive regulatory approaches, what can they do instead? The crux of our argument is that incremental change in the traditional state regulatory process is insufficient to meet the challenges posed by changes in technological scale. Instead, it is time to ask the bigger questions about the underlying goals and first principles of professional regulation. We propose three areas of reform that account for changes in both the scale of professional speech and jurisprudential limits on regulation.

A. Letting Go of Obsolete Regulatory Approaches

The first area of reform is to jettison regulatory approaches that no longer play a role in protecting the public's well-being. Scholars have noted the presence of "regulatory inertia," which "can be hard to break without an external shock, usually a tragedy or massive failure that reignites interest in regulation."[353] The COVID-19 pandemic of 2020 provided such an external shock, and both law and medicine were quick to respond in ways that swiftly integrated technology and removed protectionist barriers.

As a response to the COVID-19 pandemic, federal and state regulators further relaxed several rules in order to encourage doctors to offer telemedicine rather than in-person patient appointments.[354] These nimble responses to the pandemic illustrate the potential for regulatory flexibility. Examples of temporary measures that government authorities implemented in 2020 include:

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[351] David S. Han, *Constitutional Rights and Technological Change*, 54 U.C. DAVIS L. REV. 71, 130 (2020).

[352] *Id.*

[353] Nathan Cortez, *Regulating Disruptive Innovation*, 29 BERKELEY TECH. L.J. 175, 227 (2014).

[354] Carmel Shachar et al., *Implications for Telehealth in a Postpandemic Future: Regulatory and Privacy Issues*, 323 JAMA 2375, 2375-76 (2020).

- Some states loosened or eliminated particular licensing requirements so that clinicians could serve patients in other states without obtaining additional licenses.[355]
- The Centers for Medicare and Medicaid Services (CMS) issued waivers that eliminated barriers to telemedicine use for Medicare patients.[356] These include expanding the types of eligible practitioners and allowing audio-only services.[357]
- CMS announced a temporary payment parity program for Medicare by which clinicians could be paid equally for telemedicine and in-person visits.[358]
- Some states relaxed their Medicaid requirements.[359] These policies include expanding the categories of clinicians that can be reimbursed for telemedicine visits and paying for telemedicine treatment of new patients that did not previously have an in-person visit.[360]

Regulations affecting the practice of law were also loosened in response to the pandemic. For the first time in its 231-year history, the Supreme Court heard oral arguments remotely.[361] Other courts held video

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[355] *Id.* at 2376; Federation of State Medical Boards, *States Waiving Requirements for Telehealth in Response to COVID-19*, https://www.fsmb.org/siteassets/advocacy/pdf/states-waiving-licensure-requirements-for-telehealth-in-response-to-covid-19.pdf (last updated Dec. 23, 2020).

[356] Centers for Medicare & Medicaid Services, *COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers* (Dec. 1, 2020), https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf.

[357] *Id.*, Michael J. DeAgro et al., *10 Post-Pandemic Regulatory Considerations for Telehealth Providers*, JDSUPRA (May 5, 2020), https://www.jdsupra.com/legalnews/10-post-pandemic-regulatory-80609/.

[358] Center for Connected Health Policy, *COVID-19 Telehealth Coverage Policies* (Sep. 15, 2020), https://www.cchpca.org/resources/covid-19-telehealth-coverage-policies.

[359] DeAgro et al., *supra* note 357.

[360] *Id.*; Colorado Department of Health Care Policy & Financing, *Telemedicine – Provider Information: COVID-19 State of Emergency Changes to Telemedicine Services*, https://www.colorado.gov/pacific/hcpf/provider-telemedicine (last visited Dec. 29, 2020); Washington State Health Care Authority, *Apple Health (Medicaid) Telehealth Requirements for Physical, Occupational and Speech Therapy During COVID-19 Pandemic* at 3, https://www.hca.wa.gov/assets/billers-and-providers/physical-occupational-speech-therapy-guidance-COVID-19.pdf (revised Nov. 20, 2020).

[361] Nina Totenberg, *Supreme Court Arguments Resume—But with A Twist*, NPR.ORG, https://www.npr.org/2020/05/04/847785015/supreme-court-arguments-resume-but-with-a-twist (last visited Jan 1, 2021).

hearings and even experimented with jury trials by video conference.[362] Law firms allowed lawyers to work out of their houses, increasing pressure on state regulators to acknowledge that "remote working" should be "outside the purview" of unauthorized practice restrictions.[363] Difficulties in holding an in-person bar examination also caused some states to loosen initial licensing restrictions and increased support for diploma privilege.[364]

Regulatory policies that were loosened for the pandemic should be re-evaluated when the pandemic is over. Not every change needs to be made permanent, but innovations and technological advances that were borne out of necessity might suggest areas in which older restrictions have outlived their value.

B. Increasing Government Speech

In addition to abandoning outdated policies, professional regulatory entities should become more vocal advocates in areas where their actions can have the greatest public benefit. The Supreme Court has hinted that government entities should consider ramping up efforts to engage in their own communication. In *Sorrell*, for example, the Supreme Court suggested that if Vermont was "displeased that detailers who use prescriber-identifying information are effective in promoting brand-name drugs," then it could "express that view through its own speech."[365]

Governmental speech can reflect regulatory policy directly, without going through licensed professionals as intermediaries. It therefore allows regulatory entities to engage in "complete editorial control."[366] Such editorial control may be especially useful in combatting problems of misinformation shared online. Social media has enabled attorneys and medical practitioners to reach international audiences, sometimes disseminating conspiracy theories and other pernicious information.[367] Medical and legal professionals often have outsized influence because they appear to be credible experts,[368] and thus their falsehoods can do great harm.

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[362] Angela Morris, *Lessons Learned, "History Made" in First Zoom Jury Trial in a Criminal Case*, TEXAS LAWYER, https://www.law.com/texaslawyer/2020/08/11/lessons-learned-history-made-in-nations-first-zoom-trial/ (last visited Jan 1, 2021).

[363] Anthony E. Davis et al., *Lawyers' Risk Management Newsletter, September 2020 | Lexology*, https://www.lexology.com/library/detail.aspx?g=24183982-af05-4112-8d02-f63619dee765 (last visited Jan 1, 2021).

[364] Robertson, *supra* note 176.

[365] Sorrell v. IMS Health Inc., 564 U.S. 552, 578 (2011).

[366] Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POLICY 63, 121 (2016).

[367] *See supra* Part IV.A.3.

[368] Abby Ohlheiser, *Doctors Are Now Social-Media Influencers. They Aren't All Ready for It*, MIT TECH. REV. (Apr. 26, 2020), https://www.technologyreview.com/2020/04/26/1000602/covid-coronavirus-doctors-

Regulating professional speech is challenging in light of First Amendment concerns.[369] States have developed different approaches to disciplining physicians for misleading speech, though some of the policies may be vulnerable to First Amendment challenges. California's *Manual of Model Disciplinary Orders and Disciplinary Guidelines*, establishes penalties for dishonesty that is "substantially related to the qualifications, function or duties of a physician and surgeon but not arising from or occurring during patient care, treatment, management or billing."[370] This would presumably encompass statements made on social media. The minimum penalty for such misconduct is "stayed revocation, 5 years probation" and the maximum penalty is license revocation.[371] Minnesota may discipline physicians even more broadly for "any unethical or improper conduct," including conduct likely to deceive, defraud, or harm the public."[372] Disciplinary measures can include license revocation or suspension, revocation or suspension of registration to conduct interstate telemedicine, placement of limitations or conditions on a physician's practice, civil penalties of up to $10,000 per violation, and more.[373] By contrast, Texas does not include dishonesty or spreading false information to the public as acts subject to discipline by the state medical board.[374]

It is possible that restrictive disciplinary policies would survive the Supreme Court's application of heightened review. To prevail, the state would have to develop a strong evidentiary record of the harms caused by the false statements as well as the lack of a narrower way to combat those harms.[375] In addition, the state would bear the burden of proving falsity—a difficult proposition when it comes to professional speech, as professional opinion may differ in areas without scientific consensus.

Nevertheless, because of the reach and impact of social media, state boards should not turn a blind eye to legal and medical professionals' misconduct via these platforms. When the government can develop proof of direct harm from false speech, it can sustain professional discipline even under *Alvarez*.[376] The adoption of an intermediate-scrutiny standard for professional speech—a possibility left open by *NIFLA*— would increase the likelihood that states could develop an evidentiary record sufficient to

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tiktok-youtube-misinformation-pandemic/ ("Their medical credentials give their thoughts on the virus added weight.").

[369] *See supra* Part II.

[370] Medical Board of California, Manual of Model Disciplinary Orders and Disciplinary Guidelines 24 (2016).

[371] *Id.*

[372] MINN. STAT. §147.091(g) (2020).

[373] MINN. STAT. §147.141(2020).

[374] TEX. ADMIN. CODE tit. 22 §190.8 (2020).

[375] *See supra* text associated with notes 189-195.

[376] *See supra* text associated with notes 189-195.

discipline professionals who disseminate false information likely to cause harm.[377] But when creating an adequate evidentiary record is challenging, it may be easier for government entities to let their own voices be heard in order to counter falsehoods.

The government can engage in direct public education, can publicize areas of scientific agreement, and can communicate its own viewpoint.[378] The Supreme Court's case law has been largely protective both of individual speech and of governmental speech.[379] When the government regulates others' speech, content-based restrictions are judged by heightened scrutiny.[380] But when the government itself is the speaker, heightened scrutiny does not apply.[381]

To the extent that regulatory entities are concerned about the dissemination of false speech online (and they should be concerned about it), the best course of action might be for regulatory entities to engage in their own efforts at public education rather than feeling bound to maintain neutrality even when it contradicts professional consensus. Indeed, during the COVID-19 epidemic government speech became a vital public health tool. Messaging about the importance of wearing masks and social distancing was ever-present and indispensable in the face of dangerous conspiracy theories and irresponsible risk-taking.[382]

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[377] *See* Carl H. Coleman, *Regulating Physician Speech*, 97 N.C. L. REV. 843, 883 (2019) ("[I]ntermediate scrutiny adequately protects physicians' and patients' interest in open medical communications. At the same time, unlike strict scrutiny, the standard is not so demanding that it would preclude legitimate regulatory efforts to uphold professional quality.")

[378] *See* Helen Norton, *Government Speech in Transition*, 57 S.D. L. REV. 421, 422 (2012) ("Not only must government speak if it is to govern, its speech is often quite valuable to the public. For example, government speech both informs members of the public on a wide range of topics and enables them to identify their government's priorities (and thus to evaluate its performance.").

[379] Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005) (holding that regulatory assessments used to fund "the Government's own speech" are not subject to challenge under the First Amendment); Janus v. Am. Fedn. of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 2474 (2018) (distinguishing speech of public employers (which may qualify as government speech) and public-agency unions (whose speech is not controlled by the employing agency)).

[380] *See supra* Part II.B.; Natl. Inst. of Fam. and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

[381] Johanns, 544 U.S. at 557 (considering "the First Amendment consequences of government-compelled subsidy of the government's own speech").

[382] *See e.g.* Centers for Disease Control and Prevention, *Social Distancing*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (updated Nov. 17, 2020); Centers for Disease Control and Prevention, *Use Masks to Slow the Spread of COVID-19*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html (updated Dec. 21, 2020).

C. Coordinating Beyond Borders

Finally, just as legal practice and health care have expanded beyond traditional borders, so too must regulatory authority. This requires looking beyond mere state-based professional licensing. Regulatory policy might cross state or even national borders. But regulatory coordination might also cross more theoretical boundaries, bringing together different professional disciplines or engaging in creative public-private partnerships.

1. Coordination of Professional Disciplines

As this article has shown, there is a great deal of similarity in the regulatory challenges faced by different professions. Especially when it comes to the challenges posed by technological innovation, regulatory authorities should work together to identify areas of common concern. The growth of artificial intelligence, for example, raises concerns that are not unique to any particular discipline—issues of racial or gender bias in algorithms, skill fade, and out-of-the-loop problems exist wherever AI is implemented. Government entities should set up regulatory structures that provide input from law, medicine, and other professions and allow cross-disciplinary coordination to develop best practices for integrating and optimizing emerging technologies.

2. Public-Private Collaboration

Many of the "regulation at scale" issues in professional regulation arise from the widespread influence of massive digital platforms. When possible, governmental authorities should collaborate with these platforms and integrate them into regulatory policies. Thus, for example, online review sites have created new regulatory challenges, especially when professionals seek to respond to negative reviews online, but they also offer additional information, giving regulatory authorities a limited window to client and patient concerns.[383] Professional regulatory bodies should seek to work with the larger platforms and internet intermediaries. The private entities may welcome assistance in developing content moderation guidelines and might also offer a forum for government speech that educates the public about professional standards and regulatory procedures.[384]

3. Geographic Flexibility

Technology enables attorneys and medical clinicians to practice on a national scale through telemedicine and online legal practice.[385]

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[383] *See* Robertson, *supra* note 326, at 146(explaining that even though online reviews are not always reliable, they still provide value to regulatory entities and that efforts to coordinate on moderation policies would offer benefit to both parties, as "quality-control mechanisms to improve reliability do have marketing value to online review sites").

[384] *Id.*

[385] *See supra* Parts IV.A.1 and IV.B.1.

Consequently, it makes little sense to continue to regulate attorneys and physicians exclusively on a state by state basis. Moreover, facilitating the practice of law and medicine across state borders would enhance underserved populations' access to health care and legal assistance. Individuals who live in rural areas with few lawyers or medical specialists could obtain the services of highly skilled professionals by electronic means without the cost of travel. As noted above, regulators have already removed barriers to a more national practice of telemedicine.[386] States have established mechanisms of special licenses or compacts to facilitate interstate licensure.[387]

Long before COVID-19, advocates called for full reciprocity of state medical licenses, not just for purposes of telemedicine. For example, in 2014 the prominent *Health Affairs Blog* published a piece arguing that "states should adopt mutual recognition agreements in which they honor each other's physician licenses."[388] Calls for a permanent change have gained momentum during the current pandemic.[389] Physicians have argued that state licensure restrictions defy logic because human anatomy is the same everywhere on the planet and medical training is regulated at a national level.[390] Moreover, COVID-19 has shown that licensure barriers can deprive patients of desperately needed care and cost lives.[391] In the coming months and years, regulatory authorities should carefully evaluate the benefits and shortcomings of state-by-state licensure requirements with an eye to determining the extent to which they can be further relaxed.

When it comes to the practice of law, states have made concerted efforts to coordinate their licensing practices. A majority of states now offer the Uniform Bar Exam, replacing the prior patchwork of exam coverage and practices.[392] This is a good first step, but more is needed. In law, as in medicine, overly broad state prohibitions on unauthorized practice have

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[386] *See supra* text associated with notes 189-195.

[387] *See supra* text associated with notes 189-195.

[388] Kocher, *supra* note 110.

[389] In response to COVID-19, state authorities have modified overall licensure requirements to enable physicians to provide in-person care across state lines as well as telemedicine. *See* Federation of State Medical Boards, *U.S. States and Territories Modifying Licensure Requirements for Physicians in Response to COVID-19*, https://www.fsmb.org/siteassets/advocacy/pdf/state-emergency-declarations-licensures-requirementscovid-19.pdf (last updated Jan. 8, 2021).

[390] Amr H. Sawalha, *Medical Licensure: It Is Time to Eliminate Practice Borders Within the United States*, 133 AM. J. MED. 1120, 1120 (2020).

[391] Marcel Brus-Ramer, *Coronavirus Highlights Why America Needs a National Medical License*, KEVINMD.COM (Apr. 15, 2020), https://www.kevinmd.com/blog/2020/04/coronavirus-highlights-why-america-needs-a-national-medical-license.html.

[392] Uniform Bar Examination, NCBE, https://www.ncbex.org/exams/ube/ (last visited Jan. 1, 2021).

inhibited practice flexibility and client access. Coordinating policy between the states could help avoid regulatory overreach, allowing states to focus on areas of real importance. The states should build on earlier coordination that led to the adoption of the Uniform Bar Exam and the Model Rules of Professional Conduct.[393] The Model Rules already provide some guidance for what kinds of conduct will fall under each jurisdiction's regulatory authority.[394] The states should take this coordination a step further, adopting uniform rules to protect lawyers' ability to live in one state while practicing law in another. They should also establish national norms that define the "practice of law" in a way that protects the rights of non-lawyers to engage in speech about legal matters.[395]

VI. CONCLUSION

Regulatory bodies are facing new challenges in enforcing standards of care and providing professional oversight. The Supreme Court has grown increasingly protective of professionals' free speech rights and has thereby limited the government's power to engage in traditional regulatory activities that might limit professional speech. At the same time, technological developments, including the growth of massive digital platforms and the introduction of artificial intelligence programs, create brand new regulatory challenges. The convergence of these two trends means that incremental change in the traditional state regulatory process will be ineffectual. We propose three primary pathways for reform: 1) abandoning obsolete regulatory approaches, 2) engaging in direct government speech to counter the growth of misinformation, and 3) most importantly, coordinating beyond traditional borders—that is, breaking down disciplinary separations, coordinating public and private enterprises, and moving toward more national oversight. Only by asking the bigger questions about the underlying goals and first principles of professional regulation can the government rise to the challenges posed by technological development in a way that preserves professionals' free-speech rights.

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[393] *Uniform Bar Exam Gains Major Traction Across the Country*, LAW.COM (June 28, 2018), https://www.law.com/2018/06/27/uniform-bar-exam-gains-major-traction-across-the-country/?slreturn=20210015142111 ("The Uniform Bar Exam has transformed over the past eight years from an idea to a major force changing the way lawyers get admitted to practice.").

[394] *Id.*

[395] *See supra* Part III.A; In re Jones, 123 N.E.3d 877, 886 (Ohio 2018) (DeWine, J., concurring) (explaining that the states have little interest in regulating the legal practice of lawyers who are exclusively providing services to out-of-state clients in matters pending in out-of-state courts).